

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: B13013-0078
Claimants	: Boston Marine Transport/Great American Insurance Company of New York/The American Steamship Owners Mutual Protection and Indemnity Association
Type of Claimant	: Corporate
Type of Claim	: Third Party Business Interruption/Lost Profits claim of Mayship Repair
Claimed Amount	: \$575,000
Claim Manager	: [REDACTED]

INCIDENT DETAILS

On December 13, 2012, at 2055, the tank barge BOSTON No. 30 (BOSTON 30) arrived at the New York Terminal, Elizabeth, NJ, to load 20,164.93 barrels of No. 6 fuel oil. Loading from the facility began at 2310 and was completed on December 14, 2012, at 1115. At 1330, the BOSTON 30 departed New York Terminal under tow of the Tug QUENAMES through the Arthur Kill Waterway and Kill Van Kull Waterway along the south side of Shooter's Island to the Mayship Repair Contracting Corp. (Mayship Repair) shipyard in Staten Island, NY. The BOSTON 30 arrived at the Mayship Repair shipyard at 1525.¹

At 2000, the Kirby tank barge DBL 25 (DBL 25) arrived alongside the BOSTON 30 to lighter the barge. Lightering of the BOSTON 30 began at 2035.² At 2215, the tankerman onboard the DBL 25 noticed oil in the water between the BOSTON 30 and DBL 25. Transfer of oil was stopped and sorbent boom was placed around both barges. The National Response Center was notified and Miller's Launch was contacted to respond to the oil spill. Tank soundings onboard the BOSTON 30 and DBL 25 didn't immediately reveal the source of the spill so the transfer of oil from the BOSTON 30 to the DBL 25 resumed on December 15, 2012, at 0001. This transfer continued until 0120 when it was stopped for a second time as more oil was discovered in the water between the two barges. Approximately 30,000 gallons of oil were released from the BOSTON 30.³

CG Sector New York provided oversight of the pollution removal activities and conducted the investigation. After investigation, it was determined that the BOSTON 30 ruptured its hull in transit between the New York Terminal and Mayship Repair's shipyard. Major oil spill response activities at Mayship Repair concluded on January 4, 2013; however, an inspection of the piers, bulkheads and shorelines revealed additional oil staining that required maintenance and monitoring until May 1, 2013.⁴

¹ See tug logs submitted with claim dated December 9, 2015. See also CG Sector NY VTS clip submitted with claim dated December 9, 2015. See page 3 of claim submission dated December 9, 2015.

² See tug logs submitted with claim dated December 9, 2015.

³ See Clean Waters of New York Invoice 01419 dated December 31, 2012.

⁴ See May 1, 2013 Response Closure document. Bates # FF#46.000900.

THE CLAIMANTS:

The Claimants are Boston Marine Transport as the owner and operator of the BOSTON 30 (responsible party (RP)); Great American Insurance Company of New York (Great American) as the subrogated primary insurer of the BOSTON 30 and the American Steamship Owners Mutual Protection and Indemnity Association (The American Club) as the subrogated excess insurer of the BOSTON 30. Collectively, these entities are the RP/Claimants.

CLAIM HISTORY (B13013-0002)

On December 11, 2015, the RPs submitted to the Oil Spill Liability Trust Fund (OSLTF or the Fund) a claim based on an assertion of entitlement to an act of God and sole fault of a third party defense or, in the alternative, entitlement to their applicable limitation on liability. On March 23, 2017, the NPFC determined that the RPs demonstrated entitlement to their statutory limitation on liability, \$6,408,000, but denied their request for an absolute defense. In the March 23, 2017, determination the NPFC, after reviewing the total claimed removal costs, \$15,190,226.83, and deducting \$6,408,000, offered \$8,352,718.14 to the RP.⁵

Subsequently, the RP, now the RP/Claimants, pursuant to 33 U.S.C. § 2708(b) presented claims to the Fund for reimbursement of amounts paid to third parties who were damaged by the incident. The NPFC adjudicated these third party claims and reimbursed the RP/Claimants for OPA compensable claims.

MAYSHIP REPAIR CONTRACTING CORP. CLAIM (B13013-0078)

The instant claim, one component of the damages claims paid by the RP/Claimants to third parties, seeks reimbursement of \$575,000 that the RP/Claimants paid to Mayship Repair Contracting Corp. (Mayship Repair), for claimed business interruption losses. As noted above the BOSTON 30 discharged oil during lightering activities at the Mayship Repair shipyard. As a result major oil spill removal actions were conducted at the Mayship Repair premises. The RP/Claimants assert that the losses resulted from the “overwhelming presence of the clean-up crew and its equipment” and substantially interfered with the performance of the company’s work for almost two months.⁶ Mayship Repair argued that the interference with its movement of material and effective utilization of manpower dramatically decreased Mayship Repair’s productivity and resulted in business interruption losses⁷ that continued late into 2013.

Specifically, Mayship Repair asserted that at the time of the incident it had six contracts that were impacted by the oil spill. This included four lost contracts (Circle Line Barge and Circle Line Manhattan, Boston 30 and the Sterling Equipment Barge), totaling \$213,138, and two delayed contracts (Sterling Dredge Barge and Trevcon Deck Barge) totaling \$1,040,308.

⁵ See OSLTF Claim Form dated December 9, 2015. Total removal/damage costs paid by claimant was \$18,626,072.35 (CG costs of \$305,618.01 are not included in this figure as they were never billed to the Claimant). The vessel’s gross tonnage is 1634. At the time of the incident the statutory limit on liability for this vessel was \$3,200.00 per gross ton (\$5,228,800.00) or \$6,408,000.00, whichever is greater. 33 C.F.R. 138.230(a)(3).

⁶ See [REDACTED] letter dated April 28, 2014.

⁷ See [REDACTED] letter dated April 28, 2014.

After initial review of the documents submitted by the RP/Claimants in support of its claim, the NPFC, on or about May 5, 2016, e-mailed the RP/Claimants, notifying them that the documentation initially submitted was insufficient to support reimbursement from the Oil Spill Liability Trust Fund (OSLTF or the Fund) and requested additional information.⁸ Pertinent to adjudication of this claim, NPFC requested information on how the incident impacted each of the contracts.

Between July 1 and July 19, 2016, the RP/Claimants submitted the following documentation:

- (1) Mayship Repair Financial Reports, Years Ending June 30, 2011 through June 30, 2014
- (2) January 14, 2014 [REDACTED] letter with attachments
- (3) Notes and documents of [REDACTED]
- (4) Trevcon Correspondence
- (5) Sterling Correspondence

The Mayship Repair facility, located at 3075 Richmond Terrace, Staten Island, New York, consists of a wharf, two piers, three drydocks, and an enclosed building way (construction area) measuring 300 feet by 90 feet along with a large outdoor building area on one of the piers. Its access to water is via the Kill Van Kull Waterway. One of the two piers is a finger pier, which is used to berth larger vessels, and is located approximately 500 feet from the drydocks and building area. Mayship Repair leases the property from Richmond Industrial Center, whose principal is [REDACTED].

[REDACTED] is the founder, owner and president of Mayship Repair. Its business activities consist of both new vessel construction, e.g., tugboats, barges, ferries and fishing vessels, and the repair, maintenance and conversion of existing vessels.⁹ Vessel repair and maintenance activities are conducted at the drydock facilities; vessel construction occurs at the larger pier's enclosed building way and outdoor building yard area.

Mayship Repair's initial demand, \$1,253,446, was presented to the RP/Claimants via [REDACTED], an adjuster working for Global Risk Solutions, Inc. (GRS), the company contracted by the RP/Claimants to adjudicate, settle and pay claims.¹⁰ In a letter dated April 28, 2014 from Mayship's attorney, [REDACTED], Esq., to [REDACTED] the claim was increased to \$1,945,530.¹¹ The RP/Claimants settled the claim for \$575,000 on October 31, 2014, and now seek reimbursement of the claim from the Fund.

INITIAL DENIAL:

On April 17, 2017, the NPFC issued to the RP/Claimants its initial determination denying the claim for amounts paid to Mayship on the grounds that the RP/Claimants had not provided evidence supporting the basis for the claimed lost profits or evidence that the \$575,000

⁸ See email from [REDACTED] to [REDACTED] dated May 5, 2016.

⁹ [REDACTED] Affidavit in Support, dated July 10, 2017.

¹⁰ [REDACTED], a certified public accountant, notes that he is a contractor when working for GRS. See his Declaration in Support dated June 26, 2017.

¹¹ Revised Demand, Exhibit 1 to April 28, 2014 [REDACTED] letter.

settlement was reimbursement for OPA damages resulting from the discharge of oil. The denial noted that pursuant to the Claims Regulations a claimant must prove that its income was reduced as a result of the incident, the amount of loss, and that loss must be established by income tax returns, financial statements and similar documents. Further, any income received as a result of the incident and any saved overhead and other normal expenses not incurred must be established.

REQUEST FOR RECONSIDERATION:

Via email, the RP/Claimants requested reconsideration of the decision on May 16, 2017.

In support of their request for reconsideration, the RP/Claimants provided a letter brief dated July 18, 2017, which included a [REDACTED] Affidavit in Support with 15 enclosures and a [REDACTED] Declaration in Support with two exhibits. The letter brief does not include legal arguments in support of its request for reconsideration but cites, and responds to, various sections of the initial determination. It attempts to explain the basis for the claimed losses for the lost or delayed contracts, evidence showing that the incident caused the loss to Mayship Repair and the calculation of the claimed loss of \$575,000. It repeatedly contends that the continued presence of cleanup crews and heavy equipment prevented its employees from completing work on the contracts.

NPFC Role in Adjudication of Claims Against the OSLTF

When adjudicating claims against the Oil Spill Liability Trust Fund (the Fund), the NPFC utilizes an informal process controlled by 5 U.S.C. § 555.¹² As a result, 555 U.S.C. § 555(e) requires the NPFC to provide a brief statement explaining the basis for a denial. This determination on reconsideration is issued to satisfy that requirement. It is based upon the unique facts giving rise to this claim and should not be viewed as precedent controlling other NPFC claims determinations.

During the adjudication of claims against the Fund, the NPFC acts as the finder of fact. In this role the NPFC considers all relevant evidence and weighs its probative value when determining the facts of the claim. If there is conflicting evidence in the record, the NPFC will make a determination as to what evidence is more credible or deserves greater weight, and finds facts based on the preponderance of the credible evidence.

The NPFC's initial determination, dated April 17, 2017, is hereby incorporated by reference. A request for reconsideration of an initial determination must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim.¹³ When analyzing a request for reconsideration, the NPFC performs a *de novo* review of the entire claim submission, including new information provided by the claimant in support of its request for reconsideration.

¹² The Court in *Bean Dredging, LLC v. United States*, characterizes the informal adjudication process for OSLTF claims with the following: "[W]hile the OPA allows responsible parties to present a claim for reimbursement to the NPFC, they do not confer upon such parties a right to a formal hearing, a right to present rebuttal evidence or argument, or really any procedural rights at all, see 33 U.S.C. § 2704, 2708, 2713, an entirely unremarkable fact given that Congress' overarching intent in enacting OPA was to 'streamline' the claims adjudication process ..." 773 F.Supp. 2d 63, 75 (D.D.C. 2011).

¹³ 33 C.F.R. 136.115(d).

The RP/Claimants assert that they reimbursed Mayship Repair for \$575,000 in business interruption losses resulting from the incident. The RP/Claimants assert that they paid for specific damages for four cancelled contracts and two delayed contracts. In this determination on reconsideration the NPFC considers whether the RP/Claimants have shown that Mayship Repair suffered a loss of profits resulting from the oil spill. Further, if losses did occur, the NPFC determines if there is sufficient and credible evidence that the losses totaled \$575,000 in OPA compensable damages.

ANALYSIS on RECONSIDERATION:

The RP/Claimants assert that this claim is a loss due to business interruption¹⁴ of Mayship Repair's operations. OPA damages include loss of profits or impairment of earning capacity. 33 U.S.C. § 2702(b)(2)(E); Because Mayship sought business losses related to reduced income and increased expenses, the NPFC adjudicated this claim as a loss of profits or impairment of earning capacity claim. As fully discussed below the NPFC denies this claim on reconsideration.

Whether the incident and resulting removal activities impacted Mayship Repair's business operations.

The NPFC first considers whether the incident and its resulting removal actions impacted Mayship Repair's business operations. There is some evidence that Mayship Repair was impacted by the oil removal activities from December 15, 2012 through January 4, 2013. Facts in the administrative record evidence that removal actions were conducted at the Mayship Repair premises. The responsible party activated Miller's Launch, Inc. on December 15, 2012, and it responded with oil spill response personnel, eight oil spill response vessels, 13,600 feet of containment boom, vacuum trucks, skimmers and sorbent material to begin containment and cleanup of discharged oil.¹⁵ Several oil spill removal organizations (OSROs): Clean Harbors Environmental, Clean Harbors Cooperative, Ken's Marine Service and Marine Spill Response Corporation, conducted removal activities at Mayship Repair and along the Kill Van Kull Waterway from December 15, 2012 until January 4, 2013.

Mr. [REDACTED], in his Affidavit in Support, states that Mayship's operations were completely suspended for two full weeks between December 15 and 30, 2012 because cleanup crews and their equipment were mobilized on its premises.¹⁶ Further, the RP/Claimants, in their request for reconsideration, provided the Ticket Records from August 1, 2012 to October 16, 2013 for welder, labor and supervisor time for construction activities associated with the delayed new 65' x 180' barge for Sterling. Of pertinent interest is the time recorded in December 2012 through May 2013. For the employees working on Sterling before and directly after the oil spill there is no time recorded from December 15, 2012, the date of the oil spill, through December 30, 2012.¹⁷ Time was again recorded on December 31, 2012 and recorded continually through May

¹⁴ Business interruption losses are typically addressed in an insurance context between an insured and its insurer and losses are calculated from the date of the physical loss or damage to the date the insured's premises are restored and business can resume.

¹⁵ Miller's Launch, Inc. invoices and purchase orders.

¹⁶ [REDACTED] Affidavit in Support, dated July 10, 2017, paragraph 15.

¹⁷ See Ticket Records for Sterling contract.

20, 2013. The RP/Claimants provided no time records for activities associated with the four canceled barge contracts. Some work was performed for the Trevcon barge contract on February 28, March 14, 2013 and May 20, 2013, through June 2013.¹⁸ Based on the information submitted by the RP/Claimants there was a work stoppage on the Sterling barge construction for two weeks. However, it is not clear whether the work stoppage was affected solely by the removal actions or whether there were other factors impacting the Mayship Repair claimed losses. This is addressed further below.

Mr. [REDACTED] in his Affidavit asserts that the continued presence of cleanup crews on the premises of Mayship affected their operations and caused a dramatic reduction in the productivity of Mayship workers. His statements are unclear as to the extent of the continued presence. He notes that as a result of the two week suspension "and other response activities," and the oil spill containment boom blocking the drydocks, the business was affected;¹⁹ however, the RP/Claimants have provided no specific evidence of a continued presence.

Evidence in the administrative record reveals that there was intermittent monitoring and response activities at the Mayship Repair facilities after January 4, 2013. While the majority of removal actions were completed at Mayship Repair on January 4, 2013 some additional monitoring was required at two segments – Mayship's Shipyard and Junk Yard Cove. Gallagher Marine Systems, LLC (GMS), representing the responsible party, along with U.S. Coast Guard and New York State representatives, performed Shoreline Cleanup and Assessment Techniques (SCAT) assessments.²⁰ They divided the New York coastline into segments. They inspected all segments and signed off on all segments with the exception of C-3-1 and C-3-2 (Mayship's Shipyard and Junk Yard Cove) on January 17, 2013. An inspection of Mayship Repair and Junk Yard Cove revealed additional oil staining on piers, bulkheads and shorelines.

GMS prepared three Monitoring Reports for the two sections. On January 17, 2013 the two segments were placed in a Monitoring Phase, which explained that the practical limits of active cleanup had been reached, but natural attenuation had not yet resulted in these segments; thus maintenance and monitoring was required three times a week and biweekly inspections of the oil-stained piers, bulkheads and shorelines.²¹ Accordingly, absorbent and hard boom were placed in the water near the stained areas.

The Monitoring Plan was revised on February 15, 2013.²² On February 4-6, 2013, hotsoy teams worked on the pilings along the central portion of the pier, the dry dock area and shoreline, and new boom was installed. On February 7, 2013 the segments were again inspected and revealed minor sheening. An additional inspection was conducted on February 11, 2013, that revealed no fresh oiling. On May 1, 2013, after a final inspection, the team deemed the areas clean.²³

While RP personnel, along with Coast Guard and New York State personnel, periodically went on the Mayship Repair premises to inspect the oiled piers and bulkheads in January through

¹⁸ Job Ledger Report.

¹⁹ [REDACTED] Affidavit in Support, paragraph 16.

²⁰ SCAT is a systematic method for surveying an affected shoreline after an oil spill.

²¹ GMS Monitoring Plan dated January 17, 2013.

²² GMS Revised Monitoring Plan dated February 15, 2013.

²³ GMS Closure Document dated May 1, 2013.

April 2017, there was no indication of a continued presence of response crews. Boom was replaced as needed; however, the boom was placed landside of the piers and docks and it did not appear that the boom would impede access to the premises or drydocks.²⁴ Thus, the preponderance of credible evidence is that there was no continued presence of response personnel that impacted the activities and productivity of Mayship Repair employees after January 4, 2013.

Whether the Safety Captain of the Port Order 126-12: Richmond Industrial, Suspension of Pier Operations affected the Mayship Repair operations and the claimed loss of profits

As background, Hurricane Sandy impacted the New York and New Jersey area in October 2012, two months prior to the incident. According to a FEMA Report, storm surge levels were recorded at 9.56 feet above ground level at the northern end of Staten Island.²⁵

Soon after the incident on December 14, 2012, the Coast Guard responders conducted an investigation of the Mayship Repair facility and noted significant debris in the waters and the vicinity of the facility and pier. It was determined that the debris posed a significant pollution and navigation hazard. In a Safety Captain of the Port (COTP) Order 126-12 dated December 20, 2012 and issued by [REDACTED], Captain, the order required:

1. The removal of any and all potential hazards from under the pier, around waterside structures and from the adjacent waterway out to the federally managed channel.
2. The necessary repair to the pier and associated structures and the provision of a marine surveyor or structural engineer report to the COTP New York/New Jersey for review and approval.
3. No commercial vessel movements involving the pier, other than those approved by the COTP until items (1) and (2) have been met to the approval of the COTP.

In an Amendment dated December 27, 2012, Richmond Industrial²⁶ was ordered:

1. To remove all current barges, vessels, and vehicles from the pier no later than January 2, 2013
2. To conduct an underwater survey and remove debris within the property line prior to any workboats attending the pier to survey or repair
3. Commercial vehicles will not be permitted to moor or use this pier, other than those approved by the COTP for repair and survey until the repair of the pier and moorings, and provides to the COTP an engineering analysis attesting to the structural integrity of the pier and moorings.

While the requirements in the COTP Order were to be completed by January 31, 2013, there were delays. In a February 25, 2013 letter to the Coast Guard Mr. [REDACTED] agreed that the pier needed emergency repairs and a vessel load survey. The Coast Guard issued a warning to

²⁴ See GMS Revised Monitoring Plan, dated February 17, 2013, and attached pictures.

²⁵ FEMA Mitigation Team Assessment report for Hurricane Sandy in New Jersey and New York, November 2013, page 1-6.

²⁶ The NPFC believes the COTP Order applies to both Richmond Industrial and Mayship Repair because Mayship uses the pier to berth vessels under repair and construction and for lightering operations.

Richmond Industrial on April 16, 2013 for failing to timely comply with the COTP Order. Upon completion of the items outlined in the COTP Order it was rescinded on December 10, 2013.

In a letter to the NPFC dated September 17, 2017, the RP/Claimants contend that the COTP Order had no impact on Mayship Repair's vessel repair or vessel construction operations; therefore, it had no effect on its business interruption claim. Mr. [REDACTED], in a Declaration of Support, states that Mayship Repair leases the pier from Richmond Industrial and is completely unrelated to the Mayship Repair operations impacted by the oil spill.²⁷ He states that the pier is located approximately 500 feet from the drydocks where the vessel repairs are conducted.²⁸ Further, Mayship Repair's vessel construction operations are performed on land in a large warehouse and in an outdoor workspace.

The NPFC is not convinced that the COTP Order did not impact Mayship Repair's operations. There is evidence that there may have been factors independent of the removal actions that may have impacted the claimed loss of profits. The COTP Order is broad because it suspends all pier operations, including the prohibition of all commercial vessel movements involving the pier until the pier and its moorings were repaired. Specifically, no vessels could moor or use the pier. In fact contemporaneous incident response photographs show a busy pier with vessels moored to it.²⁹ The pier was used to berth or moor large vessels during lightering operations, including the lightering of the Boston 30 at the time of the incident. The COTP Order was not rescinded until December 2013 and many operations would have been conducted at the pier that would impact Mayship Repair's profitability.

While the COTP Order references safety concerns and does not reference Hurricane Sandy or note that some debris at the pier might have resulted from the hurricane, Mr. [REDACTED] acknowledged in an April 22, 2015, news article that in 2012 the shipyard was hit hard by Sandy, suffering damage to its equipment and facilities estimated by FEMA at \$2.5 million.³⁰ He stated that "[T]hree years later, the shipyard still feels the effects of the storm surge, which reached levels of more than 14 feet high in some parts of New York Harbor" and there was about 8 feet of water in the shipyard.³¹

There is evidence in the administrative record that other factors, including the COTP Order and Hurricane Sandy, may have impacted the Mayship Repair loss of profits.

²⁷ [REDACTED] Declaration in Support, undated attachment to the RP/Claimant letter to NPFC dated September 17, 2017.

²⁸ Mr. [REDACTED] contends that the COTP order only applied to his Pier 3, which he identifies as the long finger pier on eastern portion of the property, and didn't apply to the larger western pier that contained most of the construction areas, equipment and to which the drydocks are moored. However, the CG obtained records with the dock codes including Mayship's shipyard wharf and piers. See USACE Port Series #5 – Map 10 with dock codes 514, 515 and 516. The finger pier is identified as Pier 1 and the operations pier is identified as Pier 3.

²⁹ The NPFC notes that aerial photos of the Boston 30 response in Mayship's shipyard, show empty drydocks on both December 15, 2012 (the day of the spill) and December 19, four days later.

³⁰ "May Ship repair starts construction of mini tanker." <http://www.marinelog.com/index>.

³¹ A September 11, 2013 Maritime Global News article entitled "Sterling Builds Massive Dredger" referenced Mayship's construction of the Sterling dredge barge. It stated that Superstorm Sandy brought >6ft of water into Mayship knocking a drydock into the dredge causing damage. It stated that the yard was closed at least 30 days, and without power the project stagnated for 6 weeks. <http://maritimeglobalnews.com/news/sterling-builds-massive-dredger-anz27z>

Whether the RP/Claimants have established that the \$575,000 paid to Mayship Repair was an OPA compensable damage resulting from the incident and removal actions conducted on Mayship repair premises.

As discussed above there is evidence that Mayship Repair was impacted by the removal actions at its facility from December 15, 2012 through January 4, 2013. If the removal actions were the sole cause of the claimed loss of profits and the NPFC is not convinced that they were, RP/Claimants have provided no evidence that the loss of profits for those two weeks was \$575,000.

A responsible party, when adjudicating, settling and paying a claim presented to it by a third party claiming damages by an oil spill is not constrained by OPA or the claims regulations; it may pay a claim for any or no reason; however, when that responsible party presents a claim to the Fund seeking reimbursement for its payment of that claim, it becomes a claimant and must meet OPA requirements and the associated Claims Regulations.

The Fund shall be available to the President for the payment of claims in accordance with section 2713 of OPA for uncompensated removal costs consistent with the National Contingency Plan or **uncompensated damages**. 33 U.S.C. § 2712(a)(4). Damages include profits and earning capacity. 33 U.S.C. § 2702(b)(2)(E).

The associated Claims Regulations, found at 33 CFR Part 136, provide that a claimant has the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim. 33 CFR 136.105(a). A claimant seeking reimbursement for lost profits must establish that its income was reduced as a result of the incident. 33 CFR 136.233(b). Further a claimant must establish the amount of profits or earnings in comparable periods and during the period when the claimed loss or impairment of earning capacity was suffered, as established by income tax returns, financial statements and similar documents. 33 CFR 136.233(c). Further, saved overhead and other normal expenses not incurred as a result of the incident must be established. 33 CFR 136.233(d).

In this case the RP/Claimants presented a claim to the Fund seeking reimbursement for the \$575,000 they paid to Mayship Repair for its asserted business interruption claim. Mayship Repair contended that it lost four maintenance and repair contracts and suffered costs associated with two delayed construction contracts because of the oil spill. According to the administrative record Mayship Repair's initial claim to the RP/Claimants was \$1,253,446; it was increased to \$1,945,530 in April 2014. The RP/Claimants contracted with Global Risk Solutions, Inc. to accept, adjudicate and settle claims submitted by third parties who had been damaged by the incident. [REDACTED] was assigned to adjudicate and settle the Mayship Repair claim.

In this case there is persuasive evidence in the administrative record that the \$575,000 payment to Mayship Repair was a negotiated settlement and not based on actual documented losses resulting from a two-week suspension of operations for removal actions.

In his Declaration in Support dated June 26, 2017, Mr. [REDACTED] explains that he and [REDACTED], the Mayship Repair attorney, agreed on May 3, 2014 that the Corroborated Demand

for the four lost contracts totaled \$213,138.00.³² According to Mr. [REDACTED] New York Cruise Lines hired Mayship to perform drydock services for four of its Circle Line vessels. Mr. [REDACTED] states that often maintenance work and its costs are agreed upon verbally. No written contracts or cancellation records were provided. In the case of the Circle Line Manhattan and Barge III, the maintenance was routine; and, the corroborated costs were based on subtracting the estimated costs to fulfill the contracts from the typical revenue from Circle Line's vessels, resulting in the estimated loss of \$36,319.00 for each contract.³³ As to the Boston 30, the estimated loss was \$79,960.³⁴ Finally, the estimated loss for the Sterling Barge was \$60,540.³⁵

Mr. [REDACTED] and Ms. [REDACTED] reached the Corroborated Demand for the delayed contracts, \$1,040,308, on April 28, 2014. Pursuant to the contract the stipulated delivery date for the Sterling Equipment barge was December 15, 2012. According to information in the administrative record, it was delivered in May 15, 2013; therefore, Mayship Repair incurred liquidated damages of \$200,940 in addition to \$509,254 in claimed losses. The contract for the Trevcon deck barge was executed on November 26, 2012 and was due to be delivered no later than April 15, 2013; however, it was delivered to Trevcon on October 12, 2013. The claimed loss for the Trevcon Barge was \$330,114.

On April 28, 2014 the combined demand for the lost contracts and the delayed contracts was \$1,253,446.00. In a Release and Settlement Agreement executed on October 31, 2014, Mayship Repair Contracting Corporation settled the claim for \$575,000. The Agreement does not discuss the rationale for the settlement or the lost value for each of the contracts.

In his Declaration in Support dated June 26, 2017, Mr. [REDACTED] explained his post settlement calculation shows why the \$575,000 was a "substantiated bona fide financial exit" for the Mayship Repair settlement.³⁶ He focused on the 2011 – 2014 Mayship Repair Financial Statements even though he notes that he did not have the Financial Statements when he and Ms. [REDACTED] negotiated the settlement in 2014.³⁷³⁸ He concedes that Mayship Repair, a small business with one controlling shareholder may be managed for the owner's benefit and even within the GAAP parameters may be subject to certain adjustments and manipulations.³⁹ Yet he

³² [REDACTED] Declaration in Support dated June 26, 2017, paragraph 8.

³³ Typical costs for Manhattan and Barge III maintenance: \$39,500 (each) and estimated costs to fulfill \$3,181 (each) for typical net estimated income of \$36,319 for Manhattan and \$36,319 for Barge III.

³⁴ Estimated costs for the proposed work to powerwash, scrape the bottom, repair and paint the barge was \$150,000 minus Mayship Repair costs of \$70,040.

³⁵ Estimated costs to repair the Sterling barge was \$80,720 minus the Mayship Repair costs of \$20,180.

³⁶ [REDACTED] Declaration in Support, paragraph 36.

³⁷ Id., paragraph 13 and paragraph 22.

³⁸ Notwithstanding that the NPFC doesn't find the financial statements persuasive, we note that the \$575K paid by the RP/Claimants exceeds all four years of annual profits Mayship earned in an entire year. The following are the annual income results pulled from Mayship's financial statements.

June 2011 – Net loss of \$104,965 on \$217,488 income from operations

June 2012 – Net income of \$550,658 on \$478,395 income from operations

June 2013 – Net income of \$34,269 on \$153,453 income from operations

June 2014 – Net loss of \$313,725 on \$111,317 loss from operations

³⁹ [REDACTED] Declaration in Support, paragraph 18.

states that the "Earnings from Contracts" in those statements are "helpful and useful for ascertaining the financial impact of the Incident, especially retrospectively."⁴⁰

Thus, Mr. [REDACTED] extracted the yearly earnings and percentages of annual revenue generated from contracts over \$100,000 from each of the Financial Statement and recalculated the delayed contract losses based on a percentage of annual revenue generated for the Sterling and Trevcon contracts. He determined that combined loss to be \$525,575. Adding the \$213,138.00 for the four lost contracts, the total was \$738,713. Finally, he deducted the \$200,940 in liquidated damages, for a total of \$537,773.00. In his view "it is evident why Mayship's controlling shareholder approved the settlement of \$575,000."⁴¹

CONCLUSION

The evidence in the administrative record reflects that the \$575,000 was a negotiated settlement and was not the loss profits resulting solely from the removal actions conducted at Mayship Repair premises from December 15, 2012 through January 4, 2013.

This claim is denied on reconsideration.

Claim Supervisor: [REDACTED]

Date of Supervisor's review: November 16, 2017

Supervisor Action: *Approved*

Supervisor's Comments:

⁴⁰ Id., paragraph 19.

⁴¹ Id., paragraph 35.