

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-2038
Claimant	Odyssey Seafood Trading, Inc.
Type of Claimant	Corporate
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$18,850,456.00

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 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 02 May 2012, and the CSSP began processing claims on 04 June 2012.

CLAIM AND CLAIMANT

On 30 December 2014, Mr. [REDACTED] submitted a claim for his client, Odyssey Seafood Trading, Inc. ("the Claimant") to the Oil Spill Liability Trust Fund (OSLTF) seeking \$18,850,456.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

At the time of the oil spill, the Claimant states that the business was expanding rapidly and was profitable. The Claimant states that the exported shrimp from the Gulf of Mexico was recognized in the European markets and by European distributors as a superior product. After the spill occurred, the Claimant states that the European distributors and customers emptied all shelves and either destroyed or returned all unsold product and refused to purchase any more product because of fears of short and long term contamination. The Claimant states that all efforts to continue or restart the export business of shrimp and lobster from the Gulf of Mexico to the European market failed.

The Claimant also states that in 2011, it shipped a container of shrimp product to a European distributor, but the container was returned because of concerns and fears about contamination from the spill. Accordingly, and as a result of the spill, the Claimant believes its export business is now dead with no hope of restarting it. The Claimant asserts the value of the business endeavor has been reduced to \$0.00.

¹ Optional OSLF Claim Form, signed 12/16/2014.

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 water, adjoining shorelines, or the exclusive economic zone of the United States, as described in § 2702(b) of OPA.

The OSLTF is available to pay claims for uncompensated damages pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136. 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:

- (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; and
- (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.

Under 33 U.S.C. § 2712(h)(2), no claim may be presented under this section for recovery of damages unless the claim is presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care.

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 all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

DETERMINATION OF LOSS

Claimant's Submission to the NPFC

The Claimant submitted the following documentation in support of this claim:

- Optional OSLTF Form, signed 12/16/2014;
- National Academy of Engineering and National Research Council Interim Report on the Causes of the Deepwater Horizon Oil Rig Blowout;
- Claim correspondence (with claim explanations) between the Triantaphyllis Law Firm (legal counsel for the Claimant) and the BP Claims Program, dated 9/27/2013;
- BP Claims Form for Claimant, including claim description and calculations;
- Waybill from Claimant to Cathay Pacific Airways, LTD, dated 4/2/2010;
- 2009 US Corporation Income Tax Return for 2009
- 2010 US Corporation Income Tax Return for 2010
- 2011 US Corporation Income Tax Return for 2011
- 2012 US Corporation Income Tax Return for 2011
- 2007-2010 Internal Calculations of Losses made by Claimant;
- 2007-2010 Boat Calculations with corresponding invoices/waybills for Claimant;
- Cover Letter for Additional Information Request from Claimant, dated 1/26/2015;
- Cancellation Letter from "The Shrimp" to Claimant, dated 5/05/2010;
- Copy of Contract between "The Shrimp" and Claimant, dated 12/15/2006;
- Copy of Contract between Porto Costelo, Inc. and Claimant, dated 10/05/2006;
- Copy of Contract between Porto Aegean, Inc. and Claimant, dated 6/15/2005;
- Cancellation Letter from Porto Aegean, Inc. to Claimant, dated 7/07/2010;
- Bill of Lading for Aathanasakos Returned Cargo Container, dated 2/13/2011;
- Shipping Invoice from Kronos International Shippers to Claimant, dated 3/9/2011;
- Bill of Lading for Claimant's Cargo Container, dated 12/20/2010;
- Letter from Claimant to BP Oil Spill Claim Attorneys, undated.

The Claimant alleged that this claim was first presented to the Responsible Party and that the RP denied payment on this claim.² On 30 December 2014, the Claimant presented this claim to the NPFC, seeking \$18,850,456.00 in loss of profits or impairment of earning capacity. The NPFC will adjudicate the claim to the extent presentment requirements have been satisfied. If any

² Optional OSLTF Claim Form, signed on 12/16/2014.

damages subject of this claim were not first presented to and denied by the RP, these damages are denied for improper presentment.³

Evidence in this claim submission indicates that the Claimant is not a member of the Deepwater Horizon Economic and Property Damage Class Action Settlement (E&PD Settlement). Again, if the Claimant is discovered to be in litigation against the RP, or is later found to be part of the EP&D Settlement or any other class action settlement/lawsuit, this claim will be denied for improper presentment.

NPFC Determination

In order to prove a claim for loss of profits or impairment of earning capacity damages, a Claimant must provide evidence sufficient to prove (1) that the claimant sustained a loss or reduction in income, and (2) that the loss was caused by damage to real or personal property or natural resources caused by the discharge of oil during the Deepwater Horizon oil spill.

The claim as presented is denied for several reasons. The claim is for loss of profits and earnings and must meet the specific criteria as outlined above. The Claimant's primary assertion is that the perception of tainted shrimp resulted in the failure of the business and the return of product, wherein it provided documentation of some cancellations and a voyage with returned freight.

First and foremost, the income tax information from 2009 (the one un-impacted period provided) clearly demonstrates that this business earned and reported an income of only \$590.00. While the revenues were \$417,382.00, the cost of goods sold were reportedly \$416,792.00-- only \$590.00 less. More specifically, the cost of goods sold for the products is 99% of the sales. The actual losses/earnings may have been far less than what is projected/claimed. As such, it could be argued that 2010's total income (-\$106,477.00) may have been impacted by the spill; however, no documentation was provided to show that this is the case. Additionally, the 2010 losses would most likely have been discoverable by April 15, 2011, as they were clearly documented in the 2010 Federal Tax filings which makes the claim submission untimely in accordance with the statute of limitations associated with damages.

The Claimant's attempts to project revenues from 2011 through 2012 in order to claim a loss of profits of \$2,356,307.00, which the Claimant then arbitrarily multiplies by eight to come to a total sum certain of \$18,850,456.00, is unsupported by the evidence and is clearly prospective in nature and not OPA compensable. Further, the Claimant has not provided evidence to support the assertion that oil impacted its fishing market to include 2010, 2011 and 2012. With this in mind, it appears that the totals for each year, 2011-2013, are speculative/prospective, and as such, are not *incurred* losses. Speculative losses are not payable under OPA; rather, only actual losses. The projections for 2011-2013 are based on anticipated sales, not the actual income/adjusted profits from its 2009 and 2010 Federal Tax forms.

While some documentation was provided to show that certain buyers in Europe cancelled orders and referred to concern over the Deepwater Horizon spill, there has been no evidence provided that this was the sole market or customers the Claimant serviced. It also appears that the prospective losses claimed appear to be the direct result of the Claimant's decision to cease

³ 33 C.F.R. § 136.103(c)(2).

operations as opposed to the inability to catch seafood and/or actual damage to the fishery. The Claimant was asked to provide documentation of all canceled orders/contracts for all claimed losses in 2011, 2012 and 2013, along with proof that each canceled shipment/contract was a direct result of the oil spill.

The Claimant supplied documentation for only two of its customers at the time of the spill. While it provided a letter from "The Shrimp" (including a copy of the agreement letter between "The Shrimp" and the Claimant), as well as a letter from Porto Aegean, Inc. (including a copy of two agreement letters between Porto Aegean, Inc. and the Claimant), these were letters of the terms between the Claimant and these customers, not contracts. That said, it has not provided specific voyages lost/canceled from 2011-2012 (only one voyage that was returned). The agreement letters provided show the terms in which the Claimant and its customers did business, but neither show that there was a guarantee of business or a long term, set charter or contract in place that would show specific losses. As such, it appears to be business decisions on the part of the customers to hire/contract with the Claimant, and not a direct result of the oil spill.

Ultimately, the claim is denied primarily on the basis that it was not presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care. See, 33 U.S.C. § 2712(h)(2). As stated above, the 2010 losses would most likely have been discoverable by April 15, 2011, as they were clearly documented in the 2010 Federal Tax filings. The argument could be made that the Claimant did incur damages for cargo returned by Aathanasakos; however, the cargo (sent to Aathanasakos M.O.O EPE, located in Moschato, Greece, on December 13, 2010) was received back into New York on 13 February 2011, so it is reasonable to assume that the Claimant would have discovered the losses for this voyage at this time. The Claimant neither provides documentation of the disposal of the product as waste, nor does it provide an explanation as to why the containers were sent to Chicago-- perhaps there was a secondary use that may have mitigated some losses. As a result, it cannot be determined that a loss was mitigated or even occurred.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that it sustained a financial loss in the amount of \$18,850,456.00, or (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 discharge of oil. Additionally, this claim is denied because it was submitted after the statute of limitations for damage claims.

Claim Supervisor:  *NFFC Claims Adjudication Division*

Date of Supervisor's Review: *3/3/15*

Supervisor's Action: *Denial approved*

Supervisor's Comments: