

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
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5890/DWHZ
16 July 2012

Apostolou-Berset 2, LLC


Re: Claim Number: N10036-1820

Dear Mr. Apostolou:

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 N10036-1820 involving the Deepwater Horizon oil spill. Please see the attached Claim Summary/Determination Form for further explanation.

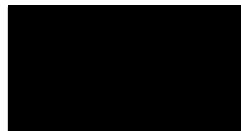
You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you 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 N10036-1820.

Mail reconsideration requests to:

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

Sincerely,



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

Enclosure: Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1820
Claimant	Apostolou-Berset 2, LLC
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$500,000.00

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.

On 08 March 2012, the United States District Court, Eastern District of Louisiana issued a "Transition Order" (TO) limiting the GCCF's ability to accept, process, or pay claims except as provided in that order. The TO created a Transition Process (TP) to facilitate the transition of the claims process from the GCCF to a proposed Court Supervised Settlement Program (CSSP). The Court granted Preliminary Approval of the proposed settlement agreement on 2 May 2012, and the CSSP began processing claims on 4 June, 2012.

CLAIM AND CLAIMANT

On 23 May 2012, Mr. Pete Apostolou on behalf of Apostolou-Berset 2, LLC (the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$500,000.00 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.¹

The Claimant is a corporation in St. Petersburg, Florida, which was "put together to invest in high end waterfront real estate. The group purchased several luxury waterfront homes that were to be sold for profit."² The Claimant alleged that the Deepwater Horizon oil spill negatively impacted the marketability of waterfront property in Bradenton, Florida, thus causing the Claimant be unable to sell two waterfront properties as planned. The Claimant alleged that because of a lack of interest in the properties following the oil spill, the corporation incurred unanticipated holding costs, and the properties eventually sold at prices much lower than anticipated.³

The Claimant alleged to have incurred \$500,000.00 in loss of profits damages as a result of the corporation's difficulty selling the two properties, allegedly due to effects of the Deepwater Horizon oil spill.

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 § 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

¹ Optional OSLTF Claim Form, signed on 3 May 2012.

² Hardship Letter, 9 January 2012.

³ Hardship Letter, 9 January 2012.

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:

- (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.

Under 33 U.S.C. § 2712(f), payment of any claim or obligation by the Fund under OPA shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

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

- Optional OSLTF Claim Form, signed on 1 May 2012;
- GCCF Denial Letter on Interim Payment/Final Payment Claim, 18 April 2012;
- Hardship Letter, 9 January 2012;
- Response to GCCF Deficiency Letter, 17 April 2010;
- 2009 Form 1120S with schedules and attachments;
- 2010 Form 1120S with schedules and attachments;
- Monthly Profit and Loss Statements, 2009;
- Monthly Profit and Loss Statements, 2010;
- Monthly Profit and Loss Statements 2011;
- Articles of Organization, Apostolou-Berset, signed on 25 March 2009;
- Letter from Garth Vernon, 9 January 2012;

- Copy of the Claimant's driver's license;
- Map showing location of business;
- Exclusive Right of Sale Listing Agreement, beginning 9 October 2009;
- Copy of payment to Alexa Realty, 12 July 2010;
- Apostolou-Berset 2, LLC, Certificate of Resolution and Consent, 12 July 2010;
- Bill of Sale, 12 July 2010;
- MLS Listing, 701 Riviera Dunes Way, Palmetto, List Price, \$1,950,000.00;
- Mapquest print-out of property location;
- MLS Listing, 5606 Inspiration Ter, Bradenton, List Price, \$1,799,000;
- Mapquest print-out of property location;
- Residential Sale and Purchase Contract, 701 Riviera Dunes Way, purchase price of \$1,600,000.00 and closing date of 26 July 2010, signed on 30 June 2010;
- Addendum to above contract, signed on 8 July 2010;
- HUD-1 Settlement Statement;
- Map showing location of property, 701 Riviera Dunes Way, Palmetto;
- Settlement Statement (HUD-1);
- HUD-1 Settlement Statement Addendum, signed on 31 March 2011;
- Exclusive Right of Sale Listing Agreement, signed on 21 October 2009;
- Settlement Statement (HUD-1), signed on 31 March 2011;
- HUD-1 Settlement Statement Addendum, signed on 30 March 2011;
- Exclusive Right of Sale Listing Agreement, regarding 5606 Inspiration Terrace, listing price of \$2,600,000.00, signed on 21 October 2009.

On 10 January 2012, the Claimant presented an Interim/Final payment claim to the RP/GCCF, seeking lost profits and earning capacity damages.⁴ The Claimant was assigned Claimant ID 3573346 and the Interim/Final payment claim was assigned claim # 9554569.⁵ According to the Claimant, this claim # 9554569 was denied by the GCCF.

According to OPA, a claim must be presented first to the RP/GCCF, prior to presentment to the NPFC. Should the RP/GCCF deny payment on the claim, or fail to issue payment within 90 days of presentment, the Claimant may present the claim to the NPFC.⁶ Information available to the NPFC indicates that the GCCF has denied payment on claims submitted by the Claimant for damages now presented to the NPFC. Therefore, the NPFC may adjudicate this claim to the extent that the damages now presented to the NPFC, were first presented to the RP/GCCF. Any damages now before the NPFC, which were not first presented to the GCCF, are denied for improper presentment.

Additionally, the NPFC notes that evidence presented in this claim submission indicates that the Claimant is a member of the economic damages class of the Deepwater Horizon oil spill class action settlement (the BP settlement).

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 this claim.

⁴ Optional OSLTF Claim Form, signed on 1 May 2012.

⁵ GCCF Denial Letter on Interim Payment/Final Payment Claim, 18 April 2012.

⁶ 33 C.F.R. § 136.133(c)(2).

As an initial matter, it appears that the Claimant is a member of the economic damages class of the BP settlement. This claim is therefore considered to have been settled, and the Claimant is ineligible to recover funds from the OSLTF. According to OPA, the payment of any claim by the NPFC is subject to the NPFC's ability to obtain, by subrogation, the rights to recover all costs and damages from the responsible party. If a claim has been settled, the Claimant no longer has rights to the claim and therefore cannot subrogate rights to the NPFC.

While this claim may not have been quantified or paid, it is considered to have been settled by virtue of the Court's preliminary approval of the settlement agreement. If the Claimant disagrees that he is a member of the economic damages class of the BP Settlement, he should then submit evidence to indicate that he has either opted out or is excluded from the BP Settlement in his request for reconsideration of this claim.

Furthermore, this claim would be denied under OPA's loss of profits damage category, as the Claimant has failed to prove that he has sustained a financial loss as a result of the Deepwater Horizon oil spill.

In order to prove a claim for loss of profits damages, a claimant must provide documentation sufficient to prove (1) that the claimant sustained an actual financial loss within the meaning of OPA, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

The Claimant has failed to provide documentation sufficient to prove that he sustained an actual financial loss in the period following the Deepwater Horizon oil spill. According to OPA, in order for a claimant to prove that he has sustained a compensable loss of profits, a claimant must prove "that the claimant's income was reduced"⁷ as established by "the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered."⁸

Here, the Claimant has alleged that he sustained losses stemming from (1) increased holding costs, and (2) decreased sales prices for two properties sold after the Deepwater Horizon oil spill.

"Holding costs" incurred by the Claimant to maintain his own property (e.g., property insurance, home owner's association dues, and mortgage payments) are not, in and of themselves, a reduction in profits or earnings, and are not a loss that may be compensable under OPA. Furthermore, the Claimant has not identified the amount of this loss which the Claimant has classified as losses due to having incurred "holding costs for an extended period of time."⁹ Because the Claimant has not identified the amount of increased holding costs incurred, and because the Claimant has not proven that extended holding costs resulted in the Claimant sustaining a loss of profits or that he experienced extended holding costs due to the Deepwater Horizon oil spill, these costs are denied.

The Claimant's profit and loss sheets indicate that since the organization became operational, it has sold five properties, two of which are the subject of this claim. The Claimant's first sale in February of 2010, netted the Claimant a profit of \$62,178.53.¹⁰ The Claimant made a second sale in March of 2010, on which the Claimant sustained a loss of \$122,828.32.¹¹ The Claimant's third sale, in April of 2010 also resulted in the Claimant sustaining a loss- this time in the amount of \$305,029.00.¹²

⁷ 33 C.F.R. § 136.233(b).

⁸ 33 C.F.R. § 136.233(c).

⁹ Letter from the Claimant regarding losses, 9 January 2012.

¹⁰ Monthly Profit and Loss Statement, 2010.

¹¹ Monthly Profit and Loss Statement, 2011.

¹² Monthly Profit and Loss Statement, 2010.

Following the oil spill, in July of 2010, the Claimant sold one of the properties that is the subject of this claim. The Claimant earned a profit of \$416,682.85 on this sale.¹³ In July of 2011, the Claimant sold the second property, this time earning a profit of \$167,348.52.

It appears then, that the Claimant's sales prior to the oil spill resulted in losses totaling \$365,678.79. After the spill, the Claimant's sales generated profits of \$584,031.37 on sales. The Claimant alleged that he sustained losses based on the fact that he could have earned even higher profits had the oil spill not occurred. What the Claimant could have earned is speculative and unsupported by the evidence provided. For example, the Claimant has failed to provide financial documentation that would indicate that during time periods in which sales were not affected by the oil spill, the Claimant generated a certain amount of sales revenue which would have been expected after the oil spill. Accordingly, the evidence provided does not serve to substantiate that the Claimant should have received a particular level of profit on the sale of any of his properties. To the contrary, it appears that in the period following the oil spill, the Claimant's sales were far more profitable than they had been prior to the spill.

Further, the Claimant has not provided evidence such as certified real estate appraisals of his properties before and after the spill which would serve to baseline the pre-spill values versus the post spill values at the time the properties were sold. If the Claimant decides to return to the NPFC on reconsideration, he should consider providing evidence to definitively establish the values of his properties both pre and post spill. Additionally, since the Claimant's sales record on his properties was better after the spill than before it, he should provide evidence to prove that the values of the properties and his ability to sell them were affected by the Deepwater Horizon oil spill as opposed to a myriad of other factors affecting the Florida real estate market which is evidenced by the losses sustained in the pre spill sales.

This claim is therefore denied because the Claimant failed to meet his burden to demonstrate (1) that he sustained a loss in the amount of \$500,000.00 and (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) this claim is denied because it is considered to have been settled by virtue of Claimant belonging to the economic damages class associated with the CSSP.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *7/16/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹³ Monthly Profit and Loss Statement, 2010.