

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N10036-1789
Claimant	: Martin Marine, Inc.
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits/Real or Personal Property/Assessment Costs
Amount Requested	: \$929,365.62

**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 8 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 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 24 February 2012, Mr. [REDACTED], on behalf of Martin Marine, Inc. (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking (1) \$435,000.00 in loss of profits or impairment of earning capacity damages, (2) \$475,855.32 in real or personal property damages, and (3) \$18,510.30 in damage assessment costs. The Claimant alleged to have incurred all claimed costs and damages, totaling \$929,365.62, as a result of the Deepwater Horizon oil spill.<sup>1</sup>

Following the Deepwater Horizon oil spill, BP contracted with certain companies to provide services to assist in the spill response. Cal Dive Offshore Contractors Inc. (Cal Dive) was one of these primary contractors, hired under the terms of an 8 May 2010 Master Service Contract. Pursuant to that contract, Cal Dive hired the Claimant to provide a tug and barge unit "for BP spill cleanup."<sup>2</sup>

Email correspondence on 1 June 2010 indicates that the Claimant contacted Cal Dive to offer the tug/barge unit for service in the spill response. In the email, a representative of the Claimant

<sup>1</sup> Optional OSLTF Claim Form, signed on 13 June 2012.

<sup>2</sup> RE: Proposal for offshore unit Tug Martin Spirit, Barge Martin Endeavor, 1 June 2010.

stated that they “[could] offer his Tug/Barge unit the “Spirit/Endeavor.” The Claimant specified that “[t]he Barge has Screw Pumps which would make her ideal to pump skimmed oil/slops.” The Claimant offered to charter the unit to Cal Dive “at USD \$14,500/Day ++.”<sup>3</sup>

The offer was accepted by Cal Dive, as evidenced by a contract between Cal Dive and the Claimant, also dated 1 June 2010. The contract indicates that the Claimant would be compensated \$14,500.00 per day, plus “fuel, lube oil and other applicable charges.”<sup>4</sup> Furthermore, as stipulated between the parties,

upon completion of this contract, the barge must be cleaned and made gas free and suitable for loading of No. 6 Fuel Oil, at Charterer’s expense. The time spent to clean the barge shall be billable at the current date rate(s). Acceptance of the barge cleaning shall be at discretion of the owner.<sup>5</sup>

The tug/barge unit was chartered by Cal Dive from approximately 5 June 2010 until it was demobilized and redelivered to the Claimant on approximately 29 November 2010. However, the unit was not cleaned and repaired to the Claimant’s satisfaction and the Claimant was unable to attain a gas free certificate to allow the barge to carry future oil cargoes. The Claimant incurred costs to return the unit to the condition specified in the contract, which included replacement of certain parts and equipment. In sum, the Claimant alleged to have sustained costs to clean and repair the unit, totaling \$475,855.32.

Furthermore, during the period between the demobilization of the unit and it being cleaned and repaired to the Claimant’s standards, the Claimant was unable to charter the unit. As such, the Claimant seeks to recover approximately \$14,500.00 per day that the unit was being cleaned and repaired, from about 12 December 2010 through 27 January 2011, totaling \$435,000.00.

At the time of original submission, the Claimant had not directly presented this claim to the Responsible Party or an agent acting on its behalf. Instead, the Claimant sought reimbursement for these costs from Cal Dive, who the Claimant alleged was obligated to pay the Claimant under the terms of the contract between the parties. The Claimant was also present at mediations between Cal Dive and BP concerning costs that are subject of this claim. However, the parties failed to reach a settlement agreement. According to the Claimant, Cal Dive is continuing to pursue a claim against BP for various costs and damages, including those that are subject of this claim.

The NPFC originally denied the claim on 23 August 2012 because the Claimant (1) failed to properly present this claim to the RP, (2) failed to prove that they are either excluded from, or have opted out of the Economic and Property Damage Settlement class, (3) failed to prove that they have sustained loss of profits or impairment of earning damages in the amount of \$435,000.00, uncompensated loss for property damages in the amount of \$475,855.32, or assessment costs in the amount of \$18,510.30, and (4) failed to prove that their alleged loss is due to the injury, destruction or loss of property or natural resources as a result of the discharge or substantial threat of discharge of oil.

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<sup>3</sup> Email from OFFSHORE to [REDACTED]

<sup>4</sup> RE: Proposal for offshore unit Tug Martin Spirit, Barge Martin Endeavor, 1 June 2010.

<sup>5</sup> RE: Proposal for offshore unit Tug Martin Spirit, Barge Martin Endeavor, 1 June 2010.

### **REQUEST FOR RECONSIDERATION:**

On 16 October 2012, the NPFC received the Claimant's request for reconsideration. In support of their claim, the Claimant provided a nine-page letter asserting various factual and legal arguments in response to deficiencies identified in the NPFC's initial claim summary determination. From the date of the reconsideration request until approximately 4 June 2013, the Claimant provided supplementary documentation in response to NPFC requests for clarification and additional information. At the request of the NPFC, the Claimant provided (1) a complete copy of the claim presented to BP on behalf of Martin Midstream Partners, LLC, (2) a copy of the Master Service Agreement between BP and Cal Dive, (3) proof of Mr. [REDACTED] continuing authority to represent the Claimant, as well as various other responses to NPFC requests for clarification regarding the status of this claim as a component of a larger claim presented by Martin Midstream Partners to the BP Claims Program.<sup>6</sup>

### **NPFC Determination on Reconsideration**

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 C.F.R § 136.233 and § 216.213 a claimant must establish that they have sustained a loss of profits or real property damage, and prove that the loss or damage was due to the destruction or injury to real or personal property or natural resources caused by the discharge or substantial threat of discharge of oil.

The NPFC considered all the documentation submitted by the Claimant and performed a *de novo* review of the entire claim submission.

#### **1. Loss of Profits or Impairment of Earning Capacity Damages: \$435,000.00.**

In accordance with 33 C.F.R. § 136.231-35, certain proof requirements must be met in order to prove a claim for loss of profits or impairment of earning capacity damages under OPA. In addition to proving that the alleged financial loss was due to an oil spill, the claimant must prove that they have sustained a **net loss** of profits during the period in which they are alleging to have been affected by an oil spill.

In order to determine the extent of a claimant's financial loss, OPA's implementing regulations require that certain mitigating factors be accounted for.

33 C.F.R. § 136.235 clearly states that the amount of compensation potentially available to a claimant is "limited to the actual net reduction or loss of earnings or profits suffered," taking into account various limiting factors, specifically including, "all income resulting from an incident."<sup>7</sup>

Therefore, in order to prove that the Claimant has sustained a net financial loss, the Claimant's lost income must exceed income earned as a result of the incident. A copy of the contract

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<sup>6</sup> The NPFC received correspondence from the Claimant in letters dated as follows: 6NOV12, 16NOV12, 16FEB13, 15APR13, 4JUN13.

<sup>7</sup> 33 C.F.R. § 136.235.

proposal between the Claimant and Cal Dive indicates that the Claimant was to be compensated “\$14,500.00 per day plus fuel, lube oil and other applicable charges.”<sup>8</sup> If the Claimant earned this daily rate from about 5 June 2010 through 29 November 2010, the Claimant would have earned approximately \$2,566,500.00 for the use of this particular tug/barge unit. However, the Claimant failed to provide evidence to document its income earned as a result of the oil spill. Although this evidentiary failure was noted in the NPFC’s initial determination, the Claimant again failed to provide this evidence on reconsideration.<sup>9</sup>

The Claimant has alleged to have sustained lost profits damages in the amount of \$435,000.00, which does not appear to exceed the amount earned as a result of the spill. Therefore, the Claimant has not demonstrated that they experienced a net loss due to alleged unpaid charter fees for the period from 12 December 2010 through 27 January 2011. As such, the Claimant is not entitled to recover loss of profits or impairment of earning capacity damages in any amount.

2. Failure to demonstrate that the alleged losses were caused by the Deepwater Horizon oil spill.

The NPFC does not dispute that the Claimant’s tug/barge unit operated in heavy oil when the Claimant signed a contract allowing the unit to be used “as a collection platform for offshore skimming units”<sup>10</sup> at a daily rate of \$14,500.00. The basis for the Claimant’s loss is not that the unit encountered oil while being used to skim and store oil, but rather, that the chartering party returned the unit in a condition other than the condition previously agreed upon by the parties. The contract between the Claimant and Cal Dive stipulates that “the barge must be cleaned and made gas free and suitable for loading of No. 6 Fuel Oil, at Charterer’s [Cal Dive’s] expense.”<sup>11</sup>

The Claimant has provided documentation indicating that the cost to return the unit to the specified condition was borne by the Claimant and not by Cal Dive. The cause of the Claimant’s loss then, is not the fact that the unit was damaged by oil, but rather, that the Claimant and not the chartering party, incurred the costs to clean and repair the unit.

The Claimant indicates that although BP offered to settle the claim, the offer was rejected because “Cal Dive insisted on taking a certain amount of the amount BP offered.”<sup>12</sup> It seems then, that the reason the Claimant incurred uncompensated costs to clean the unit, was not the oil spill itself, or even BP’s failure to pay the costs, but rather, due to a disagreement regarding the disbursement of funds between the Claimant and Cal Dive.

For these reasons, these claims for \$435,000.00 in loss of profits and impairment of earning capacity damages and \$475,855.32 in real or personal property damages are denied, as neither type of damage was caused by the oil spill, but instead, resulted from contractual disputes between the parties regarding how the unit should be returned to the Claimant and who should bear the costs to return the unit to its previously agreed upon condition. The OSLTF cannot be

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<sup>8</sup> Proposal for offshore unit Tab Martin Spirit, Barge Martin Endeavor, 1 June 2010.

<sup>9</sup> See, NPFC claim determination, N10036-1789, 23 August 2012.

<sup>10</sup> Service Doc and Timeline. See also, Email, Subj: Barge Proposal, 6/1/2010.

<sup>11</sup> Contract, Proposal for offshore unit Tug Marin Spirit, Barge Marin endeavor, 1 June 2010.

<sup>12</sup> Letter from [REDACTED] to the NPFC, 11 May 2012.

used to enforce contracts between parties when the parties have specifically agreed that one party, who is not the RP, is responsible for costs the Claimant seeks to recover from the OSLTF. Because these alleged damages are not compensable under OPA, all assessment costs associated with these damages are likewise denied.

3. The Claimant cannot subrogate the NPFC to rights that would allow the NPFC to recover these costs from the RP.

In addition to failing to prove that the Claimant sustained a net loss of profits, or that costs or damages were incurred as a result of the oil spill as defined in OPA, the Claimant is also precluded from recovery because the Claimant does not have rights against the RP to which the NPFC may be subrogated.

According to OPA, “the payment of any claim by the NPFC is subject to the United States Government acquiring by subrogation, all rights of the claimant or State to recover from the *responsible party* [emphasis added].”<sup>13</sup> Pursuant to this provision, this claim cannot be compensated by the OSLTF because the Claimant does not maintain rights to pursue claims against BP arising under the Master Service Contract between BP and Cal Dive. The Master Service Contract specifically indemnifies BP “from and against all claims, liabilities, damages and expenses arising out of or incidental to this contract” including, “all damages to or losses of Third Parties’ property.”<sup>14</sup>

If the NPFC were to make a payment on this claim, the NPFC would be subrogated to the rights of the Claimant. The Claimant is in a contractual relationship with Cal Dive, who has agreed to indemnify BP against claims such as the one presented here. However, the NPFC does not have the authority to recover these costs against Cal Dive, who is not a responsible party under OPA. Because the NPFC would not have the ability to recover these costs, the NPFC cannot compensate the Claimant. Furthermore, the NPFC reiterates that the situation leading to this claim was specifically anticipated in the contract between Cal Dive and the Claimant, in which the parties agreed that Cal Dive, who is not a Responsible Party, would bear the costs of returning the unit to a certain condition upon completion of the contract.

4. Evidence suggests that costs that are the subject of this claim are being pursued through judicial action.

In accordance with OPA’s implementing regulations, the NPFC may not make payment on a claim “during the pendency of an action by the person in court to recover costs which are the subject of the claim.”<sup>15</sup> The Claimant has stated that its parent company, Martin Midstream Partners, is currently attempting to recover these costs in an action against BP. Publicly available evidence indicates that Martin Midstream Partners is likely pursuing these same costs through litigation against BP in the U.S. District Court for the Eastern District of Louisiana.<sup>16</sup> As such, the NPFC would be precluded from making any payment on this claim.

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<sup>13</sup> 33 U.S.C. § 2712(f).

<sup>14</sup> Master Service Contract, Art. 12.02, 12.02.03(ii).

<sup>15</sup> 33 C.F.R. § 136.103(d).

<sup>16</sup> See, e.g., Cal Dive International Inc. v. BP Exploration and Production Inc, Case No. 2:2013cv01254, E.D. La, filed on 18 April 2013; Action under Oil Pollution Act of 1990.

In addition to pursuing these damages in court, the Claimant has indicated that Cal Dive is likely pursuing the same costs in a claim against BP. Specifically, the Claimant stated that they believe that “Cal Dive’s claim [to BP] includes not only Martin Marine’s invoices plus mark-up, but also other claims. . .”<sup>17</sup> The NPFC does not have any information to determine whether or not these claims, as presented by Cal Dive, have been compensated either in court or through the claims process. According to 33 C.F.R. § 136.1, the OLSTF is only available to pay claims for “certain *uncompensated* removal costs or *uncompensated* damages [emphasis added].” Because the NPFC cannot determine whether or not these damages have been compensated by the RP, possibly through a claim by Cal Dive, the NPFC cannot make a payment to the Claimant.

Finally, it is important to note that the NPFC has made several requests for update from the Claimant’s Counsel with respect to the Claimant’s litigation status and as of the date of this writing, the NPFC has received no response from the Claimant. On May 11, 2017, the NPFC again formally requested an update on the Claimant’s litigation status. In the letter, the NPFC stated that on Wednesday, September 28, 2016, Ms. [REDACTED], NPFC Claims Manager who had been working the subject claim, emailed Claimant Counsel requesting the status of the Martin Midstream Partners, LP (Martin Marine) v. BP Exploration and Production, Inc. et al case, as well as an update regarding the Martin Operating Partnership, LP vs. Cal Dive Offshore Contractors, Inc. in Texas. The letter further stated that on Friday, October 21, 2016, Claimant Counsel responded to Ms. [REDACTED] stating that they were not ignoring Ms. [REDACTED] and that they would have a response to the NPFC by the following week.<sup>18</sup>

Upon receiving no further communications from Claimant Counsel, Mr. [REDACTED], Ms. [REDACTED] reached out again on Friday, February 10, 2017, requesting another status update on the litigation cases for which Mr. [REDACTED] represents. The NPFC’s letter further stated that as a refresher, on September 29, 2015, Mr. [REDACTED] issued a letter to Mr. [REDACTED] Chief of the Claims Adjudication, advising the litigation cases were consolidated to MDL No. 2179.

The NPFC’s letter of May 11, 2017 informed Claimant Counsel that since the NPFC has not received a reply from him, the NPFC has followed the MDL No. 2179 and advised Claimant Counsel that Judge [REDACTED] issued Pretrial Order No. 63 on or about February 22, 2017 which states in relevant part . . . “[F]or purposes of this Pretrial Order No. 63, the Court makes clear that the B3 Pleading Bundle includes contract claims related to response efforts, including Vessels of Opportunity (“VoO”) Program contract claims in which Plaintiffs seek compensation that might be owed by BP or another defendant under a VoO or other similar charter agreement or other contract, relating to the Plaintiff’s vessel charter and/or other clean-up efforts.” This Pretrial Order further states that any Plaintiff who has timely filed a claim in the B3 pleading bundle and who have not released their claim(s) to date, those Plaintiffs are further ordered to complete a Sworn Statement and must be filed into the record of the plaintiff’s individual lawsuit no later than April 12, 2017.

The NPFC then requested that Claimant Counsel provide a copy of any and all pleadings along with a detailed status update on all of the litigation filed no later than Thursday, May 25, 2017.

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<sup>17</sup> Response to NPFC request for additional information, 15 April 2013.

<sup>18</sup> Email response from [REDACTED] to NPFC request for litigation update status 21 Oct 2016.

The NPFC furthered advised Claimant Counsel that if the NPFC does not receive a reply by the May 25, 2017 deadline, the NPFC will continue adjudicating the referenced claims using only the documentation previously submitted by the Claimant, Martin Marine.

On June 12, 2017, and in one last attempt to determine the Claimant's litigation status, the NPFC contacted Mr. [REDACTED], of Kirkland & Ellis LLP, who is identified in Judge [REDACTED] Pretrial Order No. 63 associated with MDL No. 2179 dated February 22, 2017,<sup>19</sup> as Counsel for BP. The NPFC received an email response from Mr. [REDACTED] on behalf of Mr. [REDACTED] dated June 13, 2017, stating that Martin Midstream Partners, LP and any of its affiliated companies settled and voluntarily dismissed with prejudice its claims against BP via a Notice of Voluntary Dismissal(s) With Prejudice dated April 13, 2016.<sup>20</sup>

Additionally, Mr. [REDACTED] also provided the NPFC with a copy of a Notice of Voluntary Dismissal(s) With Prejudice for Cal Dive International, Inc. dated May 6, 2016.<sup>21</sup> The significance of this information pertains to the Claimant's evidence that demonstrates it was in a contractual relationship with Cal Dive and the Claimant has indicated that Cal Dive is likely pursuing the same costs in a claim against BP. Specifically, the Claimant stated that they believe that "Cal Dive's claim [to BP] includes not only Martin Marine's invoices plus mark-up, but also other claims. . ."<sup>22</sup>

Based on the foregoing, this claim is again denied because the Claimant has failed to meet their burden to prove (1) that the Claimant sustained a net loss of profits (2) that the Claimant's alleged losses are due to injury or destruction or loss of real or personal property or a natural resource as a result of a discharge or a substantial threat of a discharge of oil (i.e., the Deepwater Horizon oil spill), and (3) that the U.S. Government could obtain, by subrogation, rights to recover these damages against the Responsible Party.

Based on the foregoing, this claim is denied upon reconsideration.

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *06/14/17*

Supervisor Action: *Denial on reconsideration approved*

Supervisor's Comments:

<sup>19</sup> See, Pretrial order No. 63 dated February 22, 2017, in the United States District court, Eastern District of Louisiana.

<sup>20</sup> See, Notice of Voluntary Dismissal(s) With Prejudice dated April 13, 2016 in the United States District Court Eastern District of Louisiana.

<sup>21</sup> See, Notice of Voluntary Dismissal(s) With Prejudice dated May 6, 2016 in the United States District Court Eastern District of Louisiana.

<sup>22</sup> Response to NPFC request for additional information, 15 April 2013.