

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
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4803 8862

5890/DWHZ
20 November 2012

Hospitality & Catering Management Services, Inc.


Re: Claim Number: N10036-1836

Dear Mr. Santowski:

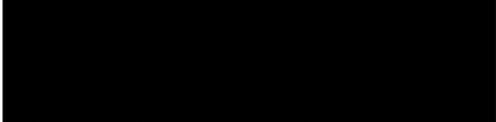
The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on the claim number N10036-1836 involving the Deepwater Horizon oil spill. Please see the attached Claim Summary/Determination 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 N10036-1836.

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

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1836
Claimant	Hospitality & Catering Management Services, Inc.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity/Real Property
Amount Requested	\$124,908.00

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 May 2012, Mr. Michael Santowski on behalf of Hospitality & Catering Management Services, Inc. (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$124,908.00 in loss of profits or impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.¹

The Claimant is a management company, which hires international university students to provide temporary staffing solutions to certain restaurant and hotel customers in Alabama, Florida, Louisiana and Mississippi.² The Claimant alleged that following the Deepwater Horizon oil spill, certain Gulf Coast clients, with whom the Claimant had long-standing contractual relationships, "cancelled or reduced their staffing orders from [the Claimant]."³ Reduced staffing needs resulted in the Claimant refunding visa costs for student/workers who had prepared to travel to the U.S. The Claimant also continued to pay for housing for these student/workers who did not actually come to the U.S., per the terms of lease agreements allegedly signed prior to the oil spill.

As a result of the reduction in staffing orders by the Claimant's clients, the Claimant alleged to have incurred a loss of (1) \$47,090.00 based on the reduction in available working hours provided by his clients as compared to 2009, (2) \$26,650.00 in visa refunds and (3) \$51,168.00

¹ Optional OSLTF Claim Form, signed on 28 June 2012.

² Claim cover letter from the Claimant to the NPFC, 29 May 2012.

³ Claim cover letter from the Claimant to the NPFC, 29 May 2012.

in rent payments to landlords with whom the Claimant had signed contracts prior to the oil spill.⁴ In sum, the Claimant seeks to recover \$124,908.00 in loss of profits or impairment of earning capacity damages resulting from 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 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.

⁴ Claim cover letter from the Claimant to the NPFC, 29 May 2012.

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 NPFC

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

- Optional OSLTF Claim Form, signed on 7 October 2011;
- Response to NPFC request for additional information, 29 May 2012;
- Exhibit A, Billing charts, 2009, 2010;
- Exhibit B, List of VISA refunds issued;
- Exhibit C, Chart showing rental losses;
- Exhibit D, Chart of monthly income, 2009;
- Exhibit E, Chart of monthly income, 2010;
- Letter from the Wendco Group to the GCCF, 9 December 2010;
- Letter from Superb Foods supporting this claim, 17 September 2010;
- Labor Service Agreement 7 February 2011;
- Labor Service Agreement, 1 September 2008;
- Services Agreement, 1 January 2009;
- Labor Service Agreement, 27 August 2007;
- Fax from the Claimant to the NPFC responding to additional information requests, received on 16 July 2012;
- Labor Service Agreement, 4 February 2009;
- Email from the Claimant to the NPFC regarding additional documentation, 16 July 2012;
- 2009 Form 1120S, showing ordinary business income of (-\$142,184.00);
- 2009 Form 4562;
- Letter from the Claimant to David Marzano, re: 2009 S Corporation Schedule K-1 (Form 1120S), 3 December 2010;
- Letter from the Claimant to Raoul Finlay, re: 2009 S Corporation Schedule K-1 (Form 1120S), 3 December 2010.

The Claimant presented this claim to the NPFC on 30 May 2012.⁵ The Claimant alleged to have presented this claim to the Responsible Party or its agent on 14 December 2010.⁶ According to the Claimant, the RP denied payment on this claim. The NPFC does not have evidence to independently verify this assertion. However, the NPFC will adjudicate this claim to the extent that it has been first presented to, and denied by the Responsible Party.⁷ Any damages now before the NPFC which have not been properly presented are denied.

Due to the location of the Claimant's business, it appears that the Claimant is not a member of the Deepwater Horizon Economic and Property Damage Settlement class (E&PD Settlement).⁸

NPFC Determination

⁵ Optional OSLTF Claim Form, signed on 7 October 2011.

⁶ Optional OSLTF Claim Form, signed on 7 October 2011.

⁷ 33 C.F.R. § 136.103(c)(2).

⁸ Letter from the Claimant to the NPFC, 23 July 2012.

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.

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 net reduction or loss of earnings or profits”⁹ and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill. Here, where the Claimant is a business, the Claimant must prove that he sustained an actual reduction in profits as a result of the Deepwater Horizon oil spill. The reduction in profits must be evident when comparing the Claimant’s earnings during the claimed loss period, with his earnings in a similar, but unaffected period.¹⁰

1. Failure to prove financial loss.

The Claimant alleged to have sustained a loss of \$124,908.00 as a result of the effects of the Deepwater Horizon oil spill. Anticipating lower than usual patronage, the Claimant’s clients reduced their staffing requirements, causing the Claimant to incur additional costs, and lose anticipated revenue. As a basis for comparison, the Claimant provides charts showing 2009 gross earnings generated from particular clients.

In a letter to the Claimant dated 12 June 2012, the NPFC requested copies of the Claimant’s 2009, 2010 and 2011 tax returns so as to understand how or if the Claimant’s alleged loss of business affected the Claimant’s overall earnings.¹¹ According to OPA, a Claimant must demonstrate that they have incurred a financial loss by providing certain reliable financial documentation, specified to include, “tax returns, financial statements and similar documents.”¹² As of the date of this determination, the Claimant has not provided tax returns for 2010 or 2011. Likewise, no verifiable financial data for 2010 or 2011 has been provided to allow the NPFC to compare the Claimant’s 2010 earnings with his earnings in a year unaffected by the oil spill.

As such, the Claimant has failed to prove that he sustained a financial loss in a certain amount as a result of the Deepwater Horizon oil spill.

2. Failure to prove loss caused by damage to property or natural resources resulting from the discharge of oil.

In order to prove that the Claimant’s alleged loss is compensable under OPA, a Claimant must provide evidence to demonstrate that the loss was “due to injury to, destruction of, or loss of real or personal property or natural resources” resulting from the oil spill.¹³

Here, the link between the Claimant’s losses and the oil spill, are the losses allegedly sustained and anticipated by the Claimant’s clients, thereby causing them to decide to reduce their staffing needs. The Claimant chose to bear the costs incidental to the staffing reductions, rather than to

⁹ 33 C.F.R. § 136.235.

¹⁰ 33 C.F.R. § 136.233(c).

¹¹ NPFC Request for additional information, 12 June 2012.

¹² 33 C.F.R. § 136.233(c).

¹³ 33 C.F.R. § 136.

pursue remedies under his contracts with the clients. These losses then are based on anticipated and actual reductions in business, presumably due to decreases in tourism and general economic conditions in the Gulf coast communities following the oil spill, as well as due to the Claimant's decision not to enforce the contracts. The Claimant's alleged loss therefore, is not due to injury to property or natural resources resulting from the oil spill. Therefore, the Claimant's alleged losses in the amount of \$124,908.00 are not compensable under OPA.

Based on the foregoing, the Claimant has failed to provide evidence sufficient to prove (1) that he sustained a loss of profits in the amount \$124,908.00, 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 from a vessel.

Claim Supervisor: *NPFC Claims*

Date of Supervisor's Review: *11/20/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments: