APPENDIX

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December 30, 2009

The Honorable Nora Barry Fischer
United States District Court
Western District of Pennsylvania
Suite 5260, U.S. Post Office and Court House
Seventh Avenue and Grant Street
Pittsburgh, PA 15219

RE: Mon River Towing, Inc. v. Industry Terminal and Salvage Company
Civil Action No. 06-1499

Dear Judge Fischer:

Pursuant to your order dated November 16, 2009, I have been appointed as Special Master in the above-referenced matter in order to inform the Court as to the calculation of damages for lost profits. Specifically, I was asked to determine the amount of lost profits, if any, sustained by Mon River Towing, Inc. ("Mon River" or the "Plaintiff") over the period of May 22, 2004 to October 15, 2004.

In making my determination, I considered the evidence of record from the trial, including selected documents submitted into evidence and trial transcripts as well as the oral arguments of the parties presented to the Court and Special Master on November 30, 2009.

The Court issued a Memorandum Opinion dated December 4, 2009, addressing the applicable legal standards for determining what profits, if any, were lost by the Plaintiff during the time its barges were out of service for repair. The conclusion of the Memorandum Opinion is as follows:

> The Court has therefore determined that the opinions expressed in *The Conqueror, Crain Brothers,* and *Zubik* provide the controlling law with respect to lost profits in admiralty cases, and that these cases provide the Special Master with the appropriate guidelines for determining what lost profits, if any, were suffered by the Plaintiff in this case.
>
> To find lost profits, the Special Master must find that: (1) profits have actually been, or may reasonably supposed to have been, lost; and (2) the amount of that loss can be determined with reasonable certainty.

> The amount of loss can be shown either through: (1) market value or (2) value of use. (Here it appears that Plaintiff is proceeding by way of the latter theory). Value of use can be illustrated by showing (a) the profits earned by the vessels just prior to the loss of the vessel, (b) the loss to the business of the Plaintiff by being deprived of the use of the vessels in that business, and/or (c) the cost to the Plaintiff of operating substitute vessels or utilizing the existing fleet to do the work of the lost vessels. All values must be determined with reasonable certainty, by factually-supported, not merely speculative evidence of the income and costs normally attributed to the damaged vessels, and they must be arrived at by application of reliable principles and methods of accounting.

I have based my analysis upon the above legal standard.

Mon River's Claim for Lost Profits

The Plaintiff's claim for lost profits is based upon the following assumptions:

- Mon River was operating at 100% capacity during the damage period.
- The barges were out of service for 1,229 days.
- Average revenue per ton was $1.87.
- Average tons per load were 1,808.
- Loads per barge per day were 0.101.
- Boat costs were $0.50 per ton.
- Barge costs were $80.71 per day

Based upon these assumptions, the Plaintiff has claimed total lost profits of $211,807.34. Each of these assumptions is discussed in detail below:

- *Capacity* - The Plaintiff has argued that it had no available capacity during the damage period and would have been able to secure additional work for the 13 damaged barges.

  I reviewed and analyzed the green sheets[1] and other documentation in order to determine the average days per load per barge (based upon the number of loads delivered and the number of active barges), as well as the number of tons delivered. Based upon this analysis of Mon River's fleet utilization, it appears that the Plaintiff had excess capacity during most, if not all, of the damages period. The following chart displays the Plaintiff's average loads per barge per day, tons moved and number of active barges between June and December 2004.

[1] The reliability of this analysis is limited due to the difficulty in reading the handwritten green sheets.

Month	Days per Load per Barge	Tons[2]	Available Barges[3]
June	13.7	536,635	239
July	18.0	375,783	249
August	13.1	597,499	263
September	14.2	507,000	279
October	12.3	827,881	290
November	13.1	N/A	300
December	17.5	N/A	308

This analysis indicates that Mon River's busiest month was October, when each barge delivered a load every 12.3 days.[4] If each barge in Mon River's fleet can deliver a load every 12.3 days, any time Mon River's fleet was below that utilization level (as it was in every month between June and September), it could potentially have done additional work. Further, the analysis demonstrates that, even as Mon River's fleet size was growing, the amount of tons delivered actually decreased between June and July and between August and September. This indicates that Mon River had excess capacity because its tons delivered did not increase as its fleet size increased.

While there are many other factors that could potentially influence a fleet's capacity (e.g., trip length, time to load/unload, contractual obligations) that may not be captured by the above analysis, the fact that Mon River's fleet was significantly less utilized in June through September compared to October provides evidence that the Plaintiff had excess capacity.

Further, the trial testimony indicates that Mon River was able to meet all of its contractual obligations and was unable to identify any specific lost opportunities,[5] indicating that the Plaintiff may have had excess capacity.

Even assuming that all of Mon River's fleet was active during the damage period, as the Plaintiff has claimed,[6] does not prove that Mon River was at full capacity. A proper analysis of capacity would consider the fleet size and the maximum number of loads each barge could deliver given the trips that need to be made. However, Mon

[2] See Plaintiff's Exhibit 8. Note, while we had green sheets for November and December, we did not consider the total tons delivered reliable given the issues with the green sheets discussed above.

[3] See Plaintiff's Exhibits 15 and 16, as well as green sheets. The number of barges considers barges returned to service in the middle of a month as a "partial" barge. For example, if a barge is returned to service on the 15th of a month, it is considered ½ of a barge.

[4] While October was part of the damage period, only one barge was out for repair, and it was returned on October 15th.

[5] See July 28, 2009 trial transcript, pages 109 to 110.

[6] Based upon our review of the Plaintiff's green sheets, it appears that some barges were not active between June and October, including 113JX, 272, 1005, and 1007. However, we note that because the green sheets are hand-written, there were numerous entries that were difficult to read. The reliability of any analysis based upon the green sheets is limited.

River did not provide any analysis or documentation of its fleet capacity and instead relied upon the testimony of its personnel.[7]

Without proof that Mon River had no excess capacity or that it had lost opportunities, the Plaintiff did not meet the legal standard that profits were actually or reasonably supposed to have been lost.

- *Lost Barge Days* - The Plaintiff determined its lost barge days as the time between the date of the incident and the time each barge returned to service. However, starting the damage period at the date of the incident is not appropriate. But-for the incident, the barges would have had to complete their trip and be unloaded before they could potentially be used again. Thus, the damages period should begin only after the time that the barges would have been unloaded. Additionally, I understand that barge number 423 was cleared to return to service on June 10, 2004, not June 25, 2004, as the Plaintiff has claimed which would also reduce the number of lost barge days.[8]

- *Average Revenue per Ton* - The Plaintiff determined an estimate of the average revenue per ton that would have been earned by the 13 barges based upon the average revenue per ton between May and October, the alleged damages period.

  As discussed above, the date of the incident was May 22, 2004, and the damage period should have begun some time after that date (likely at the end of May or beginning of June). Thus, May should not be included in the determination of average revenue per ton.

  Further, the Plaintiff's assumption that the average revenue per ton would approximate Mon River's total fleet-wide revenue per ton is inappropriate. Mon River has not identified what its lost opportunity was or could have been. Thus, this is speculative evidence of the income and costs attributed to Mon River's non-damaged barges, which does not meet the legal standard set forth in this case.

- *Average Tons per Load* - The Plaintiff determined that the 13 barges would have carried an average of 1,808 tons per load based on the average tons per load carried by the 13 barges between October and December 2004. However, there is no basis for this assumption. The incremental tonnage that the barges would have carried (if there were actually lost opportunities) may be substantially different than the average tonnage the barges carried in October to December. For example, on the barges' first trip, the average tons per barge amounted to fewer than 1,700 tons. This is speculative evidence of the income and costs normally attributed to the damaged vessels, which does not meet the legal standard set forth in this case.

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[7] In its May 23, 2006 letter (See Defendant's Exhibit 16) to International Marine Underwriters, Mon River provides information that it claims proves that its entire fleet of barges was in use at the time the 13 barges were damaged. However, this information is only for the period May 20, 2004 to May 24, 2004. Mon River never provided this information for the remainder of the damage period and/or never performed any analysis of this data.

[8] See Joint Exhibit 3 and Joint Exhibit 5.

- *Loads per Barge per Day* - The Plaintiff calculated the average loads per barge per day based upon the utilization of the 13 barges between October and December 2004. There is no basis to assume that the damaged barges would have been utilized in the same manner between May and October that they were actually used between October and December. October was the Plaintiff's busiest month based upon days per load per barge. Thus, it is likely that using the October to December time frame to estimate Mon River's lost loads would overstate fleet utilization and increase damages.

  Further, using the loads per barge per day between October and December and the average revenue per ton between May and October is inconsistent. Average revenue per ton is based on numerous factors, including distance traveled. The Plaintiff performed no analysis that indicated that the average revenue per ton between May and October would have been consistent with the loads being delivered by the 13 barges between October and December.

  Therefore, Mon River's assumption is speculative evidence of the income and costs normally attributed to the damaged vessels, which does not meet the legal standard set forth in this case.

- *Barge Costs* - The Plaintiff calculated the costs of the barge based upon its charter rate with SCF plus the applicable insurance on the barges. The charter rate is $75 per day, based upon Mon River's agreement with SCF. The insurance rate was calculated in two parts. First, the cost of hull insurance was determined by comparing Mon River's hull insurance costs on other similar barges. Next, the cost of pollution and excess policies was determined by allocating Mon River's pollution and excess policies for its entire fleet to the barges at issue.[9] I was not provided with support for most of the underlying data supporting these calculations, and therefore cannot verify the reasonableness of the calculations. However, assuming the data is accurate, the Plaintiff's methodology for calculating insurance costs appears to be reasonable.

- *Boat Costs* – The Plaintiff assumed its boat costs would be $0.50 per ton. This $0.50 per ton amount is based upon an internal calculation done by Mon River to evaluate the profitability of a potential contract with First Energy.[10] Mon River also performed another analysis of boat costs, which estimated a cost of $0.36 per ton.[11] The Plaintiff claims that the maximum boat cost would be $0.50 per ton.[12]

  However, reviewing the trial transcript, it is clear that $0.50 per ton may not be the maximum boat costs. William Seiler, Mon River's former controller, testified at trial that boat costs can be higher or lower than $0.50 per ton, and the costs were complicated to determine because there were too many variables.[13] This is supported

[9] See Defendant Exhibit 21.
[10] See Defendant Exhibit 48.
[11] See Plaintiff Exhibit 27.
[12] See November 30, 2009 transcript of oral arguments, page 15.
[13] See July 28, 2009 trial transcript, page 180.

by the fact that the Plaintiff's two separate calculations used widely varying assumptions, which resulted in two distinctly different results.

While I understand that the Plaintiff's calculation of $0.36/ton boat costs attempted to account for these variables, the calculation is speculative. Mon River's calculation of lost profits was not done to a reasonable degree of certainty, and therefore the variables used in its boat cost calculation (including boat costs, average miles per round trip, average speed, and tons per barge) are based upon other speculative assumptions.

The Plaintiff has not proven that profits have actually been, or may reasonably supposed to have been, lost nor does it determine the amount of that loss with reasonable certainty. Further, many of the Plaintiff's assumptions in its lost profits analysis are speculative evidence of the income and costs normally attributed to the damaged vessels.

Lack of Financial Information

In order to prove that Mon River experienced actual lost profits, or may reasonably supposed to have experienced lost profits, the Plaintiff could have provided additional information. Specifically, Mon River failed to provide certain financial and operational information, including:

- Monthly and annual financial statements, including income statements and balance sheets for 2000 through 2004.
- Trial balances of all revenue and expense accounts.
- Any internal analyses of revenue, expenses and profitability used to manage the business on a day-to-day basis.
- Contract profitability analyses.
- Budgets or forecasts that estimated results for 2004.
- Variance analyses between actual and forecasted results.
- Analyses of fleet capacity.

Most of this information should have been kept in the ordinary course of business and would have provided the most unbiased view of Mon River's potential lost profits, if any. This information would have provided insight into the actual financial results of the business prior to, during and after the damage period, which would have been instructive of whether the Plaintiff experienced lost profits and the amount of those lost profits, if any. Without this information, it cannot be determined if the Plaintiff actually or may reasonably supposed to have experienced lost profits, nor can the amount of that loss be determined with reasonable certainty.

Conclusion

The Plaintiff's damage calculation does not meet the legal standard of proof required in this matter. Specifically, Mon River has not proven that profits have actually been, or may reasonably supposed to have been, lost, nor does it determine the amount of that loss with reasonable certainty. The Plaintiff's lost profit assumptions are based on speculative evidence of the income and costs normally attributed to the damaged vessels. Mon River has failed to provide factually-supported financial and operating evidence that would confirm or verify the appropriateness of the underlying assumptions used in its claim for lost profits.

Very truly yours,

Schneider Downs & Co., Inc.

Certified Public Accountants

By: Thomas G. Claassen

Thomas G. Claassen, CPA, ABV, CFE, CFF

c: William R. Ellis, Esquire
Leonard Fornella, Esquire
Max T. Busatto, Esquire