

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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Arlington, VA 20598-7100
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5890
11 January 2011

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 5749

Destin Beachwear & Accessories, Inc., d/b/a Beach Bums
Attn: [REDACTED]
11111 Highway #98-West
Miramar Beach, FL 32550

RE: Claim Number: N10036-1522

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 the claim number N10036-1522 involving Deepwater Horizon. 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 N10036-1522.

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: (1) Claim Summary / Determination Form
(2) Documentation Presented by the Claimant, N10036-1522

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N10036-1522
Claimant	: Destin Beachwear & Accessories, Inc., d/b/a Beach Bums
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: \$1,057,476.00

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 26 October 2011, Sherri Jarvis, President of Destin Beachwear & Accessories, Inc. d/b/a Beach Bums, (jointly referred to as “the Claimant”) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$1,057,476.00 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.¹

The Claimant owns a retail store in Miramar Beach, Florida, specializing in bathing suits, resort wear, beach accessories and apparel.² The Claimant asserts that her primary customers are tourists.³ The Claimant asserts she had already bought inventory for the [summer 2010] Busy Season, but “[t]ourism was brought to a standstill just as Busy Season was kicking in”.⁴

The business has operated in Miramar Beach for 21 years.⁵ The Claimant stated that the BP oil spill brought the 2010 tourist season to a standstill, just as the season had begun.⁶ The Claimant also indicates that she had begun “ordering merchandise in November 2009 for the [summer 2010] busy season and had received 90% of the spring and summer deliveries when the oil spill occurred.”⁷ She identified the peak season as “from March 1st through September 4th, covering tourist[s] and the periods of Spring Breaks, Easter, Memorial Day, Summer Vacations, July 4th and Labor Day.”⁸

To mitigate damages, the Claimant indicates that she aged merchandise quickly and offered massive markdowns. In addition, the Claimant indicated that she normally had five full-time employees and three part-time employees, adding as many as 10 part-time employees during the busy tourist season.⁹ During 2010, the Claimant indicated she was “... forced to reduce staff to

¹ Optional OSLTF Claim Form signed 7 October 2011 and received 26 October 2011.

² www.fishnfool.com/destinlinks.html, accessed 14 December 2011.

³ Claimant letter to NPFC dated 18 November 2011 and Claimant letter to GCCF dated 26 October 2010.

⁴ Optional OSLTF Claim Form signed 7 October 2011 and received 26 October 2011.

⁵ Claimant letter to NPFC dated 18 November 2011.

⁶ Optional OSLTF Claim Form signed 7 October 2011 and received on 26 October 2011.

⁷ Claimant letter to NPFC dated 18 November 2011.

⁸ Claimant letter to NPFC dated 18 November 2011.

⁹ Claimant letter to NPFC dated 18 November 2011.

the bare minimum, because traffic was the worst in the history of the summer peak season.”¹⁰ Additionally, she stated, “There was no need for any new hires and those who had been hired were let go as I had to cut back in every way possible.”¹¹

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 waters or adjoining shorelines or the exclusive economic zone, as described in § 2702(b) of OPA.

The OSLTF which is administered by the NPFC, is available, pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136, to pay claims for uncompensated damages. 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.
- (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.

¹⁰ Claimant letter to NPFC dated 18 November 2011.

¹¹ Claimant letter to NPFC dated 18 November 2011.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

On 26 October 2011, the Claimant presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$1,057,476.00 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.¹²

The Claimant asserts having presented a claim to BP in June 2010,¹³ an Emergency Advance Payment (EAP) Claim to the GCCF on 29 October 2010 in the amount of \$438,274.00¹⁴ and an Interim Payment (IP) Claim to the GCCF on 10 January 2011 in the amount of \$266,020.00, under GCCF Claimant ID # 1085777.¹⁵ The NPFC conducted an independent investigation and confirmed presentment to BP on 7 June 2010, but was unable to confirm the amount of the claim to BP.¹⁶ The NPFC's investigation also confirmed EAP and IP Claims to the GCCF in the amounts of \$438,274.00 and \$266,020.00 and presentment dates to the GCCF of 28 September 2010 and 17 January 2011 for the EAP and IP Claims, respectively.¹⁷ The NPFC also confirmed that Claimant ID # 1085777 applied to the GCCF claims and that neither had been denied.¹⁸ The Claimant indicates that it has been 18 months since presenting her claim to BP and 12 months since submitting her first claim to the GCCF; she is not satisfied with the GCCF's payments to date.¹⁹

To support this claim the Claimant presented a large amount of documentation, which is summarized in Enclosure (2). In sum, the majority of the Claimant's documentation is financial in nature, including corporate tax returns,²⁰ personal tax returns,²¹ Profit & Loss Statements for 2007, 2008, 2009, 2010 and 2011 (through October),²² Monthly Florida Sales and Use Tax Returns,²³ Daily Sales summaries,²⁴ Payroll Details,²⁵ and two years' of Sales Audit Daily Summary Reports.²⁶ The Claimant also presented evidence of two payments from the GCCF, in total \$41,952.03.²⁷

¹² Optional OSLTF Claim Form signed 7 October 2011 and received 26 October 2011. The Summary of Claim Loss enclosure includes a deduction of payments made on the EAP and IP Claims.

¹³ Claimant's fax to GCCF dated 3 November 2010.

¹⁴ Destin Beachwear fax to GCCF dated 1 November 2010 and Optional OSLTF Claim Form signed 7 October 2011 / received 26 October 2011.

¹⁵ GCCF Emergency Advance Payment Claim Form dated 29 October 2010 and GCCF Interim Payment Claim Form dated 20 January 2011.

¹⁶ GCCF – U.S. Coast Guard Report as of 21 November 2011.

¹⁷ GCCF – U.S. Coast Guard Report as of 21 November 2011. This report also indicates the Claimant's having filed an additional IP Claim with the GCCF for Real/Personal Property damage, but this claim is not relevant to the claim before the NPFC.

¹⁸ GCCF – U.S. Coast Guard Report as of 21 November 2011.

¹⁹ Optional OSLTF Claim Form signed 7 October 2011 and received 26 October 2011, GCCF check #00112465 dated 8 November 2010 and GCCF check #00417430 dated 24 June 2011.

²⁰ Income Tax Return for S Corporation for years 2007, 2008, 2009 and 2010.

²¹ Individual Income Tax Returns (Forms 1040) for 2008 and 2009.

²² Destin Beachwear & Accessories/Beach Bums annual Profit & Loss statements for January through December 2007, 2008, & 2009 and monthly Profit & Loss statements for 2007, 2008, 2009, 2010 & 2011 (through October).

²³ Sales and Use Tax Return, Florida Form DR-15 for January through December 2008, January through December 2009, and January through June 2010.

²⁴ Destin Beachwear Daily Sales summaries for January through December 2008, 2009 and 2010

²⁵ Destin Beachwear and Accessories Inc., Weekly Payroll Details 30 March 2010 through 13 July 2010.

²⁶ Sales Audit Daily Summary Reports, 1 January 2007 through 31 December 2007 and 1 January 2010 through 31 December 2010.

²⁷ GCCF Check Number 00112465 dated 8 November 2010 and GCCF Check Number 0417430 dated 24 June 2011.

The Claimant calculated losses of \$1,057,476 by averaging gross profits for 2008, 2009 and 2010, then using the “original BP formula” of multiplying by two, and finally subtracting payments made by the GCCF.²⁸

NPFC Determination

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 waters or adjoining shorelines or the exclusive economic zone, as described in Section 2702(b) of OPA. Pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136, the OSLTF, which is administered by the NPFC, is available to pay claims for uncompensated damages.

After an initial review, the NPFC sent the Claimant a letter requesting additional information to evaluate the claim further. The letter requested, among other things, additional financial documentation to support that the Claimant sustained lost profits & earnings, as well as other documentation supporting and explaining how the Deepwater Horizon oil spill caused the Claimant’s losses. The Claimant was given 14 days to respond to the letter, dated 7 November 2011.

On 18 November 2011, the Claimant responded in part to the information request by providing explanations, payroll records from 30 March 2010 to 13 July 2010, monthly Profit and Lost Statements for 2010 and 2011, copies of two GCCF payment checks, a replacement page for the original presentation, evidence of paying Walton County Sales & Use Taxes and a copy of Claimant’s letter of 28 October 2011 that requested the GCCF to provide the NPFC with a copy of her GCCF claim.²⁹

The NPFC has considered all documentation presented by the Claimant.

The NPFC requested that the Claimant provide evidence or documentation that would indicate that the claimed damages were caused by the Deepwater Horizon oil spill and not other factors. The NPFC will not presume causation or a lack thereof based upon business type or location. Causation is an element of every claim that must be proven by the Claimant. Here, the Claimant has asserted, but not documented, that the BP oil spill brought 2010 tourism in Destin/Miramar, Florida, to a standstill.³⁰ If the Claimant submits a request for reconsideration to the NPFC, evidence linking her alleged loss to the Deepwater Horizon oil spill must be submitted in order for her claim to be successful.

The Claimant estimated lost profits for 2010 to the NPFC of \$1,057,476.³¹ Amounts claimed to the NPFC in excess of the amount claimed to the RP/GCCF are denied due to lack of presentment to the RP.³² Of the \$1,057,476.00 claimed to the NPFC, \$619,202.00 is denied for

²⁸ Summary Claim of Loss attachment to Claimant’s 7 October 2011 letter to the NPFC and the Claimant’s 18 November 2011 letter to the NPFC.

²⁹ Claimant letter to NPFC dated 18 November 2011.

³⁰ Optional OSLTF Claim Form signed 7 October 2011 and received 26 October 2011.

³¹ Optional OSLTF Claim Form signed 7 October 2011 and received 26 October 2011. The Summary of Claim Loss enclosure includes a deduction of payments made on the EAP and IP Claims.

³² 33 C.F.R. § 136.103(a) requires that, except as provided in paragraph (b) of the section, “all claims for removal costs or damages must be presented first to the responsible party or guarantor . . .”. Subparagraph (b) does not apply to this claim.

lack of presentment to the RP. Amounts claimed to the NPFC that were properly presented to the RP/GCCF (\$438,274.00) are addressed below.

The Claimant has shown profits of \$41,639.83 and \$30,735.09 for 2009 and 2010, respectively.³³ The Claimant has also shown payments from the RP/GCCF that total \$41,952.03.³⁴ The Claimant has failed to demonstrate that she sustained an uncompensated loss of profits in 2010 as compared to previous periods.

The NPFC denies the claim because (1) the Claimant has failed to demonstrate that her alleged loss of profits was 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) the Claimant failed to demonstrate a loss of profits for 2010 in excess of the amount paid by the RP/GCCF.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *1/11/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

³³ Destin Beachwear & Accessories/Beach Bums monthly Profit & Loss statements for 2009 and 2010.

³⁴ GCCF Check Numbers 00112465 dated 8 November 2010 and GCCF Check Number 0417430 dated 24 June 2011.

Enclosure (2)

Documentation Presented by Claimant N10036-1522

Below is a listing of documentation provided by the Claimant:

- Optional OSLTF Claim Form signed 7 October 2011 and received 26 October 2011.
- Claimant letter to NPFC dated 7 October 2011.
- GCCF letter dated 9 October 2010 regarding completion of an online claim form.
- Email to GCCFInfo dated 30 October 2010 regarding password.
- Destin Beachwear fax to GCCF dated 1 November 2010.
- Email to GCCFInfo dated 2 November 2010 regarding password.
- Email from GCCFInfo dated 3 November 2010 regarding password.
- GCCF letter dated 31 January 2011 regarding documentation.
- GCCF letter dated 24 June 2011.
- GCCF letter dated 9 August 2011 on Expiration of Re-Review Option for Interim/Final Payment Claim.
- GCCF letter dated 20 September 2011 regarding final payment offer.
- Undated Attachment B to GCCF letter.
- Undated Attachment A to GCCF letter.
- Letter of 28 October 2011 asking the NPFC to request a copy of the Beach Bums claim file from the GCCF.
- Four GCCF emails to NPFC Staff dated 7 November 2011 with attachments regarding GCCF Claimant #1085777.
- GCCF Emergency Advance Payment Claim Form dated 29 October 2010.
- GCCF Claim Form Generated Online 11/06/2010 for EAP Claim in the amount of \$251,640.00.
- GCCF Interim Payment Claim Form dated 10 January 2011.
- Claimant Summary of Loss of Profits and Earnings Capacity L (undated).
- Beach Bums Annual Profit & Loss Statement for 2007, January through December.
- Beach Bums Annual Profit & Loss Statement for 2008, January through December.
- Beach Bums Annual Profit & Loss Statement for 2009, January through December.
- Destin Beachwear & Accessories, Inc. Annual Profit & Loss Statement Comparison, for Jan-Dec 09 and for Jan-Dec 08, with % Change.
- Destin Beachwear & Accessories, Inc. Annual Profit & Loss Statement Comparison, for Jan-Jun 10 and for Jan-Jun 09, with % Change.
- Destin Beachwear & Accessories, Inc. Monthly Profit & Loss Statement Comparisons, for individual months Jan-Dec 09 and for Jan-Dec 08, with % Change.
- Destin Beachwear & Accessories, Inc. Monthly Profit & Loss Statement Comparisons, for individual months Jan-Sept. 10 and for Jan-Sept. 09, with % Change.
- Destin Beachwear & Accessories, Inc. Profit & Loss Statements for July 2008, compared to July 2007, with % Change.
- Destin Beachwear & Accessories, Inc. Profit & Loss Statement Comparisons, for the periods May-Dec. 10 and for May-Dec. 07.
- 2007 Federal Income Tax Form 1120S with attached Schedules A, B, K, L, M-1 & M-2; Form 4562; and Statements 1 through 14.
- 2007 Schedule K-1 (Shareholder 1 not identified).
- 2007 Schedule K-1 for Shareholder Charles L. Jarvis.

- 2008 Federal Income Tax Form 1120S with attached Schedules A, B, K, L, M-1 & M-2; and Statements 1 through 14.
- 2008 Schedule K-1 for Shareholder Sherri B. Jarvis
- 2008 Schedule K-1 for Shareholder Charles L. Jarvis.
- 2009 Federal Income Tax Form 1120S 1120-S with attached Schedules A, B, K, L, M-1 & M-2; and Statements 1 through 11.
- 2009 Schedule K-1 for Shareholder Sherri B. Jarvis
- 2009 Schedule K-1 for Shareholder Charles L. Jarvis.
- 2009 Form 8879-S.
- 2010 Federal Income Tax Form 1120S with attached Schedules A, B, K, L, M-1 & M-2; and Statements 1 through 11.
- 2007 Form 1040 for Charles & Sherri Jarvis, with Schedules A, B, D, D-1, E and SE, and Form 1116, with worksheets and statements.
- 2008 Form 1040 for Charles & Sherri Jarvis, with Schedules A, B, D, D-1, E and SE, and Form 1116, with worksheets and statements.
- 2009 Form 1040 for Charles & Sherri Jarvis, with Schedules A, B, D, D-1, E and SE, and Form 1116 & Form 8582, with worksheets and statements.
- 2008 Walton County Tangible Personal Property Tax Return, Destin Beachwear and Accessories, Inc.
- Sales and Use Tax Return, Florida Form DR-15 for January through December 2008.
- Sales and Use Tax Return, Florida Form DR-15 for January through December 2009.
- Sales and Use Tax Return, Florida Form DR-15 for January through June 2010.
- GCCF Claimant #1085777 Monthly Sales Audit Daily Summary Reports for January 2010 through December 2010.
- GCCF Claimant #1085777 Monthly Sales Audit Daily Summary Reports for January 2007 through December 2007.
- Destin Beachwear Daily Sales summaries by month, January through December 2008, 2009 and 2010.
- Undated spreadsheet, Destin Beachwear & Accessories d/b/a Beach Bums, showing 2007 Monthly Sales and 2010 Monthly Sales.
- Beach Bums comparison of 2007 Monthly Sales to 2010 Monthly Sales.
- Destin Beachwear and Accessories Inc., Weekly Payroll Details 30 March 2010 through 13 July 2010.