CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N08057-0115
Claimant	: U.S. United Ocean Services, LLC
Type of Claimant	: Corporate
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: $366,627.18

INCIDENT:

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision with the M/V TINTOMARA and discharged oil into the Mississippi River, a navigable waterway of the United States. Approximately 282,828 gallons of oil[1] were released into the Mississippi River; the spill response was coordinated by the Federal On-Scene Coordinator (FOSC) and the Unified Command, who immediately closed the River to vessel traffic. According to a press release submitted by the Claimant the River in the New Orleans area was open to commercial traffic on August 11, 2008.[2]

CLAIM AND CLAIMANT:

Claimant, United Ocean Services, LLC (UOS), is a subsidiary of United Maritime Group, LLC.[3] UOS barges regularly moved coal from locations on the Mississippi River to Tampa Bay and on their return trips moved phosphate rock to facilities on the Mississippi River. UOS also chartered ocean-going vessels to U.S. government agencies to move cargo to various ports around the world. Claimant seeks reimbursement for a loss of profit and additional expenses incurred by four of its tug/barge units (M/V Naida Ramil/Peggy Palmer, M/V Lisa W/Barbara Vaught, M/V Beverly Anderson/Mary Turner, M/V Debbie Rankin/Diana T) and one ocean-going vessel (the M/V Tina Litrico) due to the incident.

Initial Claim:

At the time of the NPFC adjudication of the claim, Claimant's sum certain was ($377,107.00 in loss of profits and $36,652.00 in overhead and incidental expenses).[4] In its initial determination dated May 22, 2013, the NPFC offered to pay $12,153.50 in expenses and denied the $377,107.00 in loss of profits. The NPFC denied a portion of the additional expenses on the grounds that Claimant provided insufficient information to support the fuel costs and denied the loss of profits because Claimant had not established that the tug/barge units and ocean-going vessel suffered a loss of profits and/or quantified that loss.

Request for Reconsideration:

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

[2] "River Conditions, River Conditions Update," August 11, 2008.

[3] Two other subsidiaries of UMG, LLC, United Barge Lines and United Barge Terminal, submitted claims to the Fund and were adjudicated under separate claims numbers.

[4] Claimant's $397,815.00 in claimed Loss of Profits included $20,708.00 of fuel costs. NPFC moved these fuel costs to the Overhead and Incidental expenses category in our analysis section, which was more appropriate. This provided for a Loss of Profit total of $377,107.00 and Overhead and Incidental Expenses total of $36,652.00, which still equals Claimant's total sum certain of $413,759.00.

UOS timely sought reconsideration of the NPFC determination on July 19, 2013. It reduced its sum certain to $366,627.18 ($329,975.18 in claimed loss of profits and $36,652.00 in additional expenses).[5] The reduced sum certain represents a decrease in the daily TCE rate used to calculate an alleged loss of profits for the M/V Beverly Anderson/Mary Turner ($56,000 to $49,974.00) and the M/V Debbie Rankin/Diana T ($41,800 to $11,437) tug/barge units.

In support of its request for reconsideration UOS argues that it may receive damages equal to a loss of profit or impairment of earning capacity and that the NPFC applied an incorrect legal standard to the facts and evidence because Claimant established that its vessels were active in a market ready for its services. Further, Claimant argues, that it was not required to prove that it lost charters in order to recover lost profits. Claimant provided no new factual information to support its request for reconsideration but provided a legal argument that will be more fully described below.[6]

NPFC RECONSIDERATION ANALYSIS:

The Director, NPFC, upon written request of the claimant or of a person duly authorized to act on the claimant's behalf, reconsiders any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. 33 CFR 136.115(d). On reconsideration the NPFC reviews the claim **de novo**, incorporating the initial determination by reference. The NPFC views this as a loss of profits claim.

Tug and Barge Units: M/V Naida Ramil/Peggy Palmer; M/V Lisa W/Barbara Vaught; M/V Beverly Anderson/Mary Turner; and M/V Debbie Rankin/Diana T.

Claimant argues that the NPFC used an incorrect legal standard when it denied Claimant's loss of profits because it established that the delayed tug/barge units were active in the market place and that the case law firmly establishes that a shipowner is entitled to recover lost profits upon a showing that its vessel was active in a market ready for its services and that uncontroverted proof that the vessel operated in an active market is sufficient to establish lost profits. Delta Steamship Lines, Inc. v. Avondale Shipyards, Inc., 747 F. 2d 995, 1001 (5^{th} Cir. 1984).

The NPFC acknowledges that the units were active in the market place. This is supported by the Port Operations Report provided in the UOS Vessel Utilization, Port Operations Report for the tug/barge units. However, a loss of profits may be awarded as long as it is proven with reasonable certainty. Id. (*quoting* The CONQUEROR, 166 U.S. 110, 125 (1897) (A time honored rule in maritime cases to determine lost detention profits is to seek a fair average based on a number of voyages before and after.) *See also* Moore-McCormack Lines, Inc. v. the ESSO CAMDEN, 244 F.2d 198, 201 (A fairer measure of lost profits is the average daily earnings over the entire period of the three voyages in evidence.)

In this claim Claimants failed to provide sufficient financial information to quantify a loss of profits for the tug/barge units. In its submission dated September 13, 2013, Claimant provided a one-page Voyage Profit/Loss Report (Report) for each tug/barge unit. Some Reports were not for the impacted voyages; therefore, they cannot be considered in a calculation to quantify a loss of profits of that tug/barge unit.[7] The Reports are summary sheets and do not include underlying

[5] See Email from Mr. Ryan Hahn to Mr. Robert Rioux, dated 9/13/2013.

[6] See The Miller Law Firm letter dated July 19, 2013.

[7] A Report was provided for Naida Ramil/Peggy Palmer's impacted voyage No. 8006 but not for voyage No. 8005, which was also impacted. A Report was provided for Lisa W/Barbara Vaught voyage No. 8017 (not impacted) but not for voyage No. 8018, the impacted voyage. A Report was provided for Beverly Anderson/Mary Turner voyage

support documentation. To quantify a loss of profits for each tug/barge unit Claimant used the time charter equivalent (TCE)[8], stated on the Report for that unit and multiplied it by the delay time. That is, it calculated a loss of profits solely on the TCE value for one voyage.

The Claims Regulations comport with the case law, providing that a claimant must first establish that its income was reduced as a consequence of the incident and second, the **amount of the reduction.** 33 CFR 136.233(b). This can be established by providing profits or earnings in comparable periods and during the period of the claimed loss (income tax returns, financial). Additionally, comparative figures for profits and earnings for the same or similar activities outside the area affected by the incident must also be established. 33 CFR 136.233(c).

In its initial determination the NPFC noted that if Claimant sought reconsideration it should provide proper and specific voyage documents to support each of its claimed tug/barge losses, and, if seeking reimbursement under a TCE theory, it should provide documents with supporting documentation for voyages, prior to, and after, the impacted voyage. In its request for reconsideration Claimant continues to argue reimbursement on a TCE theory but does not provide information on voyages prior to or after the impacted voyage.

Claimant provided individualized income statements for each tug/barge unit that tracked that unit's performance. The statements included the monthly Income Statement for August 2008 and the annualized statement for January – August 2008.[9] Each statement was based on a 31-day month of August and provided the average daily TCE for "days available to operation." While this may be a monthly average used for Claimant's business purposes, it did not provide specific financial information for the voyage prior to and after the impacted voyage. More importantly, Claimant did not use this average daily TCE in its calculation for each impacted voyage but lowered the TCE value because "the [impacted] voyage(s) would have returned a slightly lower TCE than the averaged TCE for the entire year."[10] Thus, Claimant provided no credible evidence that could be used to calculate the loss of profits for each tug/barge unit. The loss of profits for the tug/barge units is denied.

Claimant also argues that the initial NPFC determination based its denial of the loss of profits for the vessels on the grounds that the lost days due to the incident did not establish a loss of profit because Claimant provided no information establishing that the tug/barge units lost a voyage. Claimant misconstrues this NPFC explanation for its denial.

The loss of a voyage or charter is one way to establish a loss of profits and the quantification of that loss. Courts have wide discretion in ascertaining the measure of detention damages. Turecamo Maritime, Inc. v. Weeks Dredge No. 516, 872 F. Supp. 1215, 1233 (S.D.N.Y. 1994). Some of the measures include (1) the value of a specific lost charter; (2) the earnings of an average voyage, where the ship was run on a fixed route with relatively stable earnings per

No. 8039, which was not impacted but did not provide Reports for voyage Nos. 8038 or 8037, the impacted voyages. A Report was provided for Debbie Rankin/Diana T voyage No. 8008, one of its impacted voyages, but no Report was provided for voyage No. 8006.

[8] Time Charter Equivalent (TCE) is a shipping industry's metric measuring the average daily revenue performance of a vessel. It is a non-GAAP measure and is calculated by subtracting certain vessel expenses from the vessel's revenue (the expenses deducted are at a vessel owner's discretion) and dividing the net amount by the round-trip duration. Daily net revenue is different from a daily net profit or loss of profits.

[9] The income statement for the Debbie Rankin/Diana T was for December 2008 and is not pertinent to the claimed loss.

[10] Ryan Hahn letter dated July 13, 2013.

voyage; (3) average daily earnings; (4) a demonstrable loss of revenue to the business, or (6) the market cost of a substitute with similar characteristics.)

Thus, there are several methods of establishing a loss of profits and quantifying that loss. . Pursuant to the claims regulations a claimant has the burden of establishing and quantifying its loss. Because a claimant has the best understanding of its business operations, financial reporting and documentation supporting its revenue and expenses, the NPFC analyzes the method chosen by the claimant and the financial documentation to support that method. In this case Claimant attempted to quantify a loss of profits by utilizing the TCE for the impacted tug/barge unit voyages. Claimant could have established that the delay on the River resulted in a loss of profits for the impacted tug/barge units using other methods; however, it did not do so.

The claimed loss of profits for the four tug/barge units is denied.

<u>M/V Tina Litrico.</u>

In its reconsideration request UOS argues that the average daily TCE is the best evidence of the impairment to earning capacity, but instead they are willing to utilize the demurrage rate provided in the contract the Tina Litrico was working under at the time of the oil spill, which was $30,000.00[11].

Claimant submitted sufficient voyage information for the M/V Tina Litrico to establish that the vessel was active in the market place at the time of the incident. It quantified a loss of profits utilizing a TCE methodology.

Claimant submitted Voyage Profit and Loss information for voyages 8002, 8004, 8005 and 8006. These reflect that the vessel was constantly chartered and was active in the market place. The Voyage Profit and Loss sheets included support documentation itemizing a profit and loss (P&L) summary for the voyages.[12] These P&L summaries reflect freight revenue, gross and net income, vessel expenses (bunker, port and miscellaneous), daily vessel costs and voyage days. Using the financial information for voyages 8002, 8004 (the impacted voyage) and 8006, it is possible to determine an average daily loss of profits.[13]

First, based on the P&L summaries, the daily vessel costs (fixed costs) for each of the three voyages is $24,962. This cost is applied every day of a voyage and as a result any delay or extension on a voyage with fixed revenue had income/profits reduced directly by the increased daily expense. In this case the average daily fixed costs are $24,962. The daily profit for voyage 8002, 8004 and 8006 is $1,806.00, $2,776.67[14] and $1,613.00, respectively. Thus the average daily profit for the three voyages is $2,065.22. Adding the $24,962.00 daily expense and $2,065.22 in average daily profit after expenses results in an average daily earnings of $27,027.22. The delay was 4.43 days, thus multiplying the $27,027.22 x 4.43 results in a loss of profits to be $119,730.58.

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[11] The demurrage for the impacted voyage was $30,500/day but claimant lowered this amount to be conservative.

[12] The financial documents were exported from UOS profit and loss computer files; therefore they are official corporate financial documents..

[13] Voyage 8005 was not part of the calculation because 8005 does not fairly represent normal average earnings. <u>The Glyfe v. The Trujillo</u>, 209 F. 2d, 386, 389 (S.D.N.Y. 2007) (Voyages not representative of the average normal earnings should not be considered in the calculation.)

[14] Voyage 8004 summary page shows the actual profit margin per day to be $16,973.00. This includes profits from voyage 8005, which amounted to $14,196.33, and was a voyage conducted during voyage 8004. The NPFC took the $16,973.00 - $14,196.33 to come to a total profit per day for voyage 8004 of $2,776.67.

Claimant calculated its loss of profits on the demurrage rate of the vessel, i.e., $30,500 per day,[15] arguing that using a demurrage rate is the best evidence because that rate is one that is negotiated between an owner and charterer at arms-length and demurrage is intended to compensate an owner for a profit that a vessel owner will lose if the vessel is delayed and loses revenue because of a delay. The intent of demurrage is to compensate an owner for delays in loading or discharging cargo and is negotiated with a charterer on a voyage by voyage basis and is typically a rate negotiated for one voyage. It does not represent an average daily rate; a fairer measure of loss of profits is averaging the average profit for three voyages or averaging daily profits or revenue for a period of time. Moore –McCormack Lines v. the ESSO CAMDEN, 244 F. 2d at 201.

Based on the documentation provided by the Claimant, the NPFC offers $119,730.58 on reconsideration for loss of profits for the M/V TINA LITRICO.

Overhead and Incidental Expenses

In its initial claim, UOS claimed $36,652.00[16] of which the NPFC found $12,153.50 compensable. In its reconsideration request, Claimant did not argue or provide any new information concerning the Overhead and Incidental Expense deficiencies the NPFC identified in our initial determination; therefore, the NPFC offers on reconsideration **$12,153.50.**

SUMMARY:

As discussed above the NPFC offers $119,730.58 for loss of profits for the M/V TINA LITRICO and **$12,153.50** ($8,125.50 mooring costs + $528.00 additional pilots + $3,500.00 increased Agent handling fees) for Overhead and Incidental expenses found compensable and offered in our initial determination. The total offered is $131,884.08.

Amount Approved: **$131,884.08**

Claim Supervisor[redacted]
Date of Supervisor's review:
Supervisor Action:
Supervisor's Comments:

[15] It decreased the demurrage rate to $30,000 per day to be conservative.
[16] See footnote 5.