

CLAIM SUMMARY / DETERMINATION FORM

Date 11/12/2010
Claim Number N10036-0020
Claimant [REDACTED] Ft Lauderdale, FL
Type of Claimant Private (US)
Type of Claim Loss of Profits and Earning Capacity
Claim Manager [REDACTED]
Amount Requested \$59,077.04

FACTS

On October 04, 2010, the NPFC received an Oil Spill Liability Trust Fund (OSLTF) claim form from [REDACTED] on behalf of herself and her husband [REDACTED]. The [REDACTED] are claiming a loss of profits or impairment of earning capacity in the amount of \$59,077.04 due to the Deepwater Horizon oil spill (the oil spill). The [REDACTED] have not earned any sales commissions since May 2010 and assert the reason as a down real estate market in the Fort Lauderdale area resulting from the oil spill.

[REDACTED] are real estate agents working for the realty company [REDACTED] in Fort Lauderdale, Florida. The claimants formerly worked for another real estate brokerage company in Fort Lauderdale, [REDACTED] before working for [REDACTED]. Both [REDACTED] agent agreements with [REDACTED] were effective as of June 2010. The [REDACTED] compensation is strictly based on sales commissions from real estate sales on behalf of sellers and buyers as well as some commissions on leases. The Claimants' property listings have included condominiums and homes ranging from \$400,000 to properties in excess of \$1,000,000. The Claimants stated that their main clientele are property investors from Europe and "snowbirds" from the United States seeking vacation properties.

The last transaction date for commissions earned was May 27, 2010. The Claimants stated that this particular transaction was initiated a few months prior to the actual closing. The [REDACTED] have not earned any sales commissions since that transaction and subsequent to the oil spill. The Claimants do have active listings but are uncertain of any pending sales. The [REDACTED] have also submitted a claim to the Florida Realtor's Compensation Fund and have received a total of \$4000.00.

APPLICABLE LAW

The Oil Pollution Act of 1990 (OPA) provides that each responsible party for a vessel or facility from which oil is discharged into or upon the navigable waters or adjoining shorelines or economic zone is liable for removal costs and damages. 33 USC. § 2702(a). Damages include the loss of profits or impairment of earning capacity due to the injury, destruction or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant. 33 USC § 2702(b)(2)(E).

The OSLTF, which is administered by the NPFC, is available to pay claims for uncompensated damages pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136. With certain exceptions a claim must first be presented to the responsible party. 33 USC § 2713(a). If the claim is either denied or not settled by any person by payment within 90 days after the date on which it was presented, the claimant may elect to commence an action in court or present the claim to the OSLTF. 33 USC § 2713(c).

Pursuant to the claims regulations, 33 CFR § 136.233, a claimant must establish the following to prove loss of profits or impairment of earning capacity:

- (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 CFR 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 CFR 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

A. Documentation Provided

The [REDACTED] submitted the following list of documentation:

1. OSLTF Claim Form dated October 03, 2010 signed by [REDACTED]
2. "National Pollution Fund Center Gulf Oil Spill Hardship Letter" from [REDACTED] to the NPFC (via email) dated October 04, 2010.
3. Picture of [REDACTED]
4. IRS Forms 4868 and 7004 relating to tax extension filed in 2009
5. Commission checks for [REDACTED] from 2007 through 2009.
6. Corporate and Individual Tax Return filings from 2008 and 2009 with form 1099's.
7. Three emails from prospective clients relating to their decision to hold off on purchasing a property in Florida.
8. Highlighted news articles relating to the impact of the oil spill on Florida's economy.
9. "Request for Reconsideration Letter" dated October 01, 2010 from [REDACTED] to the Gulf Coast Claims Facility.
10. "Projected Income Letter" from [REDACTED] to the BP Claims Division dated June 18, 2010.
11. Agent agreements and associated documentation between [REDACTED] and [REDACTED]
12. Commission statements from [REDACTED] for 2009 and 2010.
13. Current property listings for [REDACTED]
14. Market sales statistics for Broward County from September 2008 through September 2010.
15. Denial Letters from both the GCCF and the Florida Realtor's Compensation Fund.

B. NPFC Review of the Information Provided and Market Analysis

The NPFC reviewed the initial documentation provided by [REDACTED] as well as the documentation provided pursuant to the NPFC's request for additional information dated October 15, 2010. Further, the NPFC reviewed all supplemental documentation provided by [REDACTED] following a phone interview held on October 20, 2010. Based on our review of all materials submitted by the [REDACTED] as well as a review of the claim and associated documentation by forensic accountants and economic consultants, we are unable to establish that their loss of income is a consequence of the oil spill.

The NPFC cannot establish that the loss of income is oil spill related for the following reasons:

1. Despite Broward County market statistics showing a downwards trend following July 2010, sales in the area do not reach zero as experienced by the [REDACTED]¹ In Broward County (East Coast Florida) housing sales for approximately the 6 months prior to the spill averaged a 45% increase over the prior year. Although the market showed positive trends prior to the oil spill, overall sales for condominiums and homes declined from July through September 2010 compared to 2009 by 16%, 10% and 15% for each month respectively. Based on the Broward County statistics provided by [REDACTED], it appeared that the market showed a decline in property sales subsequent to the oil spill. This decline, however, does not indicate that the [REDACTED] would make no sales whatsoever during the time frame following the spill.
2. Even if the [REDACTED] failure to sell any properties was related to a down market, available data on real estate values and transactions do not reveal clear trends that can be linked to the oil spill. Alternatively, market sales from Broward County may have declined from July through September 2010 due to the expiration of the first time home buyer's tax credit expiring March 1, 2010. The American Recovery and Reinvestment Act of 2009 provided a temporary tax credit to encourage home purchases. The tax credit expired March 1, 2010 for purchases and a July 1, 2010 deadline passed for closing of purchases. The [REDACTED] report that their commissions should not have been affected by a decline in the first time home buyer market because their client base purchases are at the higher end of the market. As explained in paragraph four below, the [REDACTED] have presented no evidence that the higher end of the market in which they operate has been affected by either the oil spill or an economic downturn.
3. The NPFC compared the data offered by the [REDACTED] with that provided by the Florida Realtors Media Center (FRMC) for the Fort Lauderdale Metropolitan Statistical Area (MSA) and for the State of Florida as a whole.² Analysis of the FRMC data for the Fort Lauderdale MSA indicates that neither existing home sales nor home median prices dropped in the months immediately following the oil spill. Such a drop only began in July of 2010, consistent with seasonal trends in Florida's housing market that cause most home sales to occur in the winter and drop off in the summer months. This trend is consistent with commissions data presented by the [REDACTED] for 2007 and 2008.³
4. In addition, according to an October 4, 2010 article at "The Real Deal Online," both the sub \$350,000 housing market and the "high-end niche" market in South Florida have performed consistently well despite the overall doldrums in the housing market. The article notes that a lot of activity persists in the high-end condo market, and that foreign buyers have been finding the sub \$350,000 market

¹ See Attachment (2), attached schedule for Broward County market statistics.

² See <http://media.living.net/statistics/statisticsfull.htm>. The data provides monthly sales prices for existing single-family homes and condominiums.

³ See, Attachment (3) Summary of [REDACTED] commissions by forensic accountants.

“especially attractive.”⁴ The information in this article has been corroborated by the NPFC’s economic advisors using available open source real estate data.⁵ [REDACTED] has indicated that her real estate sales are focused on the market’s high end but has provided no evidence of a downward trend in either sales or home prices of high-end properties in her area of operations.⁶

5. The Claimants provided three emails from prospective clients indicating that they were going to wait before purchasing property out of concerns for both the oil spill and, in one instance, hurricane season. None of the clients had entered into an agreement of sale nor has any documentation been provided to indicate that their clients were far enough along in negotiations that an agreement of sale was likely. Based upon the information provided, the NPFC cannot ascertain that any commissions were lost as a result of the oil spill.

C. Commissions Analysis:

1. Based on the date of commission checks received by the [REDACTED] during 2009, transactions occurred throughout the entire year. However, during 2008 no commissions were earned after April. All of the commissions earned during 2008 were earned during the months of February, March and April. During 2007, there was only one transaction occurring after the month of May, with the remaining transactions occurring during February, March and May. Based on the past history, there are indications that the [REDACTED] might not earn any commission income or that such earnings were very limited after April or May of each year.⁷ Thus, the current pattern of “no commissions” after May is not necessarily unusual.
2. [REDACTED] both started working for [REDACTED] during June 2010. Their relocation to [REDACTED] was unrelated to the oil spill. They have not earned any sales commissions since joining [REDACTED]. The [REDACTED] earned some sales commissions during Q1 2010 with [REDACTED]. The transition to a new company may have caused some disruption to the [REDACTED] business activities.
3. The Claimants stated that their client base included vacationers and investors from Europe. At or near the time of the oil spill, there was a sovereign debt crisis

⁴ [REDACTED] “Residential Market: Activity is High and Low for South Florida Real Estate,” The Real Deal Online, October 4, 2010, <http://therealdeal.com/miami/articles/activity-is-high-and-low-for-south-florida-real-estate>

⁵ For example, the statistical data in the article appears to be corroborated by Zillow’s Home Value Index that indicates that housing prices for this “top tier” in Fort Lauderdale has actually increased throughout 2010.

⁶ Per phone conversation dated 20 October 2010 between the [REDACTED] and [REDACTED] Claims Adjuster [REDACTED] and Forensic Accountants [REDACTED] and [REDACTED]. But see, email dated 17 October 2005 from [REDACTED] to [REDACTED] indicating that the types of properties represented include “mostly condos and single family homes, sometimes residential income.”

⁷ See, Attachment (3) Summary of [REDACTED] commissions by forensic accountants.

occurring in Europe. As a result of the debt crisis, banks reduced their lending to consumers. Therefore, the debt crisis in Europe may also have contributed to limiting prospective buyers from Europe from purchasing property in the United States at or about the time of the oil spill. However, as noted above, even under these circumstances, the availability of reasonably priced properties in South Florida, combined with the strong Euro, has resulted in a continued strong interest by Europeans in the Florida market.

LEGAL ANALYSIS

Under 33 USC § 2702(b) and 33 CFR Part 136, the claimant bears the burden of proving their loss. The [REDACTED] failure to make any commissions during the period following the oil spill could be the result of several intervening factors outside the scope of the oil spill. The list of intervening factors that may have impacted the claimant's earnings include:

1. The [REDACTED] change from [REDACTED] to [REDACTED] during June 2010.
2. Expiration of the first time home buyer's tax credit expiring March 1, 2010.
3. European sovereign debt crisis.
4. Claimant's historical annual earnings showing little or no commissions paid after April or May of each year.
5. Fort Lauderdale's real estate market has historically shown seasonal fluctuations that coincide with their failure to sell any properties.

These factors are further exacerbated by the fact that the high-end real estate market in South Florida appears to have remained stable or even improved over the previous year. [REDACTED] have not provided enough substantive evidence to establish that their losses were more likely than not the result of the oil spill and are therefore denied.

AMOUNT \$0.00

DETERMINATION [REDACTED] claim for \$59,077.04 to the OSLTF is denied.

Claim Supervisor: [REDACTED]

Date of Review: 11/12/10

Supervisor's Comments: *Denial Approved*

SUMMARY OF MARKET PROPERTY SALES - BROWARD COUNTY

Source: One Sothebys Market Report

Month	Number of Properties 2008/2009			Number of Properties 2009/2010			Percent to Prior Year	Median Price			
	Condos	Homes	Total	Condos	Homes	Total		2008/2009		2009/2010	
September	494	559	1,053	829	776	1,605	52.42%	\$124,450	\$264,000	\$75,000	\$195,000
October	510	564	1,074	868	788	1,656	54.19%	\$110,000	\$257,000	\$80,900	\$211,750
November	403	467	870	863	672	1,535	76.44%	\$105,000	\$225,000	\$83,500	\$185,000
December	549	612	1,161	896	771	1,667	43.58%	\$92,000	\$224,800	\$76,750	\$211,440
January	505	446	951	773	480	1,253	31.76%	\$80,900	\$196,000	\$67,500	\$175,000
February	543	456	999	805	537	1,342	34.33%	\$80,000	\$214,450	\$67,000	\$188,000
March	723	636	1,359	1,113	722	1,835	35.03%	\$77,500	\$225,000	\$71,000	\$219,500
April	775	633	1,408	1,060	748	1,808	28.41%	\$78,000	\$194,900	\$76,500	\$203,950
May	737	717	1,454	945	724	1,669	14.79%	\$76,000	\$190,000	\$74,800	\$215,000
June	855	803	1,658	956	812	1,768	6.63%	\$80,000	\$210,900	\$75,000	\$215,064
July	853	858	1,711	770	670	1,440	-15.84%	\$79,900	\$220,000	\$71,750	\$215,000
August	820	771	1,591	767	662	1,429	-10.18%	\$82,000	\$215,000	\$69,900	\$209,950
TOTAL	7,767	7,522	15,289	10,645	8,362	19,007	24.32%				
September 2010				752	617	1,369	-14.70%				

SUMMARY OF COMMISSION CHECKS RECEIVED

Check Date	Payee	Commission Amount
2/16/07		
2/16/07		
3/1/07		
5/23/07		
5/23/07		
12/6/07		

Total - 2007 \$69,341.85

2/1/08		
2/5/08		
2/14/08		
3/4/08		
3/24/08		
4/11/08		
4/16/08		

Total - 2008 \$99,512.25

3/26/09		
5/1/09		
5/11/09		
7/24/09		
8/17/09		
9/17/09		
11/25/09		
12/10/09		
12/17/09		
12/23/09		

Total - 2009 \$62,409.50

1/6/10		
1/18/10		
5/27/10		
5/27/10		

Total Through May 2010 \$26,194.25