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LEXSEE 2007 U.S. DIST. LEXIS 74671

CAPE BILLE SHIPPING COMPANY, LTD., Plaintiff, - against - Tug JUDY MORAN and Barge SEAHORSE I, in rem, MORAN TOWING CORPORATION, PETROLEUM TRANSPORT CORPORATION, and SEABOARD BARGE CORPORATION, in persona, Defendants.

05 Civ. 6797 (LAP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2007 U.S. Dist. LEXIS 74671*; *2007 AMC 2369

August 22, 2007, Decided
August 22, 2007, Filed

COUNSEL: [*1] For Cape Bille Shipping Company, Ltd., Plaintiff: Kirk M.H. Lyons, LEAD ATTORNEY, Lyons & Flood, L.L.P., New York, NY.

For Tug Judy Moran, their engines, tackle, appurtenances, etc., in rem, Moran Towing Corporation, in personam, Petroleum Transport Corporation, Seaboard Barge Corporation, in persona, Defendants: Richard Joseph Reisert, LEAD ATTORNEY, Clark, Atcheson & Reisert, North Bergen, NJ.

JUDGES: LORETTA A. PRESKA, U.S.D.J.

OPINION BY: LORETTA A. PRESKA

OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

LORETTA A. PRESKA, U.S.D.J.

Plaintiff's claims arising out of the March 9, 2003 allision [1] between the Barge SEAHORSE I under tow of the Tug JUDY MORAN with the M/T CAPE BILLE while she was moored at Motiva Terminal, located in Sewaren, New Jersey were tried to the Court from July 30, 2007 to August 1, 2007. The following shall constitute the Court's Findings of Fact and Conclusions of Law pursuant to *Rule 52(a) of the Federal Rules of Civil Procedure*. [2]

1 In maritime parlance, a collision between a moving vessel and a towed object is known as an "allision."

2 Because this is all admiralty case, the Court has original jurisdiction pursuant to *28 U.S.C. § 1331*.

I. Findings of Fact

A. Background

At all relevant times, **[*2]** the CAPE BILLE SHIPPING COMPANY, LTD. ("plaintiff") was the owner of the M/T CAPE BILLE ("CAPE BILLE"). (JPTO P 1.) [3] The CAPE BILLE was built in 2003. (JPTO P 2.) At all relevant times, Columbia Shipmanagement Ltd. ("CSM") was the manager of the CAPE BILLE, employing its master and crew. (Tr. I at 25/21-23, 70/22-71/5.) [4] At all relevant times, United Product Tankers ("UPT") was the broker used by CSM to find employment for the CAPE BILLE and other vessels in CSM's fleet. (Tr. II at 191/19-20, 192/4-5, 192/12-17,

192/22-193/4.)

3 "JPTO" refers to the "Stipulated Facts" contained in the Joint PreTrial Order (dkt. no. 18) filed by the parties on March 2, 2007.

4 "Tr." refers to the "Trial Transcript." There were three days of trial testimony, so the first day will be cited as "Tr. I," the second day as "Tr. II," and the third day as "Tr. III."

At all relevant times, defendant MORAN TOWING CORPORATION was the owner and operator of the Tug JUDY MORAN ("Tug"). (JPTO P 3.) At all relevant times, defendant PETROLEUM TRANSPORT CORPORATION was the owner of the Barge SEAHORSE I ("Barge"). (JPTO P 4.) At all material limes, defendant SEABOARD BARGE CORPORATION was the operator of the Barge. (JPTO **[*3]** P 5.)

B. Allision

On or about March 9, 2004, the Tug was towing the Barge in the vicinity of the Motiva Terminal, located in Sewaren, New Jersey. (JPTO P 6.) The Tug is a 3,200 hp tug, and the Barge is about 290 feet in length, 60 feet in width and 18 feet in depth. (JPTO P 7.) The Barge was light at the time of the incident and drawing about 2' forward and 3' aft. (JPTO P 7.)

David Roberts was the Mate in operational control of die Tug at all relevant times on March 9, 2004. (JPTO P 8.) At or about the same time, the CAPE BILLE was securely and properly moored at the Motiva Terminal. (JPTO P 9.) The Tug and Barge were awaiting orders and had moored alongside the north bulkhead of the Hess Terminal, which is located a short distance south of the Motiva Terminal across the Woodbridge Creek. (JPTO P 10.) Mr. Roberts had towed the Barge on other occasions prior to the allision and was familiar with the Barge's handling characteristics. (JPTO P 11.) Mr. Roberts had previously undocked barges, including the SEAHORSE I, from the north bulkhead at Hess Terminal on a number of occasions when a ship was moored at the ship berth at Motiva Terminal. (JPTO P 12.) On each of these prior occasions, **[*4]** Mr. Roberts had maneuvered the barge past the ship that was moored without incident. (JPTO P 13.)

In order to prevent the rake on the bow of the Barge from striking shoreside objects, Mr. Roberts chose not to turn the Barge at the berth at the north bulkhead at Hess Tenninal during the undocking procedure. (Tr. II at 360/12-362/2, 363/15-22.) Instead, Mr. Roberts decided to back the Barge out of the berth, turning as she was backing out, and then planned to turn the Tug and Barge around so they could proceed north in the Arthur Kill River toward their destination point. (Tr. II at 3623-363/14, 364/4-6.)

On watch aboard the Tug with Mr. Roberts at the time of the allision was Ronald Alston, a tug deckhand. (JPTO P 14; Tr. II at 359/24-360/6; Tr. III at 21/24-22/1.) Mr. Alston was a new crew member who had been working for less than two weeks. (Tr. III at 22/2-7.) Mr. Roberts had not worked with the tug deckhand before the allision. (Tr. III at 22/8-12, 23/20-24.) Prior to undocking, Mr. Roberts had instructed Mr. Alston to go aboard the Barge and act as a lookout because a container on the Barge restricted Mr. Roberts' visibility to starboard. (JPTO P 15; Tr. 11 at 359/24-360/4; Tr. **[*5]** III at 18/22-19/24.) Mr. Alston was instructed to inform Mr. Roberts when the bow of the Barge had cleared the stern of the CAPE BILLE, so that Mr. Roberts could begin turning the Tug and Bark into the main channel. (JPTO P 15.) Mr. Alston was not instructed by Mr. Roberts to give him distances off as the bow of the Barge approached the CAPE BILLE. (Tr. III at 25/13-26/8, 35/12-24.)

During the course of the undocking maneuver, and before the Barge allided with the CAPE BILLE, Mr. Alston informed Mr. Roberts that the bow of the Barge would clear the stern of the CAPE BILLE. (Tr. II at 371/6-372/2.) Then, about ten seconds before the Barge allided with the CAPE BILLE, Mr. Alston told Mr. Roberts that the bow of the Barge would not clear the stern of the CAPE BILLE. (Tr. II at 372/4-13.) In response, Mr. Roberts immediately took action to turn the Barge's bow hard to port and her stern to starboard. (Tr. II at 372/14-21; Tr. III at 28/1-14.) However, due to the late notice from Mr. Alston and the Barge's momentum, and despite Mr. Roberts' best efforts, the Barge's bow struck the stern of the CAPE BILLE. (Tr. II at 372/22-373/3; Tr. III at 28/1-29/19.) It happened so quickly that the Tug's **[*6]** engines might not have engaged in the new gear prior to the impact. (Tr. II at 372/22-373/3; Tr. III at 28/18-25, 29/13-19.)

According to an incident report prepared by Mr. Roberts, at about 0200 on Mach 9, 2004, the Barge being

towed by the Tug allided with the CAPE BILLE, while the CAPE BILLE was moored at the Motiva Terminal, as the Tug and Barge were backing out of the Hess Terminal berth. (JPTO P 16.) As a result of the allision, the CAPE BILLE sustained physical damage to her hull and associated structures and appurtenances. (JPTO P 17.)

C. Allision lnvestigation

On March 9, 2004, following the impact at 0200, the United States Coast Guard ("USCG") arrived aboard the CAPE BILLE at 0501) and suspended the CAPE BILLE from sailing out of the Motiva Terminal due to the casualty and damage sustained. (Tr. I at 74/22-75/8; Pl. Ex. 8 (Time sheet summary for March 8 through March 21, 2004): Pl. Ex. 60 (Port State Control Report of Inspection for CAPE BILLE, Forms A and B).) [5] Surveyors from Det Norske Veritas ("DNV"), the CAPE BILLE's classification society, and Independent Maritime Consulting Ltd. ("IMC"), representing the CAPE BILLE's Hull and Machinery Underwriters, arrived aboard **[*7]** the CAPE BILLE at approximately 1100 and damage surveys were conducted. (Tr. I at 76./7-12.) [6] CSM sent Captain Andreas Xapolytos as its representative to investigate the allision and coordinate repairs on an expedited basis. (Tr. I at 71/20-72/6.) He arrived from Houston where he was working on a different matter. (Tr. I at 72/7-8.)

5 "Pl. Ex." refers to "Plaintiff's Trial Exhibits" admitted into evidence during Trial. The descriptions of these exhibits are taken from the descriptions of "Exhibits" contained in the Joint Pretrial Order.

6 See also Pl. Ex. 1 (Damage Survey Report dated April 12, 2004, IMC): Pl. Ex. 3 (DNV Damage Survey dated March 9, 2004); Pl. Ex. 3 (Time sheet summary for March 8 through March 21, 2004); Pl. Ex. 96 (BMT Salvage Report dated October 14, 2004).

It was determined that the CAPE BILLE's starboard transom plating had sustained a severe indentation "with [a] deep crease . . . in way of the [s]teering [g]ear [f]lat" and it needed to be cropped and renewed. (Pl. Ex. 3 (DNV Damage Survey dated March 9, 2004).) [7] Additionally, a number of vertical frames in the aft peak tank were buckled, and two pieces of deck plating were pushed in and buckled on the steering **[*8]** engine room deck. (Tr. I at 72/21-73/16.) [8]

7 See also Tr. I at 140/7-141/13, Pl. Ex. 7 (Invoice of Rayonne Drydock and Repair dated March 16, 2004); supra note 6.

8 See also supra note 7.

As a result of its survey, DNV imposed the following condition of class upon the CAPE BILLS: (i) the damage required permanent repairs to be made by April 30, 2004; (ii) no trans-atlantic voyages could be made; and (iii) no ballast could be taken in the aft peak. (Tr. I at 76/25-78/10; Pl. Ex. 3 (DNV Damage Survey dated March 9, 2004).) The surveyors left the CAPE BILLE by 1730 and the USCG permitted (he CAPE BILLE to shift berths at 2000. (Pl. Ex. 3 (DNV Damage Survey dated March 9, 2004); Pl. Ex. 8 (Time sheet summary for March 8 through March 21, 2004).) However, the USCG required the CAPE BILLE to complete repairs and clear the condition of class as per DNV's requirements before leaving the Port of New York. (Tr. I at 76/4-6: Pl. Ex. 60 (Poll State Control Report of Inspection for CAPE BILLS, Forms A and B).)

The balance of the cargo aboard the CAPE BILLE was to be discharged at Kinder Morgan Carteret in New Jersey; however, no berth was then available at Kinder Morgan. (Pl. Ex. 8 (Time sheet summary **[*9]** for March 8 through March 21, 2004); Pl. Ex. 96 (BMT Salvage Report dated October 14, 2004).) The CAPE BILLE thus proceeded to Stapleton Anchorage in the New York harbor, arriving on March 10, 2004, at 0015. (Pl. Ex. 8 (Time sheet summary for March 8 through March 21, 2004); Pl. Ex. 96 (BMT Salvage Report dated October 14, 2004).) While anchored at Stapleton, divers conducted an underwater visual inspection of the stern region of the CAPE BILLE to determine if there had been any damage to the propeller, rudder, etc. (Tr. I at 38/7-10; Pl. Ex. 6 (Divers Report dated March 10, 2004, Randive Inc. (handwritten)); Pl. Ex. 67 (Divers Report dated March 10, 2004, Randive Inc. (typed)).) No damage to the propeller and rudder was found. (Tr. I at 38/11-13.)

On March 11, 2004 at 0040, the CAPE BILLE departed Stapleton Anchorage and proceeded to Kinder Morgan to complete discharge. (Pl. Ex. 8 (Time sheet summary for March 8 through March 21, 2004); Pl. Ex. 96 (BMT Salvage Report dated October 14, 2004).) After discharge was completed at Kinder Morgan, the CAPE BILLE left the berth at 0315 on March 12, 2004, and then returned to Stapleton Anchorage at 0930 that day. (Pl. Ex. 8 (Time sheet summary **[*10]** for March 8 through

March 21, 2004): Pl. Ex. 96 (BMT Salvage Report dated October 14, 2004).)

On March 14, 2004 at 1105, the CAPE BILLE arrived at Bayonne Dry Dock and Repair Co.'s repair yard. (Pl. Ex. 8 (Time sheet summary for March 8 through March 21, 2004).) Repairs were completed at 1940 on March 20, 2004, DNV approved the repairs, and the CAPE BILLE departed the Bayonne repair yard at 0820 on March 21, 2004. (Tr. I at 86/9-87/9; Pl. Ex. 8 (Time sheet summary for March 8 through March 21, 2004); Pl. Ex. 69 (Repair of Contract Damage dated March 20, 2004, DNV).) Thus, combining the time for repairs at the Bayonne repair yard with the immediate repairs after the allision, the CAPE BILLE was under repair for approximately 9.53125 days. (Tr. I at 43/21-45/21; see also Pl. Ex. I (Damage Survey Report dated April 12, 2004, IMC) (stating that "the time lost due to the incident and the necessary repairs amount to 9 days, 4 hours and 30 minutes").)

D. Repairs and Related Expenses

The Court credits the testimony of Carl A. Cederstav of IMC and Captain Xapolytos of CSM and finds that, given the DNV's condition of class and the USCG's requirement of removing the condition of class, Plaintiff's **[*11]** decision to have the repairs done in the New York area was the only reasonable choice under the circumstances. Bayonne Dry-Dock and Repair Co. submitted a bid in the amount of $ 108,000.00, which included, inter alia, costs for repairing and replacing various steel plates, priming and coating those materials, using line handlers, fees for wharfage and garbage disposal, and the cost of running the CAPE BILLE's inert gas system during the period of repairs. [9] (Pl. Ex. 7 (Invoice of Bayonne Drydock and Repair dated March 16, 2004.) Mr. Cederstav, an experienced professional in the industry, testified credibly that the Bayonne shipyard was the cheapest repair location under the circumstances. (Tr. I at 154/1-13 ("[T]here is no repair[yard] in the United States that has lower prices than the Bayonne [s]hipyard in New York."), 155/11-13.) Captain Xapolytos, a senior fleet manager with CSM, testified to that effect as well. (Tr. I at 91/16-92/18 ("Q. How about in the Caribbean, are they more expensive [than New York]? A. Curacao is terribly expensive. Q. How about other Caribbean yards? A. I don't think so, any other Caribbean yards. I know yards in Cuba, but vessels cannot go to Cuba because **[*12]** they have trade restriction.").) Defendants failed to impeach or introduce contrary evidence to Mr. Cederstav's and Captain Xapolytos' testimony that alternative repair locations within the CAPE BILLE's restricted travel zone were not materially cheaper than those in the New York area. Captain Xapolytos also testified credibly that if the CAPE BILLE set out in search of a cheaper, unidentified, repair location within its restricted travel zone, there was no guarantee that it would not run afoul of the DNV's condition of class. (Tr. I at 94/19-95/7.) Defendants failed to impeach or introduce contrary evidence to Captain Xapolytos' testimony that the sanction for such a violation would be punitive in the form of the loss of the CAPE BILLE's insurance. (Tr. I at 127/15-24.)

> 9 The USCG had previously agreed that repairs could be made by implementing the CAPE BILLE's inert gas system rather than completely cleaning and gas treeing the cargo tanks. (Tr. I at 84/10-85/16; Pl. Ex. 96 (BMT Salvage Report dated October 14, 2004).)

Thus, as a result of the allision, the Court finds that the CAPE BILLE sustained physical damage requiring immediate repairs in Bayonne, New Jersey in the amount of **[*13]** $ 108,000.00. (Tr. I at 30/3-8: Pl. Ex. 68 (Invoice of Bayonne Drydock and Repair dated March 16, 2004 (stamped prepaid).) In light of the relatively modest cost of repairs (Mr. Cederstav termed it a "peanut repair" (Tr. I at 157/15)), the Bayonne shipyard's relatively inexpensive cost (Tr. I at 154/1-13), the relatively higher cost of other Atlantic basin ports (Tr. I at 91/16-92/18). DNV's conditions of class (Tr. I at 76/25-78/10; Pl. Ex. 3 (DNV Damage Survey dated March 9, 2004)) and the USCG's requirements (Tr. I at 76/4-6: Pl. Ex. 60 (Pot's State Control Report of Inspection for CAPE BILLE, Forms A and B)), the decision to proceed with repairs immediately without seeking competitive bids or otherwise investigating the potential availability of another repair yard was eminently reasonable.

The Court also finds that, as a result of the allision, the CAPE BILLE incurred related expenses to the repairs. Towing costs for docking and undocking in and around the Bayonne shipyard amounted to $ 4,439,59. (Tr. I at 31/1-23.) [10] Costs to survey the damage to the CAPE BILLE amounted to $ 19,178.47. (Tr. I at 32/18-33/6, 34/1-15.) [11] Costs for pilotage, launch hire, repairs, courier/express **[*14]** mail costs, crew lodging,

diving surveys, lodging for Captain Xapolytos, and agency services amounted to $ 12,526.98. (Tr. I at 34/21-35/10, 35/16-36/7, 36/13-25, 37/5-17, 37/23-38/15.) [12] Costs to attend a pollution control meeting amounted to $ 734.00. (Tr. I at 40/20-41/8.) [13] Costs relating to Captain Xapolytos' travel to and from New York for 14 days amounted to $ 13,258.40. (Tr. I at 39/18-40/4, 40/9-17.) [14] Finally, labor expenses for the crew of the CAPE BILLE totaling 860 hours, with 194 hours of overtime, amounted to $ 12,384.00. (Tr. I at 41/18-42/l2.) [15] With the exception of Captain Xapolytos' travel from New York to Cyprus, [16] Defendants filled to demonstrate that these related repair expenses were not incurred or that they were unreasonable under the circumstances, (Tr. I at 63/9-22.)

10 See also Pl. Ex. 11 (Invoice of Marint (Offshore Services) U.K. dated March 16, 2004); Pl. Ex. 12 (Invoices of McAllister Towing of New York LLC dated March 17, 2004 & March 23, 2004); Pl. Ex. 26 (Receipts for tug service from McAllister Towing of New York LLC dated March 14, 2004 & March 21, 2004).

11 See also Pl. Ex. 10 (Invoice of DNV dated April 1, 2004); Pl. Ex. 37 (Invoices **[*15]** of IMC dated April 19, 2004 & December 30, 2004); Pl. Ex. 37A (Invoice of IMC dated February 2, 2006).

12 See also Pl. Ex. 4 (Repair of Contract Damage dated March 9, 2004, DNV, with attached repair diagrams); Pl. Ex. 13 (Invoices of Inchape Shipping Services dated March 17, 2004 & May 19, 2004); Pl. Ex. 14 (Invoices of NY/NJ Harbor Pilots dated March 14, 2004 & March 21, 2004); Pl. Ex. 15 (Invoice of Timothy D. McGovern dated April 2, 2004); Pl. Ex. 16 (Invoices of Miller's Launch dated March 12, 2004, March 15, 2004 & March 16, 2004); Pl. Ex. 17 (Invoice of Hermes Transport and Trading Corp. dated March 21, 2004); Pl. Ex. 18 (Invoice of The Staten Island Hotel dated March 15, 2004); Pl. Ex. 19 (Invoice of The Staten Island Hotel dated March 15, 2004); Pl. Ex. 20 (Invoice of Randive, Inc. of New Jersey dated March 18, 2004); Pl. Ex. 22 (Invoice for Captain Xapolytos' traveling expenses for March 9, 2004 through March 22, 2004); Pl. Ex. 23 (Launch services tickets from Miller's Launch dated March 10, 2004, March 13, 2004, & March 14, 2004); Pl. Fx. 25 (New Jersey Sandy Hook Pilot's Order from March 22, 2004); Pl. Ex. 28 (Car service receipts for March 12, 2004 through March 21, 2004); **[*16]** Pl. Ex. 30 (Supermarket and restaurant receipts); Pl. Ex. 66 (Invoice of the Staten Island Hole] for March 10, 2004 through March 14, 2004).

13 See also Pl. Ex. 21 (Invoice of O'Brien Oil Pollution Service, Inc. dated March 24, 2004).

14 See also Pl. Ex. 22 (Invoice for Captain Xapolytos' traveling expenses for March 9, 2004 through Match 22, 2004); Pl. Ex. 29 (Boarding pass for Andreas Xapolytos dated March 9, 2004); Pl. Ex. 31 (CSM Exchange Orders dated March 8, 2004 and March 19, 2004).

15 See also Pl. Ex. 32 (CAPE BILLE crew labor statement).

16 Because Captain Xapolytos was to travel hack to his office in Cyprus from Houston prior to the allision, the return leg of his trip in the amount of $ 3,210.17 (Pl. Ex. 22 (Invoice for Captain Xapolytos' traveling expenses for March 9, 2004 through March 22, 2004)) is not Defendants' responsibility. (Tr. I at 125/20-126/21) ("Q.... So had it not been for the [CAPE BILLE], the charges for your flight back to Greece would have been applied to the Houston job, right? A. Could be ... I don't know.") Tr. III at 60/8-61/14.)

Accordingly, the Court finds that the CAPE BILLE incurred repairs and related expenses as a result of the allision amounting **[*17]** to $ 167,311.27.

E. Lost Profits

The CAPE BILLE "operated in the 'spot market' on a catch-as-catch-can basis." *In re M/V NICOLE TRAHAN, 10 F.3d 1190, 1192 n.3 (5th Cir. 1994)*. (See also Tr. II at 237/25-239/1.) Since it was commissioned in 2003, the CAPE BILLE was never idle and was fully employed until at least the end of 2004. (Tr. II at 197/9-12, 197/22-25; Pl. Mem., Ex. B.) [17] With the exception of its first voyage, the CAPE BILLE operated based on voyage charters. (Tr. I at 176/12-18; Pl. Mem, Ex. B).) "Under a voyage charter, a tanker is paid by the voyage rather than for its time, i.e., paid a sum certain in consideration for carrying a metric ton of freight to its destination port." *NICOLE TRAHAN, 10 F.3d at 1192 n.3*. By contrast, under a time charter, a tanker is paid based on a daily hire rate. (Pl. Mem, Ex. B at n.2.) The time charter equivalent ("TCE") for a voyage charter is calculated as follows: (i)

take the gross revenue for that voyage and subtract certain voyage related expenses [18] to derive the net revenue; and (ii) divide the net revenue by the number of days on that voyage. (Tr. II at 196/12-197/5.) The TCE method of accounting was used by CSM for the CAPE BILLE **[*18]** and the other vessels in its fleet. (See, e.g., Pl. Ex. 36 (Recap for Vitol S.A. Inc. fixture dated January 29, 2004); Pl. Ex. 73 (Voyage Profit/Loss Report for CAPE BON); Pl. Ex. 74 (Voyage Profit/Loss for MOUNT OLYMPUS).)

17 "Pl. Mem." refers to "Plaintiff's Pretrial Memorandum," including the exhibits appended thereto, filed on April 12, 2007. Exhibit B is a summary of all of the charters of the CAPE BILLE since its commission in the fall of 2003 through the end of 2004. With the exception of the first voyage of the CAPE BILLE, which was a time charter, the CAPE BILLE operated under voyage charters. (Pl. Mem., Ex. B at n.2.)

18 Expenses such as crew wages, food, provisions, insurance, and depreciation are not included in the voyage related expenses. (Pl. Mem., Ex. B at n.2.)

UPT negotiated the CAPE BILLE's next charter and its commencement date during the course of the then-current charter. (Tr. II at 203/4-6, 246/11-20, 248/19-23.) At the lime of the allision, the CAPE BILLE was under a voyage charter with Shell that started on February 22, 2004 in Point Lisas and ended on March 12, 2004 in New Jersey and New York. (Pl. Mem., Ex. B.) The TCE for this casualty voyage was $ 30,846.72. **[*19]** (Pl. Mem., Ex. B.)

Before the casualty voyage, the CAPE BILLE was under a voyage charter that was fixed on January 29, 2004 with Vitol that commenced on February 11, 2004 in Come By Chance and ended on February 22, 2004 in New Haven and Providence. (Pl. Mem., Ex. B; Pl. Ex. 36 (Recap for Vitol S.A. Inc. fixture dated January 29, 2004).) The TCE for this pre-casualty voyage was $ 35,602.66. (Pl. Mem., Ex. B; Pl. Ex. 36 (Recap for Vitol S.A. Inc. fixture dated January 29, 2004).)

From late February 2004 to March 31, 2004, UPT was unable to obtain a voyage charter for the CAPE BILLE following the casualty voyage. (Tr. II at 218/12-18, 218/19-219/10, 230/8-18, 245/17-24, 246/11-20, 258/18-259/23, 259/24-260/7, 265/16-266/12, 269/19-270/18, 272/9-16, 273/17-23, 274/8-275/14, 281/5-282/9; Pl. Ex. 83 (Cargo Charter Proposals from UPT).) UPT employed various negotiating strategies to drum up demand by charterers to make a voyage charter commercially reasonable for the CAPE BILLE, including holding vessels in CSM's fleet out of the spot market. (Tr. II at 234/13-20, 235/1-236/5, 239/5-240/8.) These strategies were unsuccessful at that time because the spot market in the Caribbean and, to **[*20]** a lesser extent, in the Mediterranean, where the CAPE BILLE generally operated, was favoring charterers not vessel owners. (Tr. 11 at 232/11-233/6, 299/20-301/5.) According to UPT's brokers, charterers were "smelling blood" because the market was "slow," "very Slow," "extremely quiet," "dead," "at an almost standstill," "dead quite [sic]," "sliding," "softening," and "floating like [a] lead duck." (Tr. II at 274/8-275/14, 284/22-285/10, 290/25-291/4, 291/14-292/9; see also Tr. I at 59/24-60/6.) Nevertheless, UPT's brokers decided to play "hardball" and forego potential voyage chatters in the less lucrative Caribbean spot market knowing that the CAPE BILLE could be without a voyage charter following the casualty voyage. (Tr. II at 275/15-277/25, 278/125-25.)

As a result of the allision, CSM was required to inform the major oil companies of the incident. (Tr. II at 214/18-22, 215/2-7, 215/14-18, 215/24-216/25.) After CSM informed these companies of the allision and damage to the Vessel, they temporarily revoked or "froze" their approvals of the CAPE BILLE for use by them until they could further evaluate the situation and clear the vessel. (Tr. II at 214/18-22, 215/2-7, 215/14-18, 215/24-216/25.) **[*21]** The CAPE BILLE was not cleared by Shell London until, March 26, 2004, and it was not cleared by Total Finaelf until March 31, 2004. (Tr. II at 217/1-218/6; Pl. Ex. 49 (E-mail dated March 26, 2004, from STASCO to Sergey Polinetskyy regarding the CAPE BILLE's clearance for Shell business); Pl. Ex. 50 (E-mail dated March 31, 2004, from Total to Maurice Baker regarding the CAPE BILLE's clearance for Total business).)

On March 9, 2004, CSM advised UPT of the allision. (Tr. II at 198/13-199/10; Pl. Ex. 109 (E-mails received by UPT in regard to the first notice of the casualty to the CAPE BILLE).) On March 10, 2004, CSM advised UPT of the potential for repairs to be made to the CAPE BILLE. (Tr. II at 199/16-200/9; Pl. Ex. 78 (E-mails from Sergey Polinetskyy to UPT).) On March 11, 2004, CSM advised UPT further that repairs would be done in the Port of New York and that they would take four to five

days. (Tr. II at 200/10-201/9; Pl. Ex. 78 (E-mails from Sergey Polinetskyy to UPT).)

That same day, the CAPE BON, a sister ship of the CAPE BILLE in CSM's fleet, secured a voyage charter. (Tr. II at 224/1-20.) The estimated TCE for this voyage charter was $ 50,714.00. (Tr. II at 226/1-4; Pl. Ex. **[*22]** 40 (Recap for fixture of CAPE BON dated March 13, 2004).) UPT's brokers did not know if the CAPE BON had other voyage charters available to her. (Tr. II at 295/9-298/5.) On March 12, 2004, UPT was advised by CSM that repairs to the CAPE BILLE would be completed by March 17, 2004, (Tr. II at 201/17-20; Pl. Ex. 78 (E-mails front Sergey Polinetskyy to UPT regarding CAPE BILLE's repairs in New York).)

On March 15, 2004, the MOUNT OLYMPUS, a similar vessel to the CAPE BILLE in CSM's fleet, secured a voyage charter, (Tr. II at 226/15-18; Pl. Ex. 39 (Recap for fixture of MOUNT OLYMPUS dated March 15, 2004).) The TCE for this voyage charter was $ 35,065.00. (Pl. Ex. 74 (Voyage Profit/Loss Report for MOUNT OLYMPUS); see also Pl. Mem. at 21.)

At least as of March 16, 2004, UPT was in negotiations with Shell International Trading and Shipping Company Limited ("STASCO") for a voyage charter for the CAPE BILLE to load cargo at Skikda, Algeria some time between March 28 and 30, 2004. (Tr. II at 203/7-19; Pl. Ex. 41 (Recap for fixture on subjects of CAPE BILLE to STASCO dated March 16, 2004).) The estimated TCE for this voyage charter was $ 48,994.00. (Tr. II at 203/7-19: Pl. Ex. 41 (Recap for **[*23]** fixture on subjects of CAPE BILLE to STASCO dated March 16, 2004); Pl. Ex. 73 (Voyage Profit/Loss Report for CAPE BON).) The CAPE BILLE could have arrived timely to load cargo at Skikda, Algeria if it left the Bayonne shipyard on March 17, 2004. (Tr. II at 204/13-17.)

On March 17, 2004, UPT was informed by CSM that the CAPE BILLE would not complete its repairs until March 20, 2004, due to the delays at the repair yard as a result of bad weather. (Tr. II at 202/15-16, 203/1-3; Pl. Ex. 78 (E-mails from Sergey Polinetskyy to UPT).) The CAPE BILLE could not have arrived timely to load cargo at Skikda, Algeria if it left the Bayonne shipyard on March 20, 2004. Christos Matarangas, the only UPT broker called by Plaintiff to testily at trial, testified conclusorily that UPT was unable to obtain an extension of the loading date for the STASCO voyage charter. (Tr. II at 203/20-25.) However, he testified that there was no documentation to that effect and that he was not the UPT broker who had communications on this subject. (Tr. II at 310/19-311/15, 311/16-23, 312/12-14; see also Tr. I at 59/24-60/6.) In addition, UPT acknowledged that the STASCO voyage charter was not finalized because negotiations **[*24]** were still ongoing. (Tr. II at 311/24-312/7.) Because negotiations were still ongoing, because of the conclusory, hearsay nature of the testimony regarding efforts to extend the loading date, and because of the abundant, convincing evidence of a falling and, increasingly competitive, spot market, the Court does not find the STASCO voyage to have been lost on account of repair delay.

Thereafter, UPT continued to solicit voyage charters for the CAPE BILLE. (Tr. II at 231/18-24, 315/1-317/9.) As was commonplace in the industry, UPT received some offers by charterers for the CAPE BILLS and, after some negotiations, these efforts proved unsuccessful. (Tr. II at 315/1-317/9.) On March 19, 2004, Plaintiff ordered the CAPE BILLS to leave the Bayonne shipyard and proceed to Gibraltar. (Tr. II at 232/9-10.) Plaintiff was of the view that more profitable business opportunities existed in that part of the world and that a voyage charter for the CAPE BILLS would be obtained during its trans-Atlantic voyage. (Tr. II at 231/25-232/8.) However, this turned out not to be the case. (Tr. II at 278/8-13.)

The CAPE BILLE arrived in Gibraltar on March 31, 2004. Finally, on that day, the CAPE BILLS secured **[*25]** a voyage charter with BASF Intertrade to commence in Algiers. (Tr. II at 233/10-21; Pl. Mem., Ex. B.) The TCE for this post-casualty voyage, including the time lost for repairs, was $ 9,964.04. (Pl. Mem., Ex. B.) The TCE for this post-casualty voyage, excluding the time lost for repairs, was $ 14,965.22. (Pl. Mem., Ex. B at n.3.)

F. Savings

During the period of repairs, the CAPE BILLE's master and crew remained aboard the vessel. (Tr. III at 47/20-48/2.) At the same time, the CAPE BELLE consumed less lubricating oil and fuel oil than if it was operating normally. (Pl. Ex. 64 (E-mail dated August 12, 2005 from Andreas Hadjipetrou regarding operating expenses, with Invoice for fuel for CAPE BILLS dated April 12, 2004, and CAPE BILLE's Budget Expenses for 2004).) The CAPE BILLE saved $ 200.00 per day in lubricating oil and $ 3,749.00 per day in fuel oil. (Pl. Ex. 64 (E-mail dated August 12, 2005 from Andreas

Hadjipetrou regarding operating expenses, with Invoice for fuel for CAPE BILLE dated April 12, 2004, and CAPE BILLE's Budget Expenses for 2004).) Because the CAPE BILLE was under repair fur approximately 9.53125 days, $ 37,633.91 was saved.

II. Conclusions of Law

A. Liability

Plaintiff **[*26]** contends that Defendants are liable for the allision on March 9, 2004 because they fail to rebut two longstanding evidentiary presumptions in allision cases. (Pl. Mem. at 3-13.) In *The Oregon, 158 U.S. 186, 192-93, 15 S. Ct. 804, 39 L. Ed. 943 (1894)*, the Supreme Court held that a moving vessel that strikes a stationary object is presumptively negligent and at fault, See also *Villain & Fassio E Compagnia Intemazionale, etc., 207 F. Supp. 700, 706 (S.D.N.Y. 1962)*, aff'd, *313 F.2d 722 (2d Cir. 1963)*; *The Quogue, 35 F.2d 683, 684 (2d Cir. 1929)*: *The E. S. Atwood, 289 F. 737, 739 (2d Cir. 1923)*; *Gulf of Mexico, 281 F. 77, 79 (2d Cir. 1922)*; *Lind v. Pennsylvania R. Co., 139 F. 233 (2d Cir. 1905)*. In *The Pennsylvania. 86 U.S. (19 Wall.) 125, 136, 22 L. Ed. 148 (1873)*, the Supreme Court held that where a vessel violates a navigational rule or other statutory duty it must prove not only that the violation did not cause the allision, but that it could not have been the cause of the allision. "But since then, [the Court of Appeals] has interpreted the presumption more permissively; now, a party must prove its wrongdoing 'could not have been' the cause within the bounds of 'reasonable probability.'" *Otal Inv. Ltd. v. M.V. Clary, 494 F.3d 40, No. 06-0591 (L). 2007 WL 1951513, at *4 (2d Cir. 2007)* **[*27]** (citations omitted). The parties do not dispute that the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459 (codified at *33 U.S.C. § 1602 et seq.*), provide the applicable statutory duty for purposes of the presumption set forth in The Pennsylvania. (Tr. I at 7/16-25, 15/7-15.)

Defendants agree that the *Oregon* presumption applies here, (Def. Mem. at 5.) [19] Accordingly, the Court concludes that the Defendants were presumptively negligent and at fault for the allision. Defendants do not agree that the Pennsylvania presumption applies here. (Tr. I at 15/7-15.) For the reasons discussed below, the Court need not resolve that issue.

19 "Def. Mem." refers to "Defendants' Trial Memorandum of Law" filed on April 12, 2007.

In order to rebut the Oregon presumption, Defendants must make the following showing: "(i) the allision was actually the fault of the stationary object [i.e., the CAPE BILLE]; (ii) the moving vessel [i.e., the Tug and Barge] acted with reasonable care; or (iii) the allision was the result of inevitable accident." *City of Chicago v. M/V Morgan, 375 F.3d 563, 573 (7th Cir. 2004)* (citing *The Oregon, 158 U.S. at 192-93*). See also *Bunge Corp. v. M/V Furness Bridge, 558 F.2d 790, 795 (5th Cir. 1977)*. **[*28]**

Defendants contend that the Oregon presumption is rebutted because the Tug and Barge acted with reasonable care. (Def. Mem. at 5-9; Def. Supp'l Mem. at 1-3; Tr. I at 12/19-15/5; Tr. III at 55/9-57/10.) [20] The Court concludes that Defendants failed to rebut the Oregon presumption. Among other testimony adduced at trial, Mate David Roberts testified that the undocking of the Tug was more difficult than the normal operation, that he did not instruct tug deckhand, Ronald Alston, who was new to the tug, to inform him of the distances between the Barge and the CAPE BILLE as the Tug undocked the Barge, and that the deckhand first informed him that the Barge would clear the CAPE BILLE and shortly thereafter that it would not clear. (Tr. III at 18/22-19/24, 21/24-22/12, 23/20-24, 25/6-11, 25/13-26/9.)

20 "Def. Supp'l Mem." refers to "Defendants' Supplemental Trial Memorandum of Law" filed on July 24, 2007.

B. Damages

(i) Repairs and Related Expenses

The Court of Appeals has held that repairs that are immediately necessary arc properly recoverable. See Bouchard Transp. Co. v. The Tug "Ocean Prince", *691 F.2d 609, 612-13 (2d Cir. 1982)* ("if... collision repairs ore immediately necessary, the owner **[*29]** may conduct his own repairs at the same time, and is entitled to an award of detention for the period common to both the collision and owner's repairs"); *see also Turccarno Maritime, Inc. v. Weeks Dredge No. 516, 872 F. Supp. 1215, 1232-33 (S.D.N.Y. 1994)* ("Traditionally, where a damaged vessel is not a total loss, the owner is entitled to restore it to its pre-casualty condition.") (citing, inter alia, *Pan-American Petroleum and Transport Co. v. United States, 27 F.2d 684, 685 (2d Cir. 1928)*); *Standard Marine Towing Services, Inc. v. M.T. Dua Mar, 708 F. Supp. 562, 568 (S.D.N.Y. 1989)*. Moreover, it is well

settled that an "owner's reasonable and good faith decision to make immediate repairs is generally determinative" of the issue as to whether repairs were necessary. *Bouchard, 691 F.2d at 613 n.4* (citing *Skibs A/S Dalfonn v. S/T Alabama, 373 F.2d 101, 104 (2d Cir. 1967)* and *Ellerman Lines. Ltd. v. The President Harding, 288 F.2d 288, 289-90 (2d Cir. 1961))*.

Even when repairs are necessary, a vessel owner has a duty to mitigate damages. See *E.I. DuPont de Nemours & Co. v. Robin Hood Shifting & Fleeting Service, Inc., 899 F.2d. 377, 381 (5th Cir. 1990)* ("[A]bsent any suggestion as **[*30]** to why [the lowest bid] would not be a proper contractor, [the vessel owner's] duty to mitigate damages suggests that the lowest bid for replacement of the [barge) is the appropriate bid."); *Marine Office of America v. M/V VULCAN, 891 F. Supp. 278, 286-87 (E.D. La. 1995)*; *Dahlia Maritime Co. v. M/S Nordic Challenger, No. 90 Civ. 2398, 1993 U.S. Dist. LEXIS 10170, 1993 WL 268413, at *10 (E.D. La. 1993)*. However, the burden to show a failure by the vessel owner to mitigate damages is on the wrongdoer. Sec *Continental Sweden Corp. v. M.P. Howlett, Inc., 719 F. Supp. 1202, 1210 (S.D.N.Y. 1989)*. [21]

> 21 The same analysis is applied when considering whether other types of common charges such as for gasfreeing, drydocking, gangway services, line handlers, and fire line are properly recoverable as well. See *Bouchard, 691 F.2d at 615, Dahlia, 1993 U.S. Dist. LEXIS 10170, 1993 WL 268413, at *19*.

In light of the Court's factual findings regarding the reasonableness of Plaintiff's decision to have the repairs done in the New York area (see supra at 7-9), the Court concludes that Plaintiff fully satisfied its duty to mitigate its damages. This conclusion is holstered by the fact, noted above, that the cost of the repair was relatively modest. In addition, **[*31]** Defendants failed to introduce any evidence demonstrating that there were materially cheaper repair locations within the CAPE BILLE's restricted travel zone. (Tr. III at 57/12-60/3 (Counsel for Defendants: "There are other places in New York that might have been less expensive.") (emphasis added).)

Similarly, in light of the Court's factual findings regarding the related expenses incurred by Plaintiff (see supra at 9-10), the Court concludes that, with the exception of one item (see infra at note 16), Defendants are responsible for those costs. Contrary to their pre-trial statement, "Defendants [did not] show at trial that certain of the costs ancillary to the repairs, such as survey fees, attending superintendent costs and crew wages were excessive, not reasonably incurred, or are otherwise not awarded under maritime law." (Def. Mem, at 9.) The evidence was to the contrary and largely unopposed, and counsel for Defendants did not contend otherwise during his closing argument. (Tr. III at 57/11-61/15.) This conclusion is bolstered by the decisions of other courts in this District that have concluded that such expenses were routine, incidental, and necessary to allision repairs. See **[*32]** *Diesel Tanker Ira S. Bushey, Inc. v. Tug Bruce A. McAllister, No. 92 Civ. 5559, 1994 U.S. Dist. LEXIS 8788, 1994 WL 320328, at *19-*22 (S.D.N.Y. June 29, 1994)* (awarding the vessel owner, inter alia, the diver's fee and the marine surveyors' fees as reasonable and "plainly necessary to collision repairs"): *Standard Marine, 708 F. Supp. at 568-69* (awarding the vessel owner, inter alia, the captain's wages during the repair period because his presence was reasonably necessary for the protection of the vessel and to oversee repair operations).

Accordingly, Plaintiff is awarded the full amount of its repair costs in the amount of $ 108,000.00 and its related expenses in the amount of approximately $ 59,311.27, for a total amount of $ 167,311.27.

(ii) Lost Profits

When a vessel is detained for repairs after an allision, the vessel owner is entitled to damages for profits lost during the detention (i.e., repair) period. See *The Conqueror, 166 U.S. 110, 125, 127, 17 S. Ct. 510, 41 L. Ed. 937 (1897)*; *Bouchard, 691 F.2d at 612* ("The owner of a vessel damaged through the fault of another is entitled, over and above the cost of collision repairs, to an award for profits lost during the detention necessary to make the repairs."). However, the vessel owner's **[*33]** "[d]amages must not be merely speculative, and something else must be shown than the simple fact that the vessel was laid up for repairs." *The Conqueror, 166 U.S. at 127*. The vessel owner has the burden of proof to show "that there was an opportunity for him to [employ the vessel], and that he would probably have availed himself of it" but for the allision. *The North Star, 151 F. 168, 175 (2d Cir. 1907)*. See also *The Gylfe v. The Trujillo, 209 F.2d 386, 389 (2d Cir. 1954)* (affirming the special commissioner's determination that "there was a charter market for tankers of the Glyfe's general type, that

there were profitable charters available during the period in question and that the opportunity to use the Glyfe would probably have been availed of by her owner") (internal quotations omitted).

Courts possess wide discretion in calculating a vessel's damages for lost profits. See *Brooklyn E. Dist. Terminal v. United States, 287 U.S. 170, 176, 53 S. Ct. 103, 77 L. Ed. 240 (1932)*; *Turecamo, 872 F. Supp. at 1233*. For instance, lost profits may be shown by proof of the loss of a specific charter. See *The Gylfe, 209 F.2d at 389*; *Skou v. United States, 478 F.2d 343, 346 (5th Cir. 1973)*. However, it is not necessary for **[*34]** the vessel to have lost a charter in order to claim lost profits. See *The James McWilliams, 42 F.2d 130, 132 (2d Cir. 1930)*; *Standard Marine, 708 F. Supp. at 564*. Lost profits may also be shown by proof of the market price of a comparable vessel. See *The Conqueror. 166 U.S. at 127* ("The best evidence of damage suffered by detention is the sum for which vessel of the same size and class can be chartered in the market."). In addition, lost profits can he determined by the vessel's average daily earnings based on voyages preceding and following the allision. See *The Conqueror, 166 U.S. at 127* ("In the absence of such market value, the value of [the vessel's] use to her owner it the business in which she was engaged at the time of the collision is a proper basis for estimating damages for detention, and the books of the owner, showing tier earning about the time of her collision, are competent evidence of her probable earnings during the time of her detention."). Courts have evolved this method into what is known as the "three-voyage" rule. See *The Gylfe, 209 F.2d at 389*. However, the "three-voyage" rule is not rigidly applied, and voyages that are not representative of the market at the **[*35]** time of the allision are not included in the calculation. Id.

At the outset, the Court concludes that an award of lost profits is warranted. The existence of the negotiations over the STASCO voyage charter alone (see supra at 14-15), conclusively demonstrates that "there was a charter market for tankers of the [CAPE BILLE's] type, that there were profitable charters available during the period in question and that the opportunity to use the [CAPE BILLE] would probably have been availed of by her owner." *The Gylfe, 209 F.2d at 389* (internal quotations omitted). In addition, the ability of the CAPE BON and MOUNT OLYMPUS to secure voyage charters during the same time period when the CAPE BILLE would have been available but for the allision supports this conclusion. (See supra at 13-14.)

Nevertheless, based on the Court's findings with respect to the STASCO voyage charter (see supra at 14-15), the Court declines to award Plaintiff lost profits based on the loss of that charter. [22] The Court also declines to award Plaintiff lost profits based on the voyage charter secured by the CAPE BON, The estimated TCEs of $ 48,994.00 and $ 50,714.00, respectively, for those charters is inconsistent **[*36]** with the overwhelming evidence regarding the weakened state of the spot market for ship owners in March 2004. (See supra at 12-13.)

> 22 Accordingly, the Court need not resolve Defendants' request for an adverse inference that the STASCO voyage was not, in fact, lost as a result of the allision.

The Court will award lost profits based upon the "three-voyage" rule. However, consistent with the admonition by the Court of Appeals that the "three-voyage" rule "is not a rule of thumb to be invariably applied," the Court is mindful not to include in the calculation "voyage[s] [that] exaggerate[] the probable loss of profits during the detention period. *The Gylfe, 209 F.2d at 389-90*. In addition, the Court is aware of the Court of Appeals' statement that "[i]t is not required that damages be proved with mathematical exactness provided that there is reasonable data front which the amount of damages can be ascertained with reasonable certainly, 'and the party who has caused the loss may not insist on theoretical perfection.'" *Compania Pelineon de Navegacion v. Texas Petroleum Co., 540 F.2d 53, 55-56 (2d Cir. 1976)* (quoting *Entis v. Atlantic Wire & Cable Corp., 335 F.2d 759, 763 (2d Cir. 1964))*. **[*37]** Finally, the Court is mindful that "the law is well established that an admiralty court may use equitable principles where appropriate to avoid injustice" and that "[s]uch principles play be resorted to for the purpose of making an equitable and just award of damages." *Montauk Oil Transp. Corp. v. Sonat Marine, Inc., 871 F.2d 1169, 1172 (2d Cir. 1989)* (citations omitted).

Accordingly, the Court will utilize a modified version of the "three-voyage" rule to calculate lost profits here. The CAPE BILLE's pre-allision voyage with a TCE of $ 35,602.66 will not be included because the charter was obtained on January 29, 2004, which was before the spot market deteriorated materially. (See supra at 11-13.) Instead, the Court will include the following voyages

because collectively they more accurately reflect the weakened spot market at or about the time of the allision on March 9, 2004: (i) the allision voyage with a TCE of $ 30,846.72; (ii) the post-allision voyage with a TCE of $ 14,965.22; [23] and (iii) the MOUNT OLYMPUS voyage with a TCE of $ 35,065.00. The result is an average TCE of $ 26,958.98. Multiplying that figure by the approximately 9.53125 days the CAPE BILLE was under **[*38]** repair results in lost profits of $ 256,952.78. After deducted the savings realized by the Plaintiff, the lost profits award amounts to $ 219,313.87.

23 The Court declines to use the post-allision voyage TCE of $ 9,964.04 because that figure penalizes Plaintiff by including all of the time the CAPE BILLE underwent repairs in the Bayonne shipyard.

C. Pre-Judgment Interest

The Court of Appeals has held that "[i]n admiralty cases prejudgment interest 'should be granted in the absence of exceptional circumstances.'" *American Oil Trading, Inc. v. M/V SAVA, 47 F. Supp. 2d 348. 353 (E.D.N.Y. 1999)* (citing and quoting *Magee v. United States Lines, Inc., 976 F.2d 821, 822 (2d Cir. 1992))*. The Court of Appeals has granted district courts broad discretion in determining both the prejudgment interest rate to be used and the date from which it will run. See Independent Bulk Transp., Inc. v. Vessel "Morania Abaco", *676 F.2d 23, 25 (2d Cir. 1982)*; see also *Standard Marine, 708 F. Supp. at 569*.

The Court finds that there are no exceptional circumstances warranting a deviation from the general rule in favor of awarding prejudgment interest. Indeed, during his closing argument, counsel for Defendants **[*39]** did not contend otherwise. (Tr. III at 55/9-68/8, 73/20-74/23.) Accordingly, prejudgment interest is awarded to the Plaintiff on: the repair and related expenses from March 20, 2004, the date the repairs were completed (Pl. Mem. at 14); the lost profits from March 12, 2004, the date the CAPE BILLE would have left the Port of New York under a new voyage charter but for the allision (see *Independent Bulk, 676 F.2d at 25* (stating that "[p]rejudment interest has often been awarded from the time of injury") (citing *Schroeder v. Tug Montauk, 358 F.2d 485, 486, 488 (2d Cir. 1966)* and *Petition of the City of New York, 332 F.2d 1006, 1007 (2d Cir. 1964))*; using the "weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding," *28 U.S.C. § 1961*, the commencement of trial on July 30, 2007 (see *Ingersoll Milling Mach. Co. v. M/V Bodena, 829 F.2d 293, 311 (2d Cir. 1987)* (holding that the district court did not abuse its discretion in "determining prejudgment interest based upon an average of prevailing Treasury Bill rates, which are short-term, risk-free obligations"); see also *Central Hudson Gas & Elec. Corp. v. The Tug M/V Scott Turecamo, 496 F. Supp. 2d 331, No. 02 Civ. 6297, 2007 WL 2142101, at *20 (S.D.N.Y. Feb. 27, 2007))*. **[*40]** The Court takes judicial notice of the fact that the rate as of the week preceding the trial was 4.91% [24] Therefore, prejudgment interest shall be calculated at the rate of 4.91% per annum from March 20, 2004 through the date of the judgment on the repair and related expenses and from March 12, 2004 through the date of the judgment on the lost profits.

24 See Board of Governors of the Federal Resent System, Statistics: Releases and Historical Data, Selected Interest Rates (Weekly), 1 Year Treasury Constant Maturities, http://www.federalreserve.gov/releases/h15/data/Weekly_Friday_/ (last visited Aug. 20, 2007).

D. Attorneys' Fees and Costs

Plaintiff also seeks attorneys' fees and costs. With respect to attorneys' fees, "[t]he general rule in admiralty actions is that such an award 'is discretionary with the district judge upon a finding of bad faith.'" *Fortis Corp. Ins., S.A. v. M/V Cielo Del Canada, 320 F. Supp. 2d 95, 108 (S.D.N.Y. 2004)* (citing and quoting *Ingersoll, 829 F.2d 293, 309 (2d Cir. 1987))*. See also *New York Marine & Gen. Ins. Co. v. Tradeline L.L.C. 266 F.3d 112, 130 (2d Cir. 2001)*.

No such finding is appropriate here. Based upon the evidence presented at **[*41]** trial, Defendants' positions with respect to liability and damages were not taken in bad faith. Indeed, during his closing argument, counsel for Plaintiff conceded as much. (Tr. III at 54/18-24.) Thus, Plaintiffs request for attorneys' fees is denied. Finally, *Local Civil Rule 54.1* of the Local Rules of the United States District Courts for the Southern and Eastern District of New York governs the treatment of taxable costs, and the Court will resolve any disputes over that issue at the appropriate date.

III. Conclusion

For the reasons stated above, the Court concludes that Defendants are liable for the March 9, 2004 allision. Thus, Plaintiff is to recover $ l67,311.27 for repairs and related expenses and $ 219,313.87 for lost profits, plus pre-judgment interest at the rate of 4.91% from March 20, 2004 through the date of the judgment on the repair and related expenses and from March 12, 2004 through the date of the judgment on the lost profits. Judgment shall be entered accordingly.

The Clerk of the Court shall mark this action closed and all pending motions denied as moot.

SO ORDERED:

DATED: August 22, 2007

New York, New York

LORETTA A. PRESKA, U.S.D.J,