

CLAIM SUMMARY / DETERMINATION FORM

Date	: 5/06/2011
Claim Number	: N08057-078
Claimant	: Pacific Basin Shipping HK, LTD. (Agents & Operators) for Pacific Basin IHK, LTD (Charterer)
Type of Claimant	: Foreign
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: [REDACTED]
Amount Requested	: \$1,101,632.16

I. FACTS**A. Oil Pollution Incident:**

In the early morning hours of July 23, 2008, at approximately at 0130¹, the tank barge DM 932, an unmanned, non-self propelled, double hull, steel tank barge, bearing official number 546058, measuring 195 feet in length and 35 feet in breadth², 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 oil³ were released into the Mississippi River and the resulting spill response, coordinated by the FOSC Unified Command (FOSC/UC), initially closed the river to vessel traffic and later, when reopened, managed traffic through August 10, 2008.

B. RESPONSIBLE PARTY

American Commercial Lines LLC (ACL) owned the DM 932 barge at the time of the incident and is a responsible party (RP) under the Oil Pollution Act. On 24 July 2008 the NPFC designated ACL as responsible party (RP).

C. The Claimant and the Claim

This claim is presented by Pacific Basin Shipping (HK) Ltd. as agent and operator for Pacific Basin IHX Ltd., Hong Kong (collectively “Pacific Basin”) and represented by Chaffe McCall (Chaffe McCall) LLP. Claimant initially asserted in its claim dated March 17, 2008, that it suffered a loss of profits or impairment of earning capacity in the amount of \$877,233.88. Claimant executed two charter parties and asserts that the oil-spill incident caused it to lose schedule time and incur additional expenses on both charters. On 13 August 2010 Claimant amended its sum certain to \$1,101,632.16 to reflect the following:

¹ SITREP-POL ONE dated 23 July 2008.

² Complaint for Declaratory Judgment – filed 05/20/2009 - Factual Background (Pg 8) – US District Court – Eastern District of Louisiana – Civil Action No. 09-3657.

³ House Subcommittee Hearing on DM 932 Oil Spill, dated 9/15/2008

Table #1

Item Description	Amount Claimed
Reduction in Charter Profits	\$984,960.00
Increased Berth Fees	\$77,087.96
Additional Bunkers Consumed	\$34,427.70
Increased Harbor Fees	\$866.50
Increased Communication Costs	\$90.00
Increased Agency Fees	\$4,200.00
TOTAL LOSS (Claimed)	\$1,101,632.16

Pacific Basin chartered the *Serpentine* through a New York Produce Exchange time charter with Thoresen Shipping Singapore PTE LTD⁴ that provided for a “one time charter trip via safe port(s)...with an intended cargo of non hazardous/non appendix B/harmless cokebreeze...”.⁵ The charter was dated 9 July 2008 at a daily hire rate of \$82,000.00, with charterer being responsible for bunkers (\$738.00 /MT of IFO and \$1,285.00/MT of MDO), all taxes and dues on the vessel and/or cargo.

The Claimant sub-chartered the vessel to Vitol S.A., Geneva pursuant to an Americanized Welsh Coal Charter dated 18 June 2008 for a single voyage to transport approximately 39,750 (+/- 10%) metric tons⁶ of harmless coke breeze to Ghent, Belgium.⁷ The charter called out a freight rate of \$76.00 per metric ton, with the cargo to be loaded into the vessel at the average rate of 15,000 metric tons per weather working day of 24 consecutive hours, with Sundays and holidays included, commencing 12 hours after Notice of Readiness (NOR) is given by the Master to Charterers (Agents/Shipper or Receiver) after reaching the port. The applicable demurrage rate was \$85,000.00 per day/pro rata and a dispatch rate of \$43,500.00 per day/pro rata.

At 2048 on 22 July 2008, the evening before the oil-spill incident, the *Serpentine* anchored at the Point Celeste Anchorage on the Mississippi River (Mile Marker (MM) 52.0-49.8) to begin cleaning her holds in preparation for receiving cargo. At 1245 on 23 July 2008 *Serpentine* tendered a Notice of Readiness (NOR) to load devolatised coal and North American coke breeze at the United Bulk Terminal (UBT) in Davant, Louisiana (MM 55.4).⁸

At 1338 on 23 July 2008 the river restrictions put in place by the Coast Guard to minimize damage were extended from Mile 90 to Mile 50. This river closure encompassed both the UBT and Point Celeste Anchorage and prevented the *Serpentine* from commencing cargo operations or making any maneuvers not expressly authorized by the Coast Guard. According to Claimant, the time lost because of the oil spill and consequent movement restriction on *Serpentine* encompasses the time when the NOR was tendered to the time she was allowed to sail at 0253 on 8 August 2008.⁹

¹ Claimant’s Additional information submission of 25 May 2010 – via email to [REDACTED] from [REDACTED]

⁵ *Ibid.* Line 28.

⁶ Americanized Welsh Coal Charter dated 18 June 2008, between Pacific Basin IHX Limited, Hong Kong (Owner) and Vitol S.A., Geneva (Charterer)

⁷ *Ibid.* Line 11.

⁸ Claimant’s Submission – dated 26 February 2010 – page 2

⁹ *Ibid.*

The following table summarizes the correspondence claimant provided during the adjudication process:

Date	Information Provided
21 May 2010	Claimant Letter discussing: <ul style="list-style-type: none"> - “Recovery of Lost Profit Damages” and its quantification. - Additional Expenses – Berth Fees, Bunkers, Harbor Fee, Launch Expenses, Customs Fees, Communications and Agents Overtime and Agency Fee
25 May 2010	E-mail from ████████ to ████████ of 25 May 2010 providing the M/V Serpentine Charter Party between Thoresen and Pacific Basin dtd 9 July 2008
10 June 2010	E-mail from ████████ to ████████ of 10 June 2010 providing: <ul style="list-style-type: none"> - General Maritime Services (NOLA) email confirming vessel ready to load at Davant Anchorage on 23 July 2008. - Bank Transfer Records for three payments made by Pacific Basin.
4 August 2010	E-mail from ████████ to ████████ providing: <ul style="list-style-type: none"> - charter party between Pacific Basin and Vitol for the delivery of cokebreeze - answers regarding: UBT Vessel Fee Schedule, Launch Tickets, Customs Fees and Communication Fees
12 August 2010	E-mail from ████████ to ████████ providing: <ul style="list-style-type: none"> - Explanation of why additional information wasn’t available for Launch Expenses, Customs Fees and Communications Expenses. - Request to remove Launch Expenses and Customs Fees from consideration. - Invoice for Plaquemines Port, Harbor & Terminal District dated 16 Sept 2008
13 August 2010	Claimant’s letter modifying sum certain to \$1,101,632.16.
19 August 2010	E-mail with the document (e-mail) by which Pacific Basin nominated the M/V Serpentine to move cargo between Davant and Ghent.
18 October 2010	E-mail explanation of lost profits claimed (\$984,960.00).
28 March 2011	E-mail providing: Pacific Basin IHX LTD Freight Invoice, emails from ████████, HSBCnet – Transaction Details dtd 14/08/2008, Calculation of Freight due to owners, and HSBCnet – Transaction Details dtd 26/01/2009.

APPLICABLE LAW:

In general notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which

poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) of this section that result from such incident. 33 USC 2702(a).

Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant. 33 U.S.C. § 2702(b)(2)(E).

Congress directed the President to promulgate regulations “for the presentation, filing, processing, settlement, and adjudication of claims...” 33 U.S.C. 2713 (e). Those regulations are found at 33 CFR Part 136.

The Oil Spill Liability Trust Fund, which is administered by the NPFC, is available to pay claims for uncompensated removal costs consistent with the National Contingency Plan and uncompensated damages pursuant to 33 U.S.C. § 2712(a)(4) and the OSLTF claims regulations at 33 CFR Part 136.

In general, claims for removal costs or damages must first be presented to the RP per 33 U.S.C. 2713(a). If the claim is not settled by any person by payment within ninety days, the claimant may commence an action in court against the RP or present the claim to the Fund. 33 U.S.C. § 2713(c).

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 U.S.C. 2712 (h)(2).

Each claim must include at least the following, as applicable:

- (12) A statement by the claimant that no action has been commenced in court against the responsible party or guarantor of the source designated under – 136.305 or, if any action has been commenced, a statement identifying the claimant’s attorney and the attorney’s address and phone number, the civil action number, and the court in which the action is pending. 33 CFR § 105(e)(12)

Each claim must be in writing for a sum certain for compensation for each category of uncompensated damages or removal costs (as described in Subpart C of this part) resulting from an incident. If at any time during the pendency of a claim against the Fund the claimant receives any compensation for the claimed amounts, the claimant shall immediately amend the claim. 33 CFR § 136.105(b)

Claims for the loss of profits or impairment of earning capacity due to injury to, destruction of, or loss of real or personal property or natural resources may be presented to the Fund by a claimant sustaining the loss or impairment. The claimant need not be the owner of the damaged property or resources to recover for lost profits or income.

“In addition, 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 or 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, comparative 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)

In addition to 33 CFR 136.105, claims for loss of profits and impairment of earning capacity must meet the specific requirements for loss of profits and earning capacity claims in Subpart C, 33 CFR 136.231, *et seq.* 233 & 235.

If a claimant is able to establish an entitlement to a loss of profits, 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)

IV. CLAIMANT'S ANALYSIS

The Barge DM 932 oil spill released oil into and caused damage and injury to the Mississippi River, a natural resource of the United States. The resulting damage, injury and removal response disrupted shipping in and out of the Mississippi River from July 23, 2008 through August 10, 2008.¹⁰ SERPENTINE had tendered its Notice of Readiness (NOR)¹¹ at 1245 on 23 July 2008, while anchored at Point Celeste Anchorage waiting the availability of a load berth. At 1338 on 23 July 2008 the river restrictions put in place by the Coast Guard to minimize the damage caused by the ACL oil spill were extended from Mile 90 to Mile 50. This river closure encompassed both the United Bulk Terminal and Point Celeste Anchorage and prevented Serpentine from commencing cargo operations or making any maneuvers not expressly authorized by the Coast Guard.¹²

In its May 21, 2010 letter, claimant discusses the "Recovery of Lost Profit Damages" and its quantification of the Additional Expenses claimed – Berth Fees, Bunkers, Harbor Fee, Launch Expenses, Customs Fees, Communications and Agents Overtime and Agency Fee On August 13, 2010 Claimant amends its sum certain to \$1,101,632.16.

¹⁰ SITREP-POLs 1-20; documenting river closures and traffic management through 10 August 2008.

¹¹ Claimant's Exhibit B – Port Log / Statement of Facts by General Maritime Transportation Services, Inc.

¹² Claimant's Letter dated 26 February 2010, page 2.

Claimant, after various e-mail exchanges, modified the amount claimed and valued this component as \$948,960.00, based on a daily hire rate of \$78,925.00 that subtracts the 3.75% address commission ($\$82,000 - 3.75\% = \$78,985.00$)¹³. Simply stated, Claimant argues that it lost profits because it had to pay for 12.48 days of delay at a daily rate of \$78,925 for a total of \$984,960.00. It expected to realize a profit of \$1,378,350.00 but instead only netted profits of \$393,366.00. Thus it asserts that it lost profits of \$984,960.00.

Also included in the claim are the following costs:

- Increased Berth Fees \$77,087.96
Serpentine was to load a cargo of devolatised coal at the United Bulk Terminal (UBT) in Davant, LA, and was charged berthing fees based on her tonnage and the length of her stay at the dock. When Serpentine tendered her NOR to the terminal, the estimated berthing fee was \$21,796.56, based on a \$0.36/ton charge. Due to the oil spill, Serpentine wasn't able to berth at UBT until 8 August 2008. On 1 August 2008 the fees charged by UBT tripled, with Serpentine being charged \$98,084.52 for an increase of \$77,087.96.
- Additional Bunkers Consumed \$34,427.70
Serpentine burns 3.0 MT of IFO fuel per 24-hour period while idle in port. Because the vessel was delayed a period of 15 days, 13 hours, 15 minutes, or 15.55 days, Serpentine burned 46.65 tons of additional fuel that cost \$738.00 per ton and results in an additional expense of \$34,427.70.¹⁴
- Increased Harbor Fees \$866.50
Because the oil spill forced Serpentine to remain in port for an additional sixteen (16) days, she became responsible for total harbor dues of \$3,446.56. The amount claimed is the difference between her anticipated dues and the actual dues incurred by her prolonged port call.¹⁵
- Increased Communication Costs \$90.00
This is for two marine satellite calls made from 23-24 July 2008 when the Master reported to Pacific Basin the predicament following the 23 July oil spill.¹⁶
- Increased Agency Fees \$4,200.00
As a result of the oil spill, Serpentine's call in New Orleans lasted not five (5) but twenty-one (21) days. In light of the extraordinary circumstances, its agent, General Maritime Transportation Services, charged for the additional sixteen (16) days at a discounted daily rate (25% off); $16 \text{ days} \times \$350/\text{day} \times 0.75 (75\%) = \$4,200.00$.¹⁷

In summary Claimant itemizes its loss of profits and increased expenditures as follows:

¹³ Claimant's Letter dated 21 May 2010, page 6.

¹⁴ Claimant's Letter dated 21 May 2010, page 7.

¹⁵ *Ibid.*

¹⁶ *Ibid.* Page 8.

¹⁷ *Ibid.*

Item Description	Amount Claimed
Reduction in Charter Profits	\$984,960.00
Increased Berth Fees	\$77,087.96
Additional Bunkers Consumed	\$34,427.70
Increased Harbor Fees	\$866.50
Increased Communication Costs	\$90.00
Increased Agency Fees	\$4,200.00
TOTAL LOSS (Claimed)	\$1,101,632.16

III. DETERMINATION OF LOSS:

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. Real or personal property or natural resources have been injured, destroyed, or lost; specifically oil was released into and injured the Lower Mississippi River, a natural resource of the United States. 33 U.S.C. § 2703(B)
3. Claimant submitted claim to RP on 26 February 2009¹⁸. The NPFC notified the RP¹⁹ of claimed costs, however the RP never responded. 33 U.S.C. § 2713(a)
4. Claimant states that it was named a defendant in a declaratory judgment action commenced by American Commercial Lines. This action was dismissed on 8 September 2009, so that Pacific Basin and the others in it could pursue their respective claims.
5. The claim was submitted within three years of the date the injury and its connection with the discharge was discovered. 33 CFR § 136.101(a)(1)(i). 33 U.S.C. § 2712(h)(2)
6. The claimant seeks \$1,101,632.16 in loss of profits as a consequence of the increased expenses due to shipping delays from the restrictions on vessel movement in and around the immediate area of the spill on the Mississippi River. 33 CFR § 136.105(b)
7. The claimant asserts that if not for the oil-spill incident it would not have incurred in the additional expenses claimed. 33 CFR § 136.231(a)
8. In the process of adjudicating this claim, the NPFC Claims Manager collected additional information from the claimant and other sources to document what took place at the time of the incident. The additional information from other sources is provided as Enclosure #1 to this determination. 33 CFR § 136.105(e)(13)

NPFC ANALYSIS & DETERMINATION

a. Reduction in Charter Profits (Additional Hire Charges)

With the documentation provided by claimant, Pacific Basin demonstrated that it entered into a fixed-price contract²⁰ with Vitol, S.A., Geneva to deliver approximately 39,750 metric tons (+/- 10%) of harmless cokebreeze to Ghent, Belgium. The cokebreeze was to be loaded in Davant,

¹⁸ Worley Catastrophe Response letter dated 23 March 2009.

¹⁹ NPFC Letter from [REDACTED] to Nicoletti Hornig & Sweeny of 23 March 2010 (VIA E-mail).

²⁰ *Ibid.*

LA. To perform the contract, Pacific Basin chartered²¹ the Serpentine from Thoresen Shipping Singapore PTE LTD (Thoresen) for a single trip at a daily hire rate of \$82,000.00, which is reduced to \$78,925.00 after deducting the address commission (3.75%).

The NPFC confirmed that Serpentine was delayed due to the oil-spill incident for a period that totaled 374 hours and 8 minutes (Start: 7/23/2008 @ 12:45 – End: 08/08/2008 @ 02:53 hours), which when converted to days totals 15.588889 days. After subtracting the time claimant saved (3.88 days)²² the net delay that was confirmed by the NPFC is 11.708889 days. In accordance with the contract with Thoresen, Pacific Basin paid a fixed daily rate per day pro rata and when it settled the contract for the voyage, it paid \$1,196,920.55. This amount is reflected in the Hire Statement (1st)²³ bottom line.

As a result of this voyage, Pacific Basin billed and received \$3,323,062.23, which reflects the full amount that it was due from its customer, Vitol, S.A, after delivering 43,724.503 metric tons.²⁴ The contract²⁵ stipulated that Vitol was to pay Pacific Basin a fixed price of \$76.00 per metric ton delivered to Ghent, Belgium.

The oil-spill delays Pacific Basin's vessel, M/V Serpentine, experienced were not offset by the fees it collected from its customer Vitol, as the contract governing the transaction was for a firm-fixed price. A review of the contract²⁶ did not reveal a mechanism or method for Pacific Basin to offset the additional costs it experienced.

Having established that the oil spill incident affected Pacific Basin's lost profits by increasing its expenses and consequently its profits, the NPFC proceeds with the adjudication of the individual items claimed.

1. Reduction in Charter Profits

- This item refers to the additional hire that claimant had to incur for the oil spill. As stated above, Serpentine incurred 15.58889 days of delay, which were partially mitigated by claimant to net a total delay of 11.70889 days. By multiplying the net total delay by the net²⁷ hire rate of \$78,925.00, the NPFC arrives at:

$$11.70889 \text{ days} \times \$78,925.00/\text{day} = \$924,124.14$$

2. Increased Berth Fees

- This item refers to the additional fees that claimant had to incur when calling at the United Bulk Terminal (UBT). The additional fees stem from a rate change (increase) that was effective 1 August 2008, and would have been avoided, but for the oil spill.

²¹ Time Charter – New York Produce Exchange Form – dated 9 July 2008 between Thoresen Shipping Singapore PTE Ltd and Pacific Basin IHX Ltd.

²² Claimant's letter dated 21 May 2010. Page 6

²³ Hanjin Shipping Hire Statement (Final) to Pacific Basin IHC Limited - dated 13th April 2009.

²⁴ This amount includes \$41,538.28 in Broker's commission and \$84,553.77 in Dispatch earned.

²⁵ Americanized Welsh Coal Charter dated 18 June 2008, between Pacific Basin IHX Limited, Hong Kong (Owner) and Vitol S.A., Geneva (Charterer)

²⁶ *Ibid.*

²⁷ After deducting the address commission of 3.75%.

- Prior to August 1st, the fees to be charged would have been as follows: $\$0.36 \times 30,273 \text{ GRT}^{28} \times 3 \text{ prorated days} = \$32,694.84$.
- On August 1st when the rate increase became effective, the rate charged changed from a uniform rate across the board, to one that was based on an sliding scale that started at \$0.36 per gross ton for the first 39,000 tons, and moved up to \$1.08 after it reached 90,000 tons. Based on this, the charge should have been as follows: $\$1.08 \times 30,273 \text{ GRT}^{29} \times 3 \text{ prorated days} = \$98,084.52$. This figure matches the invoice from UBT.

To arrive at the compensable amount, due to the increased expense that resulted from the oil spill, the estimated charge is subtracted from the billed amount; $\$98,084.52 - \$32,694.84 = \$65,389.68$

3. Additional Bunkers Consumed

This item refers to the additional bunkers consumed and which claimant had to incur during the time the vessel was prevented by the oil spill from calling at the United Bulk Terminal (UBT). As stated above, the vessel was delayed for a total of 15.588889 days. During that time it burned IFO fuel, which costs \$738.00 per ton and is consumed at a rate of 3.0 MT per 24-hour period. Based on this consumption rate and the time delayed, the oil spill caused in additional fuel expenses. $15.588889 \text{ days} \times 3.0 \text{ (MT/Day)} \times \$738.00 \text{ (per Ton)} = \$34,513.80$

4. Increased Harbor Fees

This item refers to the additional fees that Serpentine incurred, due to the oil spill, and involved harbor fees (\$825.00.50) and security charges (\$41.25) when its call to New Orleans, which was to last four (4) days was extended by an additional sixteen (15.588889 days) in port.³⁰ General Maritime Transportation's (GMT) invoice to Pacific Basin for this particular item shows a Proforma and a Final amount, with these being \$2,835.00 and \$3,346.56 respectively. The latter matches the Plaquemines Port, Harbor & Terminal District.³¹ The first five days are included in the standard fee with the invoice showing that the extra days due to the oils spill, 11 days, are charged \$75.00 day for \$825.00. The security fee is based on 5% of this amount \$41.25. The calculations match the NPFC calculation of the compensable amount for this item: $\$825.00 + \$41.25 = \$866.25$

5. Increased Communication Costs

Claimant states that the claimed additional communication costs, \$90.00, are attributed to two marine satellite calls made by the Serpentine's Master between July 23-24, to report the vessel's predicament after the July 23 oil spill. Claimant was asked for evidence to prove this item and replied that the only information available was this statement³² and the MARISAT Telex Log³³. For claimant failing to meet its burden of proving this portion of the claim, there is no compensation for this item.

²⁸ GRT is a measure of volume and is a register tonne.

²⁹ GRT is a measure of volume and is a register tonne.

³⁰ Chafee McCall Letter dated 21 May 2010.

³¹ Plaquemines Port, Harbor & Terminal District

³² Chafee McCall Letter dated 21 May 2010.

³³ Claimants Exhibit F

6. Agency Fee

This item refers to the additional expenses incurred by Serpentine, when its call to New Orleans, initially estimated to last no more than 5 days, was extended by an additional sixteen (16) days. The period was billed at \$262.50³⁴ per day. The compensable amount is 16 days x \$262.50 = \$4,200.00.

The following table summarizes the determination of all the items above:

Item Description	Amount		
	Claimed	Determined	Denied
Reduction in Charter Profits	\$984,960.00	\$924,124.14	\$60,835.86
Increased Berth Fees	\$77,087.96	\$65,389.68	\$11,698.28
Additional Bunkers Consumed	\$34,427.70	\$34,513.80	(\$86.10)
Increased Harbor Fees	\$866.50	\$866.25	\$0.25
Increased Communication Costs	\$90.00	\$0.00	\$90.00
Increased Agency Fees	\$4,200.00	\$4,200.00	\$0.00
TOTALS	\$1,101,632.16	\$1,029,093.87	\$72,538.29

DETERMINED AMOUNT: \$1,029,093.87

Claim Supervisor: [REDACTED] Date of Supervisor's Review: Supervisor Action: Supervisor's Comments:
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³⁴ Daily Rate is \$350.00, but was discounted by 25%.