

CLAIM SUMMARY / DETERMINATION FORM

Date	: 9/21/2010
Claim Number	: N08057-071
Claimant	: Megalonissos Special Maritime Enterprise
Type of Claimant	: Corporate
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: Alyssa Lombardi
Amount Requested	: \$61,269.67

I. Facts

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision and discharged oil into the Mississippi River, a navigable waterway of the United States. Approximately 282,828 gallons of oil¹ were discharged into the Mississippi River and the resulting spill response, coordinated by the FOSC Unified Command, initially closed the river to vessel traffic and later, when reopened, managed traffic.

II. Responsible Party

American Commercial Lines LLC (ACL) owned the barge at the time of the incident and is a responsible party (RP) under the Oil Pollution Act.

III. The Claimant and the Claim

Chaffe McCall, L.L.P. (Chaffe) submitted a claim into the National Pollution Funds Center (NPFC) for its client, Megalonissos Special Maritime Enterprise (Megalonissos), owners of the M/V Megalonissos (the vessel). At the time of the collision, the M/V Megalonissos was under charter to Chalmette Refining LLC (Chalmette)². The M/V Megalonissos arrived at the 12 Mile Anchorage of the Mississippi River at 2015 hours on July 18, 2008, awaiting an available berth upriver to discharge its cargo of crude oil. The M/V Megalonissos was still awaiting berth at 12 Mile Anchorage when the M/V Tintomara collided with the tank barge DM 932 on July 23, 2008. The vessel continued to wait at this anchorage for an available berth until 1005 hours on July 25, 2008. At this time the M/V Megalonissos proceeded to the ExxonMobil Chalmette Dock #4, discharging its cargo from 1750 hours on July 25 until 1240 hours on July 31, 2008.

The M/V Megalonissos secured a subsequent charter to Chevron Marine Ltd. dated July 15, 2008 (Chevron).³ By 1500 hours on July 31, 2008, the M/V Megalonissos was ready to proceed on the Chevron charter; however, due to restrictions still in place from the oil spill, the USCG directed the M/V Megalonissos to proceed back to 12 Mile Anchorage for hull inspection and cleaning. The M/V Megalonissos was anchored at 12 Mile Anchorage for inspection and cleaning from 1745 hours on July 31 until 1455 hours on August 1, 2008, delaying it 21 hours 10 minutes, or approximately 0.882 days.

¹ See House Subcommittee Hearing on DM 932 Oil Spill, dated 9/15/2008

² See Tanker Voyage Charter between Chalmette and Megalonissos, submitted with the claim by Chaffe for Megalonissos on 2/17/2010

³ See Tanker Voyage Charter between Chevron and Megalonissos, submitted with the claim by Chaffe for Megalonissos on 2/17/2010.

In its Statement of Claim dated January 28, 2010, Claimant states that the Chevron charter became effective upon departure of the vessel from Chalmette but the vessel went off hire when it was diverted to 12 Mile Anchorage for hull cleaning. Claimant asserts that the diversion and delay for hull cleaning resulted in a loss of profits in the amount of \$39,069.43 for the vessel. Claimant calculated this loss of profits by applying the demurrage rate of \$45,000.00 (less the 1.25% address commission) from the Chevron charter⁴ to 0.882 days of delay. (The claims manager calculates this claimed loss, based on the documentation provided, to be \$39,193.88, and, therefore, this amount will be used when considering the claim.) Additionally, during the alleged 0.882 days, Megalonissos claims an additional 5.37 metric tons (mt) of fuel, increasing costs by \$4,134.90⁵, as well as \$18,073.04 in additional tug expenses. The total claimed amount is \$61,401.82.

In support of its claim Claimant initially submitted the Chalmette and Chevron charters, Port Logs/Statement of Facts for the Chalmette charter and invoices for the additional tugs.⁶

IV. APPLICABLE LAW

Claims for removal costs or damages must first be presented to the RP per 33 USC 2713(a). If the RP denies all liability for the claim or does not settle the claim within ninety days, the claimant may commence an action in court against the RP or present the claim to the Fund. 33 USC 2713(c)

The uses of the OSTLF are described at 33 USC 2712(a)(4). It provides in relevant part that:

“The Fund shall be available to the President for the payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to consistent with the National Contingency Plan or uncompensated damages.”

Damages include damages equal to the loss of profits or impairment of earnings capacity as a result of loss or destruction of real or personal property or natural resources. 33 USC 2702(b)(2)(E)

Damage claims must be presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care. 33 USC 2712 (h)(2)

In any case in which the President has paid an amount from the Fund for any removal costs or damages specified under subsection (a), no other claim may be paid from the Fund for the same removal costs or damages. 33 USC 2712 (i)

Congress directed the President to promulgate regulations “for the presentation, filing, processing, settlement, and adjudication of claims under this act against the Fund. 33 USC 2713 (e). Those regulations are found at 33 CFR, part 136.

⁴ See Section I of the Tanker Voyage Charter between Chevron Marine Ltd and Megalonissos, submitted with the claim by Chaffe for Megalonissos on 2/17/2010

⁵ While Megalonissos claims only \$4,127.20, the claims manager calculate that this total should, be \$4,134.90 (5.37 X \$770.00 = \$4,134.90). Therefore, \$4,134.90 will be the amount considered when determining Megalonissos' loss

⁶ See Port Logs/Statement of Facts submitted with the claim on February 17, 2010

Under 33 CFR 136.105(a) & 136.105(e)(6), the claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

With regard to claims for loss of profits and impairment of earning capacity, the NPFC must independently determine that the proof criteria in OPA and the implementing regulations, at 33 CFR part 136 are met, including the general provisions of 33 CFR 136.105, and the specific requirements for loss of profits and earning capacity claims in Subpart C, 33 CFR 136.231, *et seq.*

Pursuant to the provisions of 33 CFR 136.231, claims for the loss of profits or impairment of earning capacity due to injury to, destruction or, or loss of real or personal property or natural resources may be presented to the Fund by the claimant sustaining the loss or impairment.

“In addition to the requirements of subparts A & B or this part, a claimant must establish the following-

- (a) That real or personal property or natural resources have been injured, destroyed, or lost.
- (b) That the claimant’s income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resources, and the amount of that reduction.
- (c) The amount of the claimant’s profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparable figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.
- (d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant receives as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.” 33 CFR 136.233(a-d)

If a third party claimant is able to establish an entitlement to lost profits or impairment of earning capacity, then compensation may be provided from the OSLTF, but the compensable amount is limited to the actual net reduction or loss of earnings and profits suffered. Calculations for the net reductions or losses must clearly reflect adjustments for the following: all income resulting from the incident, all income from alternative employment or business undertaken, potential income from alternative employment or business not undertaken but reasonably available, and saved overhead or normal business expenses not incurred as a result of the incident, and state, local, and federal tax savings. 33 CFR 136.235(a-e)

V. DETERMINATION OF LOSS:

A. Findings of Fact

1. The incident involved the discharge and continuing substantial threat of discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters.
2. The discharge of oil into navigable waters resulted in damage to personal property and the loss of profits or impairment of earning capacity. 33U.S.C. § 2702(b)(2)(E).
3. In accordance with 33 CFR § 136.105(e)(12), the claimant certified no suit has been filed in court for the claimed uncompensated removal costs.
4. The claim was submitted on time. 33 U.S.C. § 2712(h)(2).
5. The claimant seeks \$61,401.82 in loss of profits, resulting from the discharge of oil into the Mississippi River on July 23, 2008.

6. The claimant asserts that the discharge of oil into the Mississippi River resulted in a delay for the M/V Megalonissos and the need for additional bunkers.
7. Chaffe, on behalf of its client, presented the claim to the RP prior to submitting the claim the NPFC. The RP denied the claim. Upon receipt of this claim the NPFC notified the RP of the claim. The RP responded by denying these damages.
8. In the process of adjudicating this claim, the NPFC Claims Manager collected additional information from the claimant to document what took place at the time of the incident.

B. Causation:

The tank barge DM 932 discharged oil into the Mississippi River which resulted in damage to Claimant's person property, i.e., the hull of the Megalonissos was contaminated with oil and required cleaning before it could leave the Mississippi River. The USCG provided Pollution Reports (POLREPS) to substantiate that the Mississippi River was either closed to vessel traffic or open to limited traffic during the response period.

C. Vessel Delay Time:

Claimant asserts that the oil spill caused a delay of 0.882 days when the vessel was diverted to 12 Mile Anchorage for hull cleaning and that this delay resulted in a loss of profits. Claimant calculates this delay as follows:

From 7/31/2008 @ 1745 hours until 8/01/2008 @ 1455 hours

The total delay: 21 hours, 10 minutes, or approximately 0.882 days.⁷

The terms of the tanker voyage charter party agreement between Megalonissos and Chevron provides a demurrage rate of \$45,000.00 a day.. Claimant uses this demurrage rate to quantify the loss of profits resulting from the delay of the vessel. (Claimant states that the commission clause of \$1.25% should be applied, bringing this total down by \$496.13 to an approximate claimed loss of **\$39,193.88**; however, the charter provides that this address commission had been deleted for this voyage.⁸ Therefore, it will not be applied in this determination, and therefore, the amount claimed should total **\$39,690.00**.)

D. Increased Bunkers

Claimant asserts that diversion and delay resulted in an increase in fuel consumption. In its claim submission, Megalonissos claims additional fuel consumption in the amount of \$4,127.20. Claimant calculates the increased bunkers as follows:

The M/V Megalonissos burned a total of 6.1 mt of fuel on August 1, 2008.⁹ However, as this is for the entire 24-hour period, Megalonissos needed to adjust this total to an amount used during the 21 hours, 10 minutes of delay, or 21.167 hours. By dividing the 6.1 mt of fuel consumed in one day by 24 hours, the average amount of fuel burned per hour equals 0.254 mt. Multiplying

⁷ See Port Logs and Statement of Facts from 1000 on July 18, 2008 through 1945 on August 1, 2008, submitted with the claim by Chaffe for Megalonissos on 2/17/2010

⁸ See Eletson/Chevron COA Terms, Section 34 "Address Commission," submitted with the claim by Chaffe for Megalonissos on 2/17/2010

⁹ See Megalonissos Daily Engine Log, submitted to the NPFC by Mr. Dan Tadros, Chaffe-McCall, on 7/07/2010

this number by the delay time of 21.167 hours equals approximately 5.37 mt of fuel consumed during the delay period.

At a claimed cost of \$770.00/mt for the fuel,¹⁰ the additional bunkers consumed amount to **\$4,134.90** (\$770.00/mt X 5.37 mt = \$4,134.90).

E. Additional Tug Expenses

Claimant also submits evidence that the M/V Megalonissos incurred additional tug expenses when the vessel was diverted to 12 Mile Anchorage for hull cleaning. Invoices provided for the tug fees are as follows:¹¹

7/31/2008:

Assistance fees, 2 @ \$3150.00	\$6300.00
Gross Registered Tons fees:	\$3016.00
Fuel Surcharge:	\$2794.80
Discount for early payment:	\$(3074.28)

Total:	\$ 9,036.52

8/01/2008:

Assistance fees, 2 @ \$3150.00	\$6300.00
Gross Registered Tons fees:	\$3016.00
Fuel Surcharge:	\$2794.80
Discount for early payment:	\$(3074.28)

Total:	\$ 9,036.52
Total Combined Costs:	\$18,073.04

F. NPFC Analysis:

Chaffe submitted a claim for its client, Megalonissos, asserting that the M/V Megalonissos was delayed by the tank barge DM 932 oil spill and the loss of profits resulting from this incident was \$39,193.88, based on the demurrage provided in the Chevron charter. The M/V Megalonissos scheduled a second charter, the Chevron charter, while the vessel was fulfilling the terms of the first charter, Chalmette. Port Logs/Statement of Facts submitted for the vessel while under the Chalmette charter reflects that the Chalmette charter was completed on July 31, 2008.¹² However, no Port Logs or other documentation or evidence was submitted for the Chevron charter; therefore, it is unclear when the M/V Megalonissos was available to the Chevron charterer. The Chevron charter provides that the vessel was to load on the east coast of Mexico

¹⁰ See Chevron products UK Limited invoice, submitted to the NPFC by Mr. **Dan Tadros**, Chaffe-McCall, on 7/07/2010

¹¹ See Crescent Towing and Salvage Co. Inc. invoices, dated 7/31/2008 and 8/01/2008, submitted with the claim by Chaffe for Megalonissos on 2/17/2010

¹² See Port Logs and Statement of Facts from 1000 on July 18, 2008 through 1945 on August 1, 2008, submitted with the claim by Chaffe for Megalonissos on 2/17/2010

between July 22 and July 24, 2008 (laycan¹³); however, there is no documentation evidencing that either the owner or charterer was invoiced or paid any penalty for the arrival of the vessel beyond the laycan time stated in the Chevron charter.

The Claimant did not provide an accounting for either the Chalmette or Chevron marine charters; therefore, it is unknown if the vessel lost profits resulting from the oil spill. The submitted documentation does not establish that the vessel suffered a loss of profits from the incident.

The Claimant bears the burden of providing all evidence, information and documentation deemed necessary to support the claim. The claims regulations require that a Claimant must establish a loss or profits or impairment of earning capacity by income tax returns, financial statements or other similar documents. In this case Claimant asserts that the vessel suffered 0.882 days of delay and initially submitted only the Chalmette and Chevron charters, Port Logs/Statement of Facts and invoices for the additional tugs to evidence a loss of profits. Claimant then quantified the loss of profits based on the demurrage in the Chevron charter although it is not clear from the Statement of Claim if the vessel was operating under the Chevron charter at the time the vessel was at 12 Mile Anchorage for hull cleaning or if the vessel was off hire.

In a letter dated March 12, 2010, Claimant's attorney acknowledges that the revenues from the two charters were realized but supports his argument for loss of profits by stating that the vessel's 0.882-day delay spread the vessel's anticipated profit past the additional hours and this delay resulted in a delay of the vessel's ability to generate profit from its next voyage. Claimant notes that when a delay results during a charter and the delay is caused by the charterer, the owner has recourse because the charterer pays demurrage for the delay. However, Claimant continues, when a delay occurs between charters, as may have occurred in this case, the owner cannot receive demurrage from the charterer. Thus, he loses profits.

In a second letter dated June 18, 2010, Claimant further explains that the vessel is entitled to reimbursement for its lost profits because there is a "reasonable certainty" that the delay for hull cleaning resulted in lost profits. Claimant cites Robert L. Dunn, RECOVERY OF DAMAGES FOR LOST PROFITS, which states that if the fact of damages are proven with "reasonable certainty," the plaintiff is entitled to recover the value of his contract as measured by the value of his profits. Dunn notes, and Claimant acknowledges, that case law recognizes that while the reasonable certainty test is a flexible one, "at a minimum, opinions or estimates of lost profits must be based on objective facts, figures or date from which the amount of lost profits can be ascertained." *Atlas Copco Tools, Inc. v. Air Power Tool & Hoist, Inc.*, 131 S.W. 3d 203 (Tex. App. 2004).

The NPFC agrees with, and the OPA regulations comport with, this theory. The regulations require financial reports or income tax returns – objective facts or figures - to evidence a reasonable certainty of the fact of damages. Once the fact of damages is established, there are several methodologies that may be used to quantify the damage, including the demurrage provided in the applicable charter. Demurrage - loss of profits resulting from the loss of use of a vessel - has traditionally been an item of damages in admiralty. *Skou v. United States*, 478 F.2d 343, 345 (5th Cir. 1973) However, courts sitting in admiralty agree with the requirement that damages must first be established. The mere stipulation of a liquidated sum for demurrage in a charter agreement does not obviate the need to show actual damages. *Trans-Asiatic Oil Ltd. S.A. v Apex Oil Co.*, 804 F. 2d 773, 782 (P.R. 1986).

¹³ Laycan is a ship chartering term which stands for laydays commencement and cancelling; specifies the earliest date on which laytime can commence and the latest date, after which the charterer can opt to cancel the charterparty (Maritime Dictionary, found at: m-i-link.com)

As further proof that the M/V Megalonissos is entitled to lost profits, in the June 18, 2008, letter Claimant submitted the Megalonissos charters from the Chalmette Charter (July 3, 2008) through the end of 2008 to evidence that the vessel was continually on hire. However, these charters reflect that there were sometimes days and weeks where the vessel was not under charter.

Courts have looked at a vessel's activity and the vessel's activity in a ready market to determine the fact of damages. *Hygrade No. 24 v. The Dynamic*, 233 F. 2d 444 (2d Cir. 1956) (The owner of a barge that was inoperative for 19 days was awarded net profits it would have earned for each of those days after finding that the barge was booked continuously for the entire season and the evidence was sufficient to conclude that the barge would have worked every day had it not been damaged.) However, there must be some evidence that not only was there an opportunity for the vessel to be employed during the period but that the vessel would have availed itself of that opportunity. *Skou*, 478 F. 2d at 346. (The dearth of evidence prevents a conclusion that the vessel would have been continually employed when there were lengthy inactive periods between charters and when there is no evidence that a subsequent charter commitment was not breached. To award the owner for the inactive days would be a windfall to him because he would be in a better position because of the collision than had it not occurred.) In this case the vessel was under a subsequent charter with Chevron and there is no evidence that the owner lost the charter or was penalized for providing the vessel beyond the laycan provision in that charter. Save a showing of available but missed opportunities for other employment during the period, which the Claimant has not demonstrated, he cannot recover under this theory. Finally, Claimant provided a 12-month financial statement for the M/V Megalonissos as of December 31, 2008. While this statement reflects the gross revenues, voyage and operating expenses and net income for the vessel for the year 2008, it does not provide evidence that the vessel lost profits in 2008 as compared to the vessel's finances for years prior or subsequent to 2008, the year that the tank barge DM 932 discharged oil into the Mississippi River.

In summary, Claimant has not provided sufficient or specific documentation to establish that the Megalonissos suffered a loss of profits or impairment of earning capacity resulting from the discharge of oil from the tank barge DM 932 and closure of the Mississippi River in July 2008. Both the Chalmette and Chevron charters were completed, earning Megalonissos its projected revenues for each. It has provided evidence that fuel and tug expenses increased in the amount of \$22,207.94 as a result of the discharge and these costs reduced its profits. These added costs, as discussed above, are valid and compensable under OPA.

G. Determination:

The NPFC hereby determines that the OSLTF will pay **\$22,207.94** as full compensation for the damage costs incurred by the Claimant and submitted to the NPFC under claim # N08057-071. All costs claimed are for charges paid for by the Claimant for damages as that term is defined in OPA and, are compensable damages, payable by the OSLTF as presented by the Claimant.

VI. DETERMINED AMOUNT: \$22,207.94

Claim Supervisor: **Thomas S. Morrison**

Date of Supervisor's review:

Supervisor Action:

Supervisor Comments: