U.S. Department of
Homeland Security

**United States
Coast Guard**

Director
United States Coast Guard
National Pollution Funds Center

4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: [redacted]
E-mail: [redacted]@uscg.mil
Fax: 703-872-6113

5890
8/20/2013

VIA EMAIL: [redacted]@legershaw.com

Board of Commissioners of the Port of New Orleans
ATTN: Mr. Jeffrey Lynch
1350 Port of New Orleans Place
P.O. Box 60046
New Orleans, LA 70160

Re: Claim Number N08057-0102

Dear Mr. Lynch;

The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act (OPA) (33 U.S.C. 2701 et seq.), has determined that $299,185.08 is full compensation for OPA claim number N08057-0102.

This reconsideration determination is based on an analysis of information submitted.

Disposition of this reconsideration constitutes final agency action.

If you accept this determination, please sign the enclosed Acceptance/Release Form where indicated and return to:

Director (ca)
U.S. Coast Guard
National Pollution Funds Center
4200 Wilson Boulevard, Suite 1000
Arlington, VA 20598-7100

If we do not receive the signed original Acceptance/Release Form within 60 days of the date of this letter, the determination is void. If the determination is accepted, your payment will be mailed within 30 days of receipt of the Release Form.

If you have any questions or would like to discuss the matter, you may contact me at the above address or by phone at 800-280-7118.

Sincerely,

[redacted]

Thomas S. Morrison
Chief, Claims Adjudication Division

ENCL: Claim Summary / Determination Form
Acceptance/Release Form

U.S. Department of Homeland Security

United States Coast Guard

Director
National Pollution Funds Center

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Arlington, VA 20598-7100
Staff Symbol: (CA)
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Claim Number: N08057-0102	Claimant Name: Board of Commissioners of the Port of New Orleans 1350 Port of New Orleans Place P.O. Box 60046 New Orleans, LA 70160

I, the undersigned, ACCEPT this settlement offer of $299,185.08 as full and final compensation for damages arising from the specific claim number identified above.

This settlement represents full and final release and satisfaction of the amounts paid from the Oil Spill Liability Trust Fund under the Oil Pollution Act of 1990 for this claim. I hereby assign, transfer, and subrogate to the United States all rights, claims, interest and rights of action, that I may have against any party, person, firm or corporation that may be liable for the amounts paid for which I have been compensated under this claim. I authorize the United States to sue, compromise or settle in my name and the United States fully substituted for me and subrogated to all of my rights arising from and associated with those amounts paid for which I am compensated for with this settlement offer. I warrant that no legal action has been brought regarding this matter and no settlement has been or will be made by me or any person on my behalf with any other party for amounts paid which is the subject of this claim against the Oil Spill Liability Trust Fund (Fund).

This settlement is not an admission of liability by any party.

With my signature, I acknowledge that I accept as final agency action all amounts paid for this claim.

I, the undersigned, agree that, upon acceptance of any compensation from the Fund, I will cooperate fully with the United States in any claim and/or action by the United States against any person or party to recover the compensation. The cooperation shall include, but is not limited to, immediately reimbursing the Fund for any compensation received from any other source for those amounts paid for which the Fund has provided compensation, by providing any documentation, evidence, testimony, and other support, as may be necessary for the United States to recover from any other person or party.

I, the undersigned, certify that to the best of my knowledge and belief the information contained in this claim represents all material facts and is true. I understand that misrepresentation of facts is subject to prosecution under federal law (including, but not limited to 18 U.S.C. §§ 287 and 1001).

Title of Person Signing	**Date of Signature**
Typed or Printed Name of Claimant or Name of Authorized Representative	**Signature**

Title of Witness	**Date of Signature**
Typed or Printed Name of Witness	**Signature**

DUNS Required for Payment	**Bank Routing Number**	**Bank Account Number**

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N08057-0102
Claimant	: Board of Commissioners of the Port of New Orleans
Type of Claimant	: Corporate
Type of Claim	: Loss of Profits and/or Impairment of Earning Capacity
Amount Requested	: $299,185.08
Claim Number	: N08057-0094
Claimant	: Chartis Insurance/Global Recovery/Lexington Insurance Company
Type of Claimant	: Corporate
Type of Claim	: Loss of Profits and/or Impairment of Earning Capacity
Amount Requested	: $123,597.92

FACTS:

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision with the M/T 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 and the resulting spill response, coordinated by the FOSC Unified Command, initially closed the river to vessel traffic. According to an August 11, 2008, press release the U.S. Coast Guard, Sector New Orleans, updated the safety zone on the Lower Mississippi River to extend from Mile Marker (MM) 60 to MM 97. All vessels transiting within the safety zone were directed to move at their slowest safe speed to produce minimum wake. Further, all vessels were prohibited from entering this safety zone unless granted permission by the Captain of the Port, New Orleans or the VTS.

BACKGROUND:

The Claimants, Chartis Insurance/Global Recovery/Lexington Insurance Company ("Insurers") and the Board of Commissioners of the Port of New Orleans (the Port), presented separate claims to the NPFC on February 9, 2011 and July 19, 2011, respectively. The Insurers sought reimbursement in the amount of $123,597.92, which represented an insurance payment it issued to the Port under the denied access provision in its policy. The denied access was allegedly from July 23, 2008 through August 22, 2008. The Insurers paid the Port on February 16, 2009. The Port sought reimbursement of alleged loss of profits in the amount of $422,782.00 for denied access to the Port due to the incident.

The NPFC notified the Insurers that as the subrogee it should present its claim with the Port's claim; the Insurers subsequently advised the NPFC on several occasions that the Port was not cooperating in this claim. When the Port submitted its claim to the Fund five months after Chartis submitted its claim the Port advised the NPFC that "it was filing jointly and it was retaining and addressing its respective rights." As a result the NPFC adjudicated the claims separately based on the information submitted by each claimant in support of its individual claim.

The claims regulations, under 33 CFR 136.107, provide that:

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

(a) The claims of a subrogor and subrogee for removal costs and damages arising out the same incident should be presented together and must be signed by all claimants.
(b) A fully subrogated claim is payable only to the subrogee.
(c) A subrogee must support a claim in the same manner as any other claimant.

***THE CLAIMS AND CLAIMANTS*:**

The Insurers Claim – N08057-0094

The Insurers submitted a claim for reimbursement on February 3, 2011. The Insurers paid $123,597.92 for Lexington Insurance Company (under which it operated) to the Port under the Port's insurance policy with Lexington. Lexington determined that the losses were covered under the Prevention of Access provision in the Port's insurance policy. Under the terms of the policy, the insurer would pay the loss of business income during the Period of Restoration that resulted directly from the necessary total or partial interruption of the business minus a 72-hour deductible and non-continuing or saved expenses. The terms of the policy provided that the indemnity period was limited to 30 days. Thus, business losses would be calculated from the date of the oil spill (minus three days) and would end when access to the Port was resumed or 30 days, whichever came first.

American Insurance Group (AIG)[2] contracted with GAB Robins to investigate and adjust the Port's business interruption losses. Based on a 30-day business interruption analysis from July 23, 2008 until August 22, 2008, the lost revenue was estimated to be $454,763.13.[3] The non-continuing (saved) expenses were estimated to be 18.44% of the revenues ($83,858.32). Under the terms of the policy a 72-hour deductible applied and was calculated by multiplying the daily average cash value ($82,435.63),[4] by three days ($247,308.89). Subtracting the saved expenses ($83,858.32) and the deductible ($247,306.89) from the estimated monthly revenue ($454,763.13) resulted in a payment to the Port of $123,597.92. This represented the Port's loss of profits from July 23, 2008 – August 22, 2008. Claimant paid the Port $123,597.92 in consideration of the Port executing the Subrogation Receipt dated February 16, 2009.

On December 12, 2012, the NPFC denied the Insurers claim on the basis that it was unknown whether the 30-day period used to value the loss was a function of the business interruption model, whether it was based on the 30-day limit on indemnity provided in the insurance policy or whether it was in fact based on an actual 30-day prevention of access to the Port.

Port Of New Orleans Claim – N08057-0102

In its initial submission dated July 15, 2011, the Port claimed that, as a direct result of the spill, it lost rents, fees and profits associated with four container vessels, one break-bulk vessel and nine cruise ships. It outlined its losses as: (1) cancellation of nine Carnival Cruise vessels berthing at the Port; (2) cancellation of three container vessels calls, and (3) cancellation of one break-bulk vessel call. In an e-mail to the NPFC dated July 18, 2012 (one year after it submitted its claim to

[2] Chartis Global Recovery Services and Lexington Insurance Company are subdivisions of American Insurance Group (AIG).
[3] This estimate was based on monthly revenues from June-August 2006.
[4] This was based on revenues earned from July 2007-June 2008 less mitigation.

the Fund), the Port noted that it had a long standing agreement with the Insurers to distribute funds received from the OSLTF on a pro rata basis.

Carnival FANTASY Losses:

The Carnival ship, CARNIVAL FANTASY (the FANTASY), had a berthing agreement with the Port. When the River was closed on July 23, 2008, the FANTASY missed three calls (7/26/2008, 7/31/2008, and 8/04/2008.) Another call, the 8/09/2008 voyage, was canceled as a result of the Force Majeure provision in the berthing agreement.[5]

The Coast Guard imposed a safety zone on the River on August 11, 2008, which required that vessels traveling within the zone maintain their slowest speed to avoid wake. Based on the safety zone Carnival Cruise Lines diverted five remaining calls scheduled for the Port (8/14/2008, 8/18/2008, 8/23/2008, 8/28/2008 and 9/012008) to be diverted to the Port in Mobile, Alabama. This diversion was based in part on the potential contamination of the FANTASY if it transited the River to the Port. [6] As a result of the diversion it mitigated its potential for damages because it was able to maintain its existing bookings (rather than have passengers cancel due to the incident) and to sell remaining inventory. The Port asserts that its loss of profits for the FANTASY was $375,214.00

Container and Breakbulk Vessel Losses:

The Port collects rents, dockage and harbor fees and crane rental charges when container and breakbulk vessels moor at its docks. As a result of the River closure the breakbulk vessel FROST 5[7] along with container vessels, ROME EXPRESS[8], the LIBRA J[9], the MSC BELEM[10] canceled their Applications for Berth and Requests for Cancel to berth. The Port also provided email correspondence from Ports America, Ceres and Pacorini to further support its claim that the calls were not delayed or mitigated; rather, the emails show that they were canceled completely.[11] The Port asserts that its loss of profits for these vessels was $110,883.00.

These amounts total $486,097.00. While the Port lost all expected wharfage and harbor fees from the cancelled ports of call, it did generate approximately $63,314.00 in parking revenues from Carnival FANTASY passengers who opted to park in the Port's lot and take a shuttle to

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[5] See Exhibit Y, Notice of Force Majeure, dated 8/7/2008, submitted with the supplemental claim documents to the NPFC by the claimant on 9/16/2011.

[6] See Affidavit of Mr. Terry Thornton, Carnival, dated and notarized 5/18/2012.

[7] See Exhibit U, FROST 5 Application for Berth and Request for Cancel, submitted with the supplemental claim documents to the NPFC by the claimant on 9/16/2011.

[8] See Exhibit R, ROME EXPRESS Application for Berth and Request for Cancel, submitted with the supplemental claim documents to the NPFC by the claimant on 9/16/2011.

[9] See Exhibit S, LIBRA J Application for Berth and Request for Cancel, submitted with the supplemental claim documents to the NPFC by the claimant on 9/16/2011.

[10] See Exhibit T, MSC BELEM Application for Berth and Request for Cancel, submitted with the supplemental claim documents to the NPFC by the claimant on 9/16/2011.

[11] See Exhibit G, 8.18.08 email from Eric Jupiter of Ports America; Exhibit N, 8.14.08 email form Donald Broussard of Pacorini; and Exhibit I, Emails from the Port regarding the LIBRA J and the MSC BELEM. All these documents were submitted with the supplemental claim documents to the NPFC by the claimant on 9/16/2011.

Mobile, Alabama, where the Carnival Fantasy cruises were diverted.[12] The Port then calculated a net loss of profits due to the oil spill to be $422,783.00.[13]

The NPFC denied the Port's claim on December 12, 2012 on the basis that, in exchange for $123,597.92, the Port subrogated its rights to its insurer, Lexington Insurance Company (Lexington),[14] as evidenced in the Subrogation Receipt and the Sworn Statement in Proof of Loss. The payment and subrogation of rights were based specifically on the claimant's insurance policy.[15]

REQUESTS FOR RECONSIDERATION:

The Director, NPFC, upon written request of the claimant or the person duly authorized to act on the claimant's behalf, reconsiders any claim denied. The request 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 February 7, 2013, the Port and the Insurers sent a letter, each requesting reconsideration of its claim. Notwithstanding that the Claimants assert that this is a "joint" claim each attorney provided separate legal and factual support for its request for reconsideration. The letter was signed by attorneys for both the Port and the Insurers[16]

Port's Argument and Supporting Documentation in Support of its Request for Reconsideration:

- The Port argues that it is entitled to reimbursement of its losses in the amount of $299,185.08, which is the difference between its alleged losses of $422,783.00 minus the $123,597.92 that it received from the Insurers. The Port asserts that under Lexington Policy # 0303135, the subrogation clause only transfers rights to the extent of what was paid. Thus, Lexington only gained the rights to $123,597.92 of its total loss.
- Citing to Louisiana Civil Code Article 1826(b), the Port asserts that it has rights for what it has not been paid ($299,185.08); therefore, it has not released rights for this amount to the Insurers.
- The Port argues that while the River was partially reopened on August 11, 2008, it was reopened with restrictions because the safety zone was still in effect from the site of the incident for 57 miles from Mile Marker (MM) 97 (immediately above the cruise ship terminal at the Port of New Orleans) southbound to MM 40 (near Port Sulphur, Louisiana). All vessels were required to transit through the safety zone at the lowest speed possible to minimize wake.

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[12] See Exhibit P, Carnival Cruise Lines Expected Revenue, submitted with the supplemental claim documents to the NPFC by the claimant on 9/16/2011, as well as Letter from Ms. Christine Sevin, Leger, to Ms. Alyssa Lombardi, NPFC, dated 1/07/2012.

[13] See Exhibit A, Revised Description of Losses, submitted with the supplemental claim documents to the NPFC by the claimant on 9/16/2011.

[14] See Subrogation Receipt, dated 2/16/2009, and submitted by the claimant to the NPFC with the claim submission on 7/18/2011.

[15] See Subrogation Receipt, dated 2/16/2009, and submitted by the claimant to the NPFC with the claim submission on 7/18/2011.

[16] See Request for Reconsideration of Claims Denials, dated 2/07/2013, submitted by both the Port and Lexington to the NPFC on 2/07/2013.

- As of August 27, 2008, the NOAA Scientific Support Team was investigating remaining oil in the River in the area affecting the Port, including riprap areas adjacent to the riverfront in New Orleans.[17] A status report dated 23 September 2008 reflected that the USCG, LDEQ, NOAA and the RP met to discuss a plan for continued cleanup efforts. At that time eight segments were ready for sign-off and 18 segments need additional work or discussion before signoff.[18]
- Carnival Cruise Lines had four ports of call for its vessel, CARNIVAL FANTASY, for the Port, along with three container vessels and one breakbulk vessel when the River was completely closed to traffic. All were canceled.
- On August 7, 2008, Carnival Cruise Lines invoked the Force Majeure provision of its berthing agreement with the Port due to the continuing uncertainties as to when the River would reopen without restrictions. It moved the cruise ship, CARNIVAL FANTASY, out of the Port to berthing facilities in Mobile, Alabama, for the period of August 9, 2008 through September 6, 2008, at which time the ship was scheduled to go into drydock.[19] The decision to invoke the Force Majeure provision was based on: (1) no guarantee that the FANTASY would not be contaminated with oil if it transited the River during that time; (2) returning the FANTASY to New Orleans without passengers from Mobile after dropping passengers from a sailing would be cost prohibitive and not worth the risk of possible hull contamination, and (3) returning to New Orleans with passengers and bussing them back to Mobile would be in violation of the Passenger Vessel Act and would have subjected the cruise line to federal fines.

<u>The Insurers Argument and Documentation to Support of its Reconsideration Request:</u>

- The Insurers assert that, while the NPFC advised it that its claim should be submitted with the Port's claim, the claims could be adjudicated separately. The Insurers asserts that the claims were filed jointly upon notification by the NPFC and it was Lexington's intent to fully divide the proceeds of settlement on a pro-rata basis.
- Lexington paid $123,597.92 to the Port but the Port suffered significant uninsured damages (sic). The bulk of the Port's damages were due to the cruise ship berthing cancellations, which were redirected to Mobile, Alabama.

In a May 31, 2013, letter to the NPFC, the Insurers and the Port agreed that the Port's loss of profits was $422,783.00 vice the $454,763.13 loss used in the business interruption model. The Insurers conceded that its $454,763.13 was "based on a prospective adjustment of the Port's claim. It was based on assumptions and estimations, per Lexington's internal policies and procedures, for the sole purpose of settling the insurance claim presented by its insured, the Port."[20] Lexington acknowledged that the evidence provided by the Port for its loss of profits is a more precise representation of the actual losses suffered by the Port.

The Claimants agreed that the total uncompensated loss asserted in the request for reconsideration is $422,783.00, of which $299,185.08 is payable to the Port of New Orleans and $123,597.92 is payable to Chartis Insurance.

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[17] See NOAA Situation Report that stated that two difficult cleanup issues remain, including oil riprap in the lower river and riprap areas immediately adjacent to the riverfront in downtown New Orleans.

[18] See NOAA Update 23, SEP 2008.

[19] See Affidavit of Mr. Terry Thornton, Carnival Cruise Lines, dated 5/18/2012, submitted to the NPFC via email on 5/23/2012.

[20] See May 31, 2013Letter to the NPFC, signed by attorneys for the Port and Lexington, and submitted via email on 5/31/2013.

RECONSIDERATION CLAIM ANALYSIS:

While the administrative record provides that the claims of a subrogor and subrogee for removal costs and damages arising out of the same incident should be presented together and must be signed by all claimants the Insurers and the Port of New Orleans did not do so. The NPFC advised Chartis of this regulatory requirement on several occasions; Chartis acknowledged that the Port was not cooperative in this matter. The Insurers noted that it filed its claim to the Fund without the Port—even after presenting a proposed agreement which both parties would enter and file jointly-- because of difficulties in preparing the claim together.[21]

As a result, the Insurers based the loss of profits in its business interruption model different from the alleged loss of profits submitted by the Port to the NPFC. In their initial request for reconsideration, each submitted separate arguments and documents to support their request. Only after the NPFC notified the claimants that they needed to reconcile their sum certain for the loss of profits, did they state in their May 31, 2013 letter that the Port's determination of damages ($422,783.00) is the correct value of its damages versus the $454,763.13 (which was the basis for calculating the insurance payment under the insurance policy.) As noted above, they assert that the insurance sum certain was "based on a prospective adjustment of the Port's insurance claim" and "was based on assumptions and estimations, per Lexington's internal policies and procedures, for the sole purpose of settling the insurance claim" presented by the Port.

The Port provided substantial documentation to support its loss of profits, its parking revenues and net loss profits in the amount of $422,783.00. Further, the Port acknowledged that its $123,597.92 payment from Chartis reduces its loss of profits reimbursable from the Fund to be $299,185.08 and that its subrogable rights that can be acquired by the Fund are limited to this amount. The Insurers have the subrogable rights that may be acquired by the Fund for its reimbursement of $123,597.92 from the Fund.

CONCLUSION:

Based on the above NPFC hereby determines that the claim of the Port of New Orleans is payable in the amount of $299,185.08 as full compensation for the damages submitted to the NPFC under claim N08057-0102. The claim of the Insurers is payable in the amount of $123,597.92 as full compensation for damages under claim N08057-0094.

Claim Supervisor: ***Tho*** [redacted]

Date of Supervisor's review: 8/20/13

Supervisor Action: Approved

Supervisor's Comments:

[21] See email from Ms. Beth Berry, Butler Pappas, to Ms. Alyssa Lombardi, NPFC, dated 6/09/2011.