

CLAIM SUMMARY / DETERMINATION

Claim Number:	N10036-1837
Claimant:	Martin Operating Partnership LP and Martin Marine Inc.
Type of Claimant:	Private (US)
Type of Claim:	Real or Personal Property
Claim Manager:	██████████
Amount Requested:	\$2,135,614.24

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 10 May 2012, Mr. ██████████, on behalf of Marton Operating Partnership LP and Martin Marine, Inc. (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$1,353,678.91 in real property damages, \$733,929.18 in loss of profits and earning capacity, \$48,006.15 in damage assessment costs. The Claimant alleged to have incurred damages to the Martin Orion and Poseidon as a result of the Deepwater Horizon oil spill.¹

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."²

Email correspondence on 2 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 stated that they "[could] offer his Tug/Barge unit the "Orion/Poseidon." The Claimant specified

¹ Claim Submission letter dated May 10, 2012.

² RE: Proposal for offshore unit Tug Orion, Barge Poseidon, 3 June 2010.

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 \$22,000/Day ++.”³

The offer was accepted by Cal Dive, as evidenced by a contract between Cal Dive and the Claimant, also dated 3 June 2010. The contract indicates that the Claimant would be compensated \$22,000.00 per day, plus “fuel, lube oil and other applicable charges.”⁴ 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.⁵

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 22 December 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 \$1,353,678.91.

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 \$22,000.00 per day that the unit was being cleaned and repaired, from about 16 January 2011 through 09 February 2011, totaling \$733,929.18.

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 was continuing to pursue a claim against BP for various costs and damages, including those that are subject of this claim.

APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into navigable waters and adjoining shorelines, as described in Section 2702(b) of OPA 90. A responsible party’s liability will include “removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan”. 33 USC § 2702(b)(1)(B).

³ Email from OFFSHORE to [REDACTED]

⁴ RE: Proposal for offshore unit Tug Orion, Barge Poseidon, 3 June 2010.

⁵ RE: Proposal for offshore unit Tug Orion, Barge Poseidon, 3 June 2010.

"Oil" is defined in relevant part, at 33 USC § 2701(23), to mean "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil".

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages. Removal costs are defined as "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from an incident".

Under 33 USC §2713(b)(2) and 33 CFR 136.103(d) no claim against the OSLTF may be approved or certified for payment during the pendency of an action by the claimant in court to recover the same costs that are the subject of the claim. See also, 33 USC §2713(c) and 33 CFR 136.103(c)(2) [claimant election].

33 U.S.C. §2713(d) provides that "If a claim is presented in accordance with this section, including a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund."

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 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. In addition, under 33 CFR 136, the claimant bears the burden to prove the removal actions were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR 136.203, "a claimant must establish -

- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
- (b) That the removal costs were incurred as a result of these actions;
- (c) That the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC."

Under 33 CFR 136.205 "the amount of compensation allowable is the total of uncompensated *reasonable* removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal *activities* for which costs are being claimed must have been coordinated with the FOSC." [Emphasis added].

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

On 24 February 2012, the Claimant presented this claim to the Fund, asserting that failed mediation attempts between Cal Dive and BP, at which the Claimant's representatives were present, constitute presentment of the claim to the responsible party under the law and regulations.

Under 33 U.S.C. § 2713 (a) and 33 C.F.R. § 136.103(a), all claims for removal costs, or damages must be presented first to the responsible party (RP). Under 33 U.S.C. § 2713 (c) and 33 C.F.R. § 136.103 (c)(2), if the claim is not settled within 90 days of presentment to the RP then the claimant may file a claim in court and/or submit their claim to the OSLTF.

The Claimant has not provided the NPFC with a copy of the contract between Cal Dive and BP, but asserts that the contract required mediation of all disputes. Cal Dive and BP went to mediation on 13 January 2012, with the Claimant present as a subcontractor to Cal Dive. However, Cal Dive refused to accept the settlement offer resulting from the negotiation, due to its alleged failure to provide adequate compensation to the Claimant.⁶ In response to an NPFC request that the Claimant provide proof of presentment to the RP, the Claimant stated that they "had no contract for services with BP" and "due to many previous discussions and the unsuccessful mediation process with BP, [the Claimant] feels that it has exhausted its options with BP and that submission to the GCCF would be fruitless."⁷

Evidence presented in this claim submission indicates that the Claimant may be a member of the economic damages class of the Deepwater Horizon oil spill economic and property damages class action settlement (E&PD Settlement). The NPFC sent the Claimant a letter, dated 11 July 2012, regarding the Claimant's possible status as a member of the settlement class. In response to the letter, the Claimant stated "we feel that our claim may not be covered ... as such we are researching this further and preparing to opt out of the program given our current understanding as well as contractual issues."⁸

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 or destruction or loss of real or personal property or 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 the claim. The NPFC considered all the documentation submitted by the Claimant.

⁶ Strasburger Attorneys at Law letter to [REDACTED] dated 21 February 2012.

⁷ Strasburger Attorneys at Law letter for NPFC regarding presentment dated 11 May 2012.

⁸ Email from [REDACTED] to the NPFC dated 20 July 2012.

a. Presentment to the Responsible Party

The Claimant attended mediation between the RP and Cal Dive, on 13 January 2012, regarding damages that are the subject of this claim.⁹ However, the Claimant did not present this claim to the RP/GCCF prior to its presentment to the NPFC, as is required by 33 U.S.C. § 2713 and 33 C.F.R. § 136.103.

The Claimant states that “the claim was not presented to BP as a responsible party or the GCCF because [the Claimant’s] contract was with Cal Dive, however, Cal Dive in turn presented the claim to BP.”¹⁰ However, mediation or any other negotiated settlement process pursuant to the contract between Cal Dive and BP is not the valid presentment of the Claimant’s claim under OPA and associated federal regulations. Further, the Claimant has not provided evidence that might support its contention that submitting a claim to the GCCF would be “fruitless.” Even had the Claimant presented such evidence, the Claimant’s assumption that the RP would deny payment on the claim, does not obviate claim presentment requirements under OPA.

OPA requires that a claim be first presented to the RP or the RP’s agent, here the GCCF. Because the Claimant has failed to meet claim presentment requirements, this claim has been improperly presented to the NPFC under 33 U.S.C. § 2713 and 33 C.F.R. § 136.103, and is therefore denied.

b. Loss of Profits and Impairment of Earning Capacity Damages \$1,353,678.91

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.”¹¹

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 proposal between the Claimant and Cal Dive indicates that the Claimant was to be compensated “\$22,000.00 per day plus fuel, lube oil and other applicable charges.”¹² If the Claimant earned this daily rate from about 5 June 2010 through 22 December 2010, the Claimant would have earned approximately \$4,400,000.00 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. The

⁹ Strasburger Attorneys at Law letter to [REDACTED] dated 21 February 2012.

¹⁰ Strasburger Attorneys at Law letter for NPFC regarding presentment dated 11 May 2012.

¹¹ 33 C.F.R. § 136.235.

¹² Proposal for offshore unit Tab Orion, Barge Poseidon, 3 June 2010.

Claimant has failed to present sufficient evidence to prove that they sustained an actual financial loss under OPA. Contrary to Claimant's assertions that they lost profits or earnings as a result of the Deepwater Horizon oil spill, the Claimant actually earned income as a result of the spill by employing their vessels in oil spill response operations.

The Claimant has alleged to have sustained lost profits damages in the amount of \$1,353,678.91, 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 16 January 2011 through 9 February 2011. As such, the Claimant is not entitled to recover loss of profits or impairment of earning capacity damages in any amount.

c. Destruction of Real or Personal Property Damages \$733,929.18

The OSLTF is available to pay uncompensated removal costs or damages, including certain real or personal property damages, incurred as a result of the oil spill. In this instance, however, the alleged property damages to the Claimant's vessel are not "uncompensated," as they were incurred as a result of the Claimant voluntarily conducting for profit oil spill response operations at an agreed upon contractual rate. Accordingly, while the Claimant may be dissatisfied at the amount of compensation they received for the work performed, the damages are not considered uncompensated and are not OPA compensable.

Claimant voluntarily engaged in oil spill response operations, thereby subjecting his vessels to the harm for which they now seeks compensation. To evidence that his vessel's under coatings were damaged by Deepwater Horizon oil, the Claimant has submitted information relating to the dry-docking and repair of the undercoatings of Coast Guard vessels engaged in oil spill operations. The Claimant's evidence is misplaced, however, because of the difference in the nature of the response operations in which the two types of vessels were engaged. Coast Guard cutters respond to oil spills as part of a Congressionally mandated pollution response mission. While certain costs are associated with the "burn rate" charged for that Coast Guard asset, RP's remain liable for real or personal property damages resulting from the oil spill as opposed to other factors incorporated in the "burn rate" such as a mechanical malfunction unrelated to physical oiling.

To the contrary, the Claimant's vessels were voluntarily operating in oiled waters pursuant to a profit making venture under the defined terms of a contract. Oil Spill Response Organizations and other commercial tradesmen who engage in oil spill response operations are expected to negotiate favorable contractual terms to cover the costs associated with responding in the environment in which they operate.

Further, pursuant to the contractual agreement between Cal Dive and the Claimant dated 03 June 2010, it appears that the Claimant (owner) indemnified all parties from "any property damage suffered."¹³ Here, the Claimant knew that they would be operating in oiled waters from the Deepwater Horizon incident and willingly assumed the risk to take the vessel from its off-hire status in Groves, Texas to operate for Cal Dive in Mobile, Alabama on 08 June 2010.¹⁴ For the

¹³ Charter Contract dated 02 June 2010 at section 11.

¹⁴ Enclosure 1 at pages 1-4.

foregoing reasons, this claim for real or personal damages in the amount of \$733,929.18 is likewise denied.

d. Claim Assessment Costs \$48,006.15

Under 33 U.S.C. § 2701(5) “damages” means damages specified in section 2702 (b) of this title, and includes damage assessment costs. Section 2702(b) lists damage categories provided for by OPA, including, loss of profits or impairment of earning capacity, and real or personal property. If a claimant is unable to prove that they have indeed sustained OPA-compensable damages within one of the categories listed in the statute, then any assessment costs associated with these unproven damages, would likewise be denied compensation under OPA.

In this instance, because the Claimant’s alleged damages are not OPA-compensable it follows that the assessment of non-compensable damages are likewise not compensable.

e. 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.”¹⁵ 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.¹⁶ As such, the NPFC would be precluded from making any payment on this claim.

According to 33 U.S.C. § 2712 (f),

[p]ayment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.

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. . .”¹⁷ 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.

¹⁵ 33 C.F.R. § 136.103(d).

¹⁶ 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.

¹⁷ Response to NPFC request for additional information, 15 April 2013.

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.¹⁸

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. The NPFC further 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, 2017,¹⁹ 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

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

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

companies settled and voluntarily dismissed with prejudice its claims against BP via a Notice of Voluntary Dismissal(s) With Prejudice dated April 13, 2016.²⁰

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, 2016.²¹ 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. . ."²²

Based on the foregoing, this claim is 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.

[REDACTED]

Claim Supervisor: [REDACTED]

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

Supervisor Action: *Denial on reconsideration approved*

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

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

²² Response to NPFC request for additional information, 15 April 2013.