

U.S. Department of  
Homeland Security

**United States  
Coast Guard**



Director  
National Pollution Funds Center  
United States Coast Guard

NPFC CA MS 7100  
US COAST GUARD  
4200 Wilson Blvd. Suite 1000  
Arlington, VA 20598-7100  
Staff Symbol: (CA)  
Phone: 800-280-7118  
E-mail: arl-pf-npfcclaimsinfo@uscg.mil  
Fax: 703-872-6113

CERTIFIED MAIL – RETURN RECEIPT REQUESTED  
Number: 7011 1570 0001 4803 8596

5890/DWHZ  
21 August 2012

Be'Apparels LLC



Re: Claim Number: N10036-1812

Dear Ms. Mbodj:

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 N10036-1812 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 N10036-1812.

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	N10036-1812
Claimant	Be'Apparels LLC
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$13,409.97

### ***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 21 May 2012, Novia Mbodj (the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$13,409.97 in loss of profits damages resulting from the Deepwater Horizon oil spill.<sup>1</sup>

At the time of the oil spill, the Claimant was operating a weekend-only fashion store at the Wagon Wheel Flea Market in Pinellas Park, Florida.<sup>2</sup> The Claimant alleged that the flea market "attracted many tourists throughout the year" and that following the oil spill, a decrease in tourism to the area caused the Claimant to lose business. The Claimant stated that the loss of business also prevented her from successfully operating her online store, which was under development at the time of the spill.<sup>3</sup>

The Claimant alleged that the decrease in tourism in and around St. Petersburg, Florida after the oil spill caused her to sustain a loss of income totaling \$13,409.97.

### ***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

<sup>1</sup> Optional OSLTF Claim Form, signed 21 May 2012.

<sup>2</sup> Letter from the Claimant to NPFC, dated 24 May 2012.

<sup>3</sup> Letter from the Claimant to NPFC, dated 24 May 2012.

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:

- (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***

### **Presentment**

Prior to presenting this claim to the NPFC, the Claimant filed an Emergency Advance Payment (EAP) claim with the RP/GCCF, seeking loss of profits and wages damages.<sup>4</sup> The Claimant was assigned Claimant ID 545673.<sup>5</sup> The RP/GCCF denied payment on this claim.

Prior to presenting this claim to the NPFC, the Claimant also filed a business claim with the RP/GCCF, seeking loss of profits and wages damages.<sup>6</sup> The Claimant was assigned Claimant ID

<sup>4</sup> Copy of Claimant Status from GCCF Website.

<sup>5</sup> Copy of Claimant Status from GCCF Website.

<sup>6</sup> Denial Letter on Interim Payment/Final Payment Claim, dated 21 October 2011.

3404935 and the claim was assigned claim # 9448237.<sup>7</sup> The RP/GCCF denied payment on this claim.

Prior to presenting this claim to the NPFC, the Claimant filed an Interim Payment (IP) claim with the RP/GCCF, seeking loss of profits and wages damages.<sup>8</sup> The Claimant was assigned Claimant ID 3456599 and the IP claim was assigned claim # 9318884. The RP/GCCF offered a final payment in the amount of \$25,000, which the Claimant accepted.<sup>9</sup>

On 21 May 2012, the Claimant submitted this claim to the NPFC, seeking \$13,409.97 in loss of profits and impairment of earning capacity damages.<sup>10</sup> The NPFC may adjudicate this claim to the extent that these damages have first been presented to the RP/GCCF.<sup>11</sup> Any damages now before the NPFC, which were not first presented to the RP/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 Deepwater Horizon oil spill economic and property damage class action settlement (the E&PD 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.

As an initial matter, it appears that the Claimant is a member of the Deepwater Horizon oil spill economic and property damages class action settlement (E&PD Settlement). This claim is therefore considered to have been settled, and the Claimant is therefore 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 the NPFC to those rights.

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 she is a member of the economic damages class of the E&PD Settlement, than she should submit evidence to indicate that she has either opted out or is excluded from the E&PD Settlement in her request for reconsideration of this claim.

Furthermore, this claim is denied under OPA's loss of profits damage category because (1) the Claimant has signed a Release and Covenant Not to Sue in return for final payment, and (2) the Claimant has failed to present sufficient evidence to prove that she sustained an uncompensated financial loss as a result of the Deepwater Horizon oil spill.

---

<sup>7</sup> Denial Letter on Interim Payment/Final Payment Claim, dated 21 October 2011.

<sup>8</sup> Copy of Claimant Status from GCCF Website.

<sup>9</sup> Copy of Claimant Status from GCCF Website; Determination Letter on Interim Payment/Final Payment Claim, 28 June 2011; Release and Covenant Not to Sue, 18 July 2011.

<sup>10</sup> Optional OSLTF Claim Form, undated.

<sup>11</sup> 33 C.F.R. §136.103(a)

1. The Claimant has waived her rights to seek recovery from the NPFC regarding costs that are the subject of this claim.

Information presented by the Claimant and available to the NPFC indicates that the RP/GCCF has compensated the Claimant a total of \$25,000 for losses incurred by the Claimant's personally owned business.<sup>12</sup> In consideration of this payment, the Claimant executed a Release and Covenant Not To Sue. By signing this document, the Claimant released any rights she may have had to recover against the RP or another party regarding financial losses allegedly incurred as a result of the oil spill.

Any payment from the Oil Spill Liability Trust Fund (the Fund) requires the acquisition of rights from the RP. Because these rights have been released by the Claimant to the RP/GCCF, the Claimant cannot also recover from the Fund.

The Release and Covenant Not To Sue, signed by the Claimant on behalf of her business, applies to,

all of a claimant's "affiliates," including a claimant's "spouse, heirs, beneficiaries, agents, estates, executors, administrators, personal representatives, subsidiaries, parents, affiliates, partners, limited partners, members, joint venturers, *shareholders*, et al. [emphasis added].<sup>13</sup>

Here, the Claimant is the owner, operator and sole shareholder of the business for which she accepted final payment. Therefore, by signing this agreement, the Claimant released any rights she may have had for further recovery regarding losses allegedly incurred due to the Deepwater Horizon oil spill. The release specifically addresses the Claimant's ability to seek recovery through the NPFC, stating that,

[r]eleased Parties means anyone who is or could be responsible or liable in any way for the Incident or any damages related thereto, whether a person, company or governmental entity, including . . . the federal Oil Spill Liability Trust Fund . . .

Therefore, because the Claimant has executed this release agreement on behalf of her business in exchange for final payment, the Claimant no longer has the rights to seek further recovery regarding losses allegedly incurred in her capacity as an officer of the business. As a result, the OSLTF is not available to compensate the Claimant.

2. The Claimant has failed to demonstrate that she has sustained an uncompensated financial loss as a result of the Deepwater Horizon oil spill.

Furthermore, even if the Claimant had not executed the Release and Covenant Not to Sue, this claim would be denied as the Claimant has failed to provide evidence sufficient to prove that her alleged loss was a result of the Deepwater Horizon oil spill.

The Claimant alleged that the oil spill caused a decline in tourism in and around St. Petersburg, Florida, which lead to decreased tourist traffic through the flea market where the Claimant operated her weekend business. However, the Claimant has failed to provide any evidence to indicate that the oil spill actually caused a decrease in visitors to the flea market, or to show that the oil spill otherwise caused the Claimant to sustain financial losses.

---

<sup>12</sup> Determination Letter on Interim Payment/Final Payment Claim, 28 June 2011.

<sup>13</sup> Release and Covenant Not To Sue, at 2.

Research conducted by the NPFC indicates that tourism in the summer and fall of 2010 did not decrease as compared to the previous year. The 2010 Annual Visitors Profile for Pinellas County indicates that the number of visitors to the county in May, June, July and August 2010, actually increased as compared to those months of 2009.<sup>14</sup> Likewise, the Visitors Profile indicates that expenditures in the spring and summer months of 2010, did not drop, but remained at 2009 levels.<sup>15</sup> These statistics are further supported by Pinellas County Bed Tax collections, which indicate year over year increases starting in July of 2010 and continuing through 2011.<sup>16</sup> It is unclear, then, that decreases in tourism caused the Claimant to lose business in the period following the oil spill.

Accordingly, this claim is denied because the Claimant failed to meet her burden to demonstrate (1) that she sustained a loss of profits of \$13,409.97, 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. Furthermore, the Claimant has released her rights regarding this claim by executing the Release and Covenant Not to Sue, and would otherwise be barred from recovering from the Fund by virtue of the fact that any claim she might have is considered to have been settled because of Claimant's membership in the E&PD settlement class.

  
Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *8/21/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

<sup>14</sup> St. Petersburg/Clearwater Area Convention and Visitors Bureau Annual 2010 Visitor Profile, <http://www.pinellascvb.com/statistics/Pinellas2010AnnualReport.pdf>, at 6. Accessed on 3 January 2012.

<sup>15</sup> St. Petersburg/Clearwater Area Convention and Visitors Bureau Annual 2010 Visitor Profile, Available at, [www.pinellascvb.com/statistics/Pinellas2010AnnualReport.pdf](http://www.pinellascvb.com/statistics/Pinellas2010AnnualReport.pdf), at 7. Accessed on 3 January 2012.

<sup>16</sup> Pinellas County, CVB statistics, Bed Tax Information. Available at, [www.pinellascvb.com/cms/index.php?id=6](http://www.pinellascvb.com/cms/index.php?id=6). Accessed on 3 January 2012.