

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd., Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
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CERTIFIED MAIL-RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 8061

5890/DWHZ
21 December 2011

Sally's Seafood
Attn: [REDACTED]
3242 Dauphin Street
Mobile, Alabama 36606

Re: Claim Number: N10036-1465

Dear [REDACTED]:

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 your claim number N10036-1465 involving the Deepwater Horizon oil spill. Please see the enclosed 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. If, however 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 N10036-1465.

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

Enclosures: (1) Claim Summary/Determination Form
(2) Evidence Provided by the Claimant in Support of Claim N10036-1465

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1465
Claimant	Sally's Seafood
Type of Claimant	Business
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$369,000.00

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 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.

CLAIM AND CLAIMANT

On 04 October 2011, Quyen T. Hua, on behalf of Sally's Seafood (collectively, the Claimant) presented an Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$369,000.00 in loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill.¹

The Claimant is a seafood restaurant located in Mobile, Alabama.² The Claimant asserted that, due to the Deepwater Horizon oil spill, she was unable to obtain seafood from the Gulf of Mexico for her business.³ As well, although she was able to obtain imported seafood for sale, the difference in quality from the Gulf of Mexico seafood resulted in a drop of customers patronizing her restaurant.⁴ Lastly, the Claimant asserted that a contract for the sale of her business was cancelled as a result of the oil spill.⁵

The Claimant's alleged damages include the initial contract price of the business sale (\$269,000.00)⁶, although the Claimant didn't provide an exact calculation of how the other \$100,000.00 in lost profits from the restaurant were determined.

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 exclusive economic zone is liable for removal costs and damages. 33 U.S.C. § 2702(a).

¹ The Claimant initially presented a claim for \$100,000.00 in lost of profits and impairment of earnings capacity and \$269,000.00 in real or personal property damages. Considering that the real or personal property damages claimed by the Claimant are for lost profits from a purported sale of the Claimant's business and the Claimant only presented loss of profits damages to the GCCF, the NPFC reclassified the \$269,000.00 in property damages to loss of profits and impairment of earning capacity.

² Optional OSLTF Claim Form received 04 October 2011.

³ Optional OSLTF Claim Form received 04 October 2011.

⁴ Optional OSLTF Claim Form received 04 October 2011.

⁵ Optional OSLTF Claim Form received 04 October 2011.

⁶ PHONECONE between the NPFC and the Claimant's Representative (Lon Vo) on 1 December 2011.

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 U.S.C. § 2702(b)(2)(E).

The OSLTF, which is administered by the NPFC, 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. With certain exceptions a claim must first be presented to the responsible party. 33 U.S.C. § 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 U.S.C. § 2713(c).

Pursuant to the claims regulations, 33 C.F.R. § 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 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 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.

DETERMINATION OF LOSS

The Claimant's Submission to the OSLTF

In support of her claim, the Claimant submitted all of the documentation listed in enclosure (2).

Prior to presenting this claim to the NPFC, the Claimant filed a claim with BP on 25 June 2010.⁷ The Claimant did not receive any payment from BP.⁸ The Claimant then filed an Emergency Advance Payment (EAP) claim with the GCCF for loss of profits on 03 September 2010 in the amount of \$20,000.00.⁹ The Claimant was assigned Claimant ID # 1093233 and Claim # 52111. The GCCF issued payment on the EAP claim on 25 September 2010 in the amount of \$20,000.00.¹⁰ Additionally, the Claimant filed an Interim Payment I (ICQ12011) claim with the GCCF for loss of profits on 21 January 2011 in the amount of \$369,000.00.¹¹ The Claimant was assigned Claim # 9237133. The GCCF issued payment on the Interim I claim on 05 April 2011 in the amount of \$1,000.00.¹² Lastly, the Claimant filed an Interim Payment II (ICQ22011) claim with the GCCF on 06 June 2011 in the amount of \$369,000.00.¹³ The Claimant was assigned Claim # 9395130. The GCCF issued payment on the Interim II claim on 31 October 2011 in the amount of \$11,013.52.¹⁴

Based upon the evidence provided by the Claimant, it appears that the subject matter for the Claimant's GCCF claims is the same as the subject matter of the claim before the NPFC, i.e., that due to the Deepwater Horizon oil spill, the Claimant could not obtain Gulf of Mexico seafood, suffered reduced customer demand due to selling imported seafood, and was lost a contract for the sale of her business. The NPFC deems the Claimant's GCCF claims to be properly presented to the RP and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC Claim N10036-1465 considers and addresses the earnings claimed in the Claimant's claim presented to the responsible party, specifically; GCCF Claim #'s 9237133 (ICQ12011) and 93951320 (ICQ22011).

NPFC Determination

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 documentation presented by the Claimant.

1. Availability of Gulf Seafood

The Claimant asserted that, due to the Deepwater Horizon oil spill, she was unable to obtain seafood from the Gulf of Mexico to sell at her restaurant.¹⁵ The Claimant further explained that prices went up for seafood and she was completely unable to obtain oysters.¹⁶ As well, the Claimant stated that, although she was able to obtain imported seafood from China, her customer base was uninterested in purchasing non-Gulf seafood and refrained from patronizing the restaurant.¹⁷ However, the Claimant failed to prove that she was unable to obtain seafood from the Gulf of Mexico.

The NPFC contacted the suppliers for whom the Claimant provided invoices for from the pre-spill period in 2009 and 2010. The NPFC was informed by two of the Claimant's suppliers, US

⁷ Report from the GCCF dated 21 November 2011.

⁸ GCCF Determination Letter dated 05 April 2011.

⁹ Report from the GCCF dated 21 November 2011.

¹⁰ GCCF Notice of Determination Emergency Advance Payment dated 25 September 2010.

¹¹ Report from the GCCF dated 21 November 2011.

¹² GCCF Re-Review Determination Letter on Final Payment Claim dated 27 May 2011.

¹³ Report from the GCCF dated 21 November 2011.

¹⁴ GCCF Determination Letter dated 31 October 2011.

¹⁵ Optional OSLTF Claim Form received 04 October 2011.

¹⁶ PHONECON between the NPFC and Lon Vo on 01 December 2011.

¹⁷ Optional OSLTF Claim Form received 04 October 2011.

Foods¹⁸ and Jubilee Seafood,¹⁹ that they retained inventory on shrimp (US Foods and Jubilee Foods) and oysters (Jubilee Seafood) from the Gulf of Mexico in 2010 and had the products available for sale. Consequently, if the Claimant did not have oysters and other seafood to sell, it was an independent business decision by the Claimant not to purchase these products at a higher price and thus not a result of the Deepwater Horizon oil spill.

2. No Uncompensated Loss

The Claimant asserted she lost income in 2010 and 2011 as a result of the Deepwater Horizon oil spill.²⁰ The Claimant, however, failed to prove that she suffered an uncompensated loss due to the Deepwater Horizon oil spill. Based on a review of the documentation provided by the Claimant, the NPFC has concluded that the Claimant has already been fully compensated by the responsible party (RP) for all potential losses sustained by the Deepwater Horizon oil spill. The GCCF has paid the Claimant \$32,013.52²¹, which exceeds the potential losses for the Claimant as calculated by the NPFC. Notably, in addition to the monies received from the GCCF, the Claimant did later sell the business for \$6,000.00, as well as the buyer taking responsibility for \$4,000.00 in debt from the Claimant.²²

3. Loss of Sale of the Business

The Claimant asserted that a contract for the sale of Sally's Seafood was cancelled due to the Deepwater Horizon.²³ However, the written contract presented to the NPFC failed to prove that a binding agreement to purchase the business was ever reached between the Claimant and the potential buyer. The contract dictated that Nat Paengpongsavanh was to purchase the Claimant's business on 01 November 2010 for a total of \$269,000.00.²⁴ Yet, additional language in the contract and the circumstances of the negotiation stripped the contract of any actual enforceability on the part of the Claimant.

First, the \$6,000.00 deposit given by the buyer was consideration to have exclusive purchase rights for a year; it did not serve as consideration for the actual purchase of the business. The contract explicitly states that the buyer has yet to "make a decision whether to buy her business or not." Second, the \$6,000.00 deposit was fully refundable to the buyer "For any reason that I decide not to purchase Sally's Seafood."²⁵

When contacted by the NPFC, the buyer indicated that, at the time of the contract, she had not been able to make an investigation into the Claimant's financial records to determine if the presented sale price was appropriate or not.²⁶ Further, the buyer informed the NPFC that, although it wasn't in the contract, the buyer would only be required to put down an additional \$4,000.00 if she decided to purchase the business, with the rest of the financing being covered under an installment plan.²⁷ When the NPFC inquired about the nature of the installment plan, it

¹⁸ PHONECON between the NPFC and US Foods dated 07 December 2011.

¹⁹ PHONECON between the NPFC and Jubilee Seafood dated 07 December 2011.

²⁰ Optional OSLTF Claim Form received 04 October 2011.

²¹ GCCF Determination Letter dated 31 October 2011.

²² PHONECON between the NPFC and Ms. Paengpongsavanh dated 06 December 2011.

²³ Optional OSLTF Claim Form received 04 October 2011, document titled 'Buyer and Seller Agreements' dated 01 November 2009.

²⁴ Document titled 'Buyer and Seller Agreements' dated 01 November 2009.

²⁵ Document titled 'Buyer and Seller Agreements' dated 01 November 2009.

²⁶ PHONECON between the NPFC and Ms. Paengpongsavanh dated 06 December 2011.

²⁷ PHONECON between the NPFC and Ms. Paengpongsavanh dated 06 December 2011.

was informed that the details regarding the structure of the payments had not been negotiated or agreed upon and there was no financing from third party sources in place.²⁸

Considering all the avenues for escape for the buyer contained within the contract, as well as the superficial nature given to the financial assessment and financing of the sale, the NPFC is unable to determine that there was a legally enforceable contract at the price of \$269,000.00 for the sale of the business. Consequently, the Claimant failed to prove that the loss of the sale of the business at \$269,000.00 was due to the Deepwater Horizon oil spill.

This claim is denied because the Claimant failed to meet her burden to demonstrate (1) 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 and (2) that the Claimant has suffered an uncompensated loss 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.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *12/21/11*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

²⁸ PHONECON between the NPFC and Ms. Paengpongsavanh dated 06 December 2011.

Enclosure (2)

Evidence Presented by the Claimant in Support of Claim N10036-1465

- Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form, dated 04 October 2011;
- Bank Transfer Documents dated 20 September 2011;
- Credit Promissory Note dated 21 July 2010;
- Letter from Jane E. Johnson to the Claimant dated 31 January 2009;
- Statement of Revenues and Expenses for the Claimant for the year ending 31 December 2008;
- Statement of Revenues and Expenses for the Claimant for the year ending 31 December 2009;
- Statement of Revenues and Expenses for the Claimant for April 2011;
- Letters from Cummings & Associates to the Claimant dated 11 May 2010, 14 September 2010, 28 October 2010 and 06 January 2011.
- Document titled 'Cancellation of Lease' dated 06 January 2011;
- Notary Public Declaration dated 06 January 2011;
- Notary Public Declaration dated 17 January 2011;
- Letter from Nat Paenpongsavanh to the Claimant dated 31 May 2010;
- Document titled 'Buyer and Seller Agreements' dated 01 November 2009;
- Letter from Marilei Seafood dated 05 July 2010;
- Letter from the Claimant authorizing the NPFC to obtain GCCF documentation dated 04 October 2011;
- GCCF Claim Form;
- GCCF Interim Payment Claim Form dated 20 January 2011;
- Authorization from the Claimant to allow her daughter to handle the claim, Photocopies of the Claimant's Alabama Driver License and Social Security Card, Photocopies of the Claimant's daughter's Alabama Driver License and Social Security Card.
- Letter from Cummings and Associates to the Claimant dated 06 January 2011;
- Letters from Jane Johnson to the Claimant dated 18 January 2011 (2);
- Statements of Revenues and Expenses for the Claimant for months ending 31 October 2010, 30 November 2010;
- GCCF Interim Payment Claim Form dated 11 June 2011;
- Letter from Jane Johnson to the Claimant dated 30 August 2011;
- Statement of Revenues and Expenses for the Claimant for month ending 31 January 2011;
- Letter from Jane Johnson to the Claimant dated 30 August 2011;
- Statement of Revenues and Expenses for the Claimant for month ending 28 February 2011;
- Letter from Jane Johnson to the Claimant dated 20 May 2011;
- Statement of Revenues and Expenses for the Claimant for month ending 31 March 2011;
- Letter from Jane Johnson to the Claimant dated 25 May 2011;
- Statement of Revenues and Expenses for the Claimant for month ending 30 April 2011;
- Document describing the transfer of the lease from the Claimant to Nat Paenpongsavanh dated 17 May 2011;
- Statement of Revenues and Expenses for the Claimant for the month ended 31 July 2010;
- Letter from Cummings and Associates dated 14 September 2010;
- Letter from the Claimant stating a change of address;
- Letter from the Claimant dated 23 September 2010;
- Letter from Jane Johnson to the Claimant dated 23 September 2010;

- Statement of Revenues and Expenses for the Claimant for the month ending 31 May 2010;
- Letter from Jane Johnson to the Claimant dated 23 September 2010;
- Statement of Revenues and Expenses for the month ending 30 June 2010;
- Letter from Jane Johnson to the Claimant dated 23 September 2010;
- Statement of Revenues and Expenses for the month ending 31 July 2010;
- Letter from Jane Johnson to the Claimant dated 23 September 2010;
- Statement of Revenues and Expenses for month ending August 31, 2010;
- 2009 Federal Tax Return;
- 2008 Federal Tax Return;
- Photographs of the exterior and interior of the Claimant's restaurant;
- Letter from Cummings and Associates dated 11 June 2008;
- Lease agreement between the Claimant and Northside, Ltd. dated 25 October 2005;
- Letter from the Claimant dated 30 September 2010;
- Promissory Note dated 21 July 2010;
- GCCF Supplemental Request Form For Emergency Advance Payments for Lost Earnings or Profits dated 04 October 2010;
- Letter from Cummings and Associates dated 28 October 2010;
- Statement of Revenues and Expenses for month ending 31 December 2010;
- Letter from Jane Johnson to the Claimant dated 09 February 2011;
- Partial 2010 Federal Income Tax Return;
- Promissory Note dated 21 July 2010;
- Hancock Bank Funds Transfer Request Form dated 17 November 2010;
- Hancock Bank Funds Transfer Request Form dated 28 October 2010;
- Statement of Revenues and Expenses for month ending 30 September 2010;
- Letter from Jane Johnson dated 02 November 2010;
- Price List from Jubilee Foods, Inc. dated 12 April 2011;
- Invoice from Sea Pearl Seafood Co., Inc. dated 23 February 2009;
- Invoice from US Foodservice dated 18 June 2009;
- Invoice from Anna's Seafood, Inc. dated 05 June 2009;
- Invoice from J.O. Acree Company, Inc. dated 12 February 2009;
- Invoice from Merchants Foodservice dated 15 January 2010;
- Invoice from International Oceanic Enterprises dated 07 July 2009;
- Invoice from Sea Pearl Seafood Co., Inc. dated 15 January 2009;
- Partial 2007 Federal Income Tax Return;
- 2008 Federal Income Tax Return;
- Letter from Jane Johnson to the Claimant dated 29 June 2010;
- Statement of Revenues and Expenses for year ending 31 December 2009;
- Document titled 'Buyer and Seller Agreements' dated 01 November 2009;
- Letter from the Claimant dated 01 June 2010;
- Letter from Nat Paengpongsavanh to the Claimant dated 01 May 2010;
- Letter from Nat Paengpongsavanh to the Claimant dated 31 May 2010;
- Letter from AT&T to the Claimant dated 24 May 2010;
- Payment stub from SIUPREM, Inc. [undated];
- Invoice from MobileGas to the Claimant for period ending 20 May 2010;
- Invoice from Alabama Power for period ending 12 May 2010;
- Menu from the Claimant's business;
- Bill from Chase Bank for period ending 22 November 2009;
- Letter from the Claimant dated 03 June 2006;
- Statement of Revenues and Expenses for month ended 30 April 2010;

- Document titled 'Notice of Ad Valorem Taxes & Non-Ad Valorem Assessments' for payments received 29 December 2008;
- Letter from the Claimant dated 05 July 2010;
- GCCF Letter dated 29 January 2011;
- GCCF Determination Letter dated 05 April 2011;
- GCCF Re-Review Determination Letter dated 27 May 2011;
- GCCF Determination Letter dated 31 October 2011;
- Profit and Loss Statement for the Claimant for June 2010;
- Statement of Revenues and Expenses for the Claimant for the month ending 30 April 2010;
- 2009 State of Alabama Income Tax Return; and
- 2009 Federal Income Tax Return.