

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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5890/DWHZ
14 October 2011

Glenn Kommer Tennis, Inc.


Re: Claim Number: N10036-1368

Dear Mr. Kommer:

The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on the claim number N10036-1368 involving the Deepwater Horizon oil spill. Please see the attached Claim Summary/Determination Form for further explanation.

You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you find that you will be unable to gather particular information within the time period, you may include a request for an extension of time for a specified duration with your reconsideration request.

Reconsideration of the denial will be based upon the information provided. A claim may be reconsidered only once. Disposition of that reconsideration in writing will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include claim number N10036-1368.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

Sincerely,



Claims Rejuvenation Division
National Pollution Funds Center
U.S. Coast Guard

Enclosure: Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1368
Claimant	Glenn Kommer Tennis Inc.
Type of Claimant	Corporate (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$52,811.00

FACTS

On or about 20 April 2010, the Mobile Offshore Drilling Unit Deepwater Horizon (Deepwater Horizon) exploded and sank in the Gulf of Mexico. As a result of the explosion and sinking, oil was discharged. The Coast Guard designated the source of the discharge and identified BP as a responsible party (RP). BP accepted the designation and advertised its OPA claims process. On 23 August 2010, the Gulf Coast Claims Facility (GCCF) began accepting and adjudicating certain individual and business claims on behalf of BP.

CLAIM AND CLAIMANT

On 6 September 2011, Mr. Glenn Kommer, on behalf of Glenn Kommer Tennis, Inc. (collectively, the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$52,811.00 in loss of profits and impairment of earnings capacity allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant operates a tennis center at the Ritz-Carlton Hotel and Beach Resort in Naples, Florida.² The Claimant alleged that following the Deepwater Horizon oil spill, occupancy at the hotel decreased significantly, causing the tennis center to lose income.³ The claimant specifically stated that, “[the tennis center] can only accommodate hotel guests at the tennis courts, not locals. Due to low occupancies and cancellations, we lost significant revenue.”⁴

The Claimant alleged that from May – December 2010, the Claimant sustained lost income in the amount of 52,811.00. The Claimant calculated this figure by comparing monthly revenue from May – December 2009 with monthly revenue from May – December 2010.⁵

APPLICABLE LAW

Under the Oil Pollution Act of 1990 (OPA), at 33 U.S.C. § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into or upon the navigable waters or adjoining shorelines or the exclusive economic zone, as described in Section 2702(b) of OPA.

The OSLTF which is administered by the NPFC, is available, pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136, to pay claims for uncompensated damages. One type of damages available pursuant to 33 C.F.R. § 136.231 is a claim for loss of profits or impairment of earning capacity due to injury to or destruction of natural resources.

Under 33 C.F.R. § 136.233 a claimant must establish the following:

¹ Letter to the NPFC, clarifying “sum certain,” dated 25 August 2011.

² Optional OSLTF Claim Form, dated 25 August 2011.

³ Optional OSLTF Claim Form, dated 25 August 2011.

⁴ Optional OSLTF Claim Form, dated 25 August 2011.

⁵ Document showing earnings, May – December 2009, 2010.

- (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 of injury to, destruction of, or loss of 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 received 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.

Under 33 C.F.R. § 136.105(a) and § 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 C.F.R. § 136.235, the amount of compensation allowable for a claim involving loss of profits or impairment of earning capacity is limited to the actual net reduction or loss of earnings or profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for—

- (a) All income resulting from the incident;
- (b) All income from alternative employment or business undertaken;
- (c) Potential income from alternative employment or business not undertaken, but reasonably available;
- (d) Any saved overhead or normal expenses not incurred as a result of the incident; and
- (e) State, local, and Federal taxes.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

To support this claim, the Claimant submitted the following documentation:

- Letter from the Claimant to the NPFC, noting sum certain, 25 August 2011;
- Letter from the NPFC to the Claimant, requesting sum certain, 18 August 2011;
- Optional OSLTF Claim Form, dated 25 August 2011;
- Document showing earnings, May – December 2009, 2010;
- "Tennis Recap" May – December, 2009, 2010;
- Letter from the Claimant to the GCCF, 12 January 2011;
- Denial Letter on Interim Payment/Final Payment Claim, 6 May 2011;
- Letter from Senator Rubio to the Claimant, 12 May 2011;
- Holbrook Mohr, *Gulf oil spill administrator says \$5B in claims paid out*, Naples Daily News, 25 Aug 2011;
- Raymond James, ACH Transaction Request.

On 5 October 2010, the Claimant presented an Emergency Advance Payment (EAP) claim to the RP/GCCF, seeking loss of profits and wages damages in the amount of \$34,153.00.⁶ This claim was denied on 3 December 2010.⁷

On 15 February 2011, the Claimant presented a First Quarter Interim Claim (ICQ12011) to the RP/GCCF, seeking loss of profits and wages damages in the amount of \$32,000.00.⁸ ICQ12011 was assigned # 9291303 and was denied by the RP/GCCF on 6 May 2011.⁹

On 6 September 2011, the Claimant presented this claim to the NPFC, seeking loss of profits and earnings capacity damages in the amount of \$52,811.00.¹⁰ Based upon the evidence provided by the Claimant, it appears that the subject matter of the GCCF claims is the same as the subject matter of the claim before the NPFC, i.e., Claimant lost earnings as a result of the Deepwater Horizon oil spill. The NPFC deems the GCCF claims to be properly presented to the Responsible Party and Party and, to the extent the amount of the claims presented to the RP are equal to or greater than the amount currently presented to the NPFC, the subject claim is properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC Claim N10036-1368 considers and addresses the loss of earnings up to the amount of \$34,153.00 in all claims presented to the Responsible Party, specifically: GCCF Claim #9291303 EAP and #ICQ12011. The NPFC may properly adjudicate any amount up to \$34,153.00 of this claim, as it has first been presented to and denied by the RP/GCCF in the Claimant's EAP claim and in ICQ12011.¹¹

NPFC Determination

Under 33 U.S.C. § 2702(b)(2)(E) and 33 C.F.R. Part 136, a claimant must prove that any loss of income was due to injury, destruction or loss of real or personal property or of a natural resource as a result of a discharge or substantial threat of a discharge of oil. Under 33 C.F.R. § 136.105(a) and § 136.105(e)(6), the claimant bears the burden of providing to the NPFC all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

In order to prove a claim for loss of profits and impairment of earnings capacity, the Claimant must demonstrate (1) that he sustained a loss or reduction in profits or earning capacity, and (2) that the loss or reduction was a result of the discharge or substantial threat of discharge of oil, caused by the Deepwater Horizon oil spill.

The Claimant's original submission to the NPFC did not contain sufficient documentation to demonstrate that the Claimant sustained a financial loss, or to show that his alleged loss occurred as a result of the oil spill. In order to further evaluate the claim, the NPFC requested that the Claimant provide certain additional documentation within 14 days of the date of the letter, such as a record of the alleged low occupancy at the hotel, and income tax returns to substantiate the Claimant's alleged loss of income.¹² As of this date, the Claimant has failed to respond.

Under 33 C.F.R. § 136.103(a), all claims for removal costs or damages must be presented first to the RP. The Claimant failed to make proper presentation to the RP before submitting his claim to the NPFC as is required under 33 C.F.R. §136.103(a). The Claimant presented two lost profits

⁶ GCCF United States Coast Guard Report, 6 October 2011.

⁷ Letter from the Claimant to the GCCF, dated 12 January 2011.

⁸ GCCF United States Coast Guard Report, 6 October 2011.

⁹ GCCF Denial Letter on Interim Payment/Final Payment Claim, 6 May 2011.

¹⁰ Letter from the Claimant to the NPFC, clarifying "sum certain," 25 August 2011.

¹¹ 33 C.F.R. 136.103(a).

¹² NPFC Request for Additional Information, dated 12 September 2011.

and impairment of earnings claims to the GCCF before presenting a lost profits and impairment of earnings claim to the NPFC on 06 September 2011.¹³ Any amount of this claim that exceeds \$34,153.00 is denied for the Claimant's failure to first properly present his lost profits and impairment of earnings capacity claim to the RP.

Based on the information available to the NPFC, this claim is denied because the Claimant failed to meet his burden to demonstrate (1) that he sustained a loss of profits in the amount of \$52,811.00, (2) that the alleged loss is due to the injury, destruction or loss of property or natural resources as a result of a discharge or substantial threat of a discharge of oil, and (3) the Claimant failed to make proper presentment of any and all costs in excess of \$34,153.00 to the RP before submitting his claim to the NPFC as is required under 33 C.F.R. §136.103(a).

Claim Supervisor: NPFC  *Investigation Division*

Date of Supervisor's Review: *10/14/11*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹³ Report from the GCCF dated 06 October 2011.