

## CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N10036-1648
Claimant	: KP LLC
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: \$103,100.00

### **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 claims for certain individual and business claims on behalf of BP.

### **CLAIM AND CLAIMANT:**

On 20 January 2012, Mrs. Melinda Parsons, on behalf of KP, LLC (collectively, the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) originally seeking \$110,772.00 in loss of profits damages, and \$1,086,000 in diminution of value for the condominium.<sup>1</sup> Upon clarification by the NPFC<sup>2</sup> of OPA's real or personal property damage category, the Claimant withdrew this component of the claim, noting that they had not actually sold the property at the diminished value, and that the property was not physically damaged by oil.<sup>3</sup>

The Claimant owns a condominium unit in Gulf Shores, Alabama, which was first made available for rent approximately one month prior to the Deepwater Horizon oil spill.<sup>4</sup> The Claimant alleged that the oil spill and subsequent decrease in tourism caused the Claimant to sustain an uncompensated loss of rental income from September 2010 through May of 2011, totaling \$110,772.00.<sup>5</sup> The Claimant later amended this amount, reducing the claim for loss of profits damages to \$103,100.00.<sup>6</sup>

The Claimant alleged the oil spill caused tourists to avoid Gulf Shores and Orange Beach, causing the Claimant to sustain an uncompensated loss of rental income totaling \$103,100.00 from September 2010 to May 2011.<sup>7</sup> The Claimant calculated these losses by comparing actual rental revenue to rental revenue the Claimant would have earned, had the unit been fully booked for each week of the claimed loss period.<sup>8</sup>

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<sup>2</sup> NPFC Request for additional information, 10 February 2012

<sup>3</sup> Cover Letter, response to NPFC request for additional information, 10 February 2012.

<sup>4</sup> Letter from the Claimant to the GCCF, 27 August 2011.

<sup>5</sup> Optional OSLTF Claim Form, signed on 11 January 2012.

<sup>6</sup> Response to NPFC request for additional information, 10 February 2012.

<sup>7</sup> Response to NPFC request for additional information, 10 February 2012.

<sup>8</sup> Handwritten booking calendar, loss calculation sheets by month, prepared by Claimant.

Furthermore, the Claimant stated that losses presented in this claim were not compensated by the \$55,000.00 payment previously made to the Claimant by the GCCF. According to the Claimant, this payment covered only losses sustained from May to August 2010.<sup>9</sup>

Prior to presenting a claim to the Oil Spill Liability Trust Fund, on 23 August 2010, the Claimant presented a six-month Emergency Advance Payment (EAP) claim to the RP/GCCF, seeking \$55,000.00 in loss of profits and wages damages.<sup>10</sup> The Claimant was assigned Claimant ID # 1149772, and the EAP claim was assigned claim # 7786.<sup>11</sup> The RP/GCCF issued payment on this claim in the full amount of \$55,000.00 in November of 2010.<sup>12</sup>

Also on 23 August 2010, the Claimant submitted an Emergency Advance Payment (EAP2) claim to the RP/GCCF, seeking Real Property damages in the amount of \$926,000.00.<sup>13</sup> EAP2 was assigned claim # 7907 and was denied by the RP/GCCF.<sup>14</sup>

On 14 December 2012, the Claimant submitted a Supplemental claim to the RP/GCCF, seeking loss of wages and earnings damages in the amount of \$34,662.00.<sup>15</sup> This claim was assigned claim # 4063339, and was also denied.

On 9 September 2011, the Claimant submitted a Third Quarter Interim Claim (ICQ32011) to the RP/GCCF, seeking loss of wages and earnings damages in the amount of \$96,784.00.<sup>16</sup> In a letter dated 30 November 2011, the RP/GCCF issued a determination on the Claimant's ICQ32011, concluding that previous payments to the Claimant had fully compensated the Claimant for all sustained losses, and offering the Claimant \$25,000.00 as full and final payment.<sup>17</sup> As of the date of this determination, the Claimant has not accepted the final payment offer.

In a letter dated 30 January 2012, the NPFC requested that the Claimant provide certain additional information in support of this claim. Among other items, the NPFC requested "records of reservation cancellations due to the oil spill, including contact information for each cancelling party" and "a booking calendar, showing bookings from 2010 – present."<sup>18</sup> The NPFC also requested that the Claimant identify time periods in which the Claimant utilized the unit, so that it was not available for rent.<sup>19</sup> In response to these requests, the Claimant provided a handwritten record of bookings for December 2010 to August of 2011.<sup>20</sup> However, the Claimant failed to provide any evidence of cancelled rental reservations as a result of the oil spill. The Claimant also stated that because the condominium complex was relatively new, it would not be possible to provide comparable rental records to demonstrate the level of bookings of a similar unit in the period prior to the oil spill.<sup>21</sup>

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<sup>9</sup> Response to NPFC request for additional information, 10 February 2012.

<sup>10</sup> GCCF United States Coast Guard Report, 16 February 2012.

<sup>11</sup> GCCF United States Coast Guard Report, 16 February 2012.

<sup>12</sup> GCCF United States Coast Guard Report, 16 February 2012.

<sup>13</sup> GCCF United States Coast Guard Report, 16 February 2012.

<sup>14</sup> GCCF United States Coast Guard Report, 16 February 2012.

<sup>15</sup> GCCF United States Coast Guard Report, 16 February 2012.

<sup>16</sup> GCCF United States Coast Guard Report, 16 February 2012.

<sup>17</sup> GCCF Claimant Status, accessed on 5 March 2012.

<sup>18</sup> NPFC Request for additional information, 30 January 2012.

<sup>19</sup> NPFC Request for additional information, 30 January 2012.

<sup>20</sup> PHONECON: NPFC Staff and the Claimant, 9 February 2012.

<sup>21</sup> PHONECON: NPFC Staff and the Claimant, 9 February 2012.

The NPFC denied the claim originally on March 26, 2012 on the basis that in order to prove a claim for loss of profits and impairment of earning capacity damages, a Claimant must provide documentation sufficient to prove (1) that the Claimant sustained an actual financial loss, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill. The NPFC noted that tourism statistics reflected that tourism for the winter of 2010 and fall of 2011 was higher than in previous years and did not support Claimant's assertion that the oil spill caused a decrease in tourism and caused its loss of profits.

The NPFC informed the Claimant should she decide to pursue this claim on reconsideration, the Claimant should include detailed monthly profit and loss statements, in order to allow the NPFC to calculate the extent to which the \$55,000.00 payments previously made to the Claimant by the RP have compensated the Claimant's actual lost profits.

### **REQUEST FOR RECONSIDERATION:**

On May 22, 2012, the Claimant sent a request for reconsideration to the NPFC stating she would like the NPFC to reconsider her claim.

### **CLAIMANT'S REQUEST FOR RECONSIDERATION:**

The Claimant requested reconsideration which was received by the NPFC on May 22, 2012. The Claimant provided a two-page letter requesting reconsideration, copy of two-page GCCF Supplemental Request Form dated 11/21/10 requesting \$34,662.00 in lost profits; four-pages of handwritten notes for loss rental income from September 2010 through November 2010; news article entitled "Orange Beach developers want BP funds for Turquoise condo project" dated April 29, 2012 in AL.com; news article from National Geographic Daily News entitled "Gulf Oil Spill Pictures: Oiled Beaches Time Line"; news article from the Chief Organizer entitled "Oil Spill Tar Balls on Orange Beach", news article from National Geographic dated October 12, 2010 entitled "Aerial photo of shoreline in Orange Beach AL near Florida border; news article from NPR entitled "Reminders of BP's Oil Spill Linger Along Gulf Coast" dated October 28, 2010; news article from hiffingtonpost.com entitled "Oil Spill Continues To Wash Ashore in Gulf, BP Deep-Cleaning Beaches in Response"; news article entitled "Stress of oil spill still lingering in Orange Beach" from September 2010; news article entitled "Oil mat seen as threat to Orange Beach tourism" dated May 8, 2012; and news article entitled "Oil mat cleanup underway in Orange Beach".

Claimant asserts that she does not have historical data to provide to the NPFC since they just started renting their unit in March 2010 but that she can unequivocally say that given their experiences over the last two years, that their earning power was definitely diminished over the last quarter of 2010 and beyond to May 2011.

The news articles submitted by the Claimant focus on the Orange Beach area, the oil spill and tourism. The Claimant asserts that she is not in agreement with the NPFC's statistical data provided in its original denial determination. The Claimant asserts that the articles she has provided corroborate oil spill activity in the Orange Beach area during the time period for which she seeks compensation and as such she asserts that the articles verify that her area of Orange Beach was hit much harder than other areas of Gulf Shores and she doesn't believe the statistics used by the NPFC differentiate the areas.

### **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 CFR § 136.233, a claimant must establish loss of profits or impairment of earning capacity and that the loss was due to the destruction or injury to real or personal property or natural resources. The NPFC considered all the documentation submitted by the Claimant. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. 33 CFR 136.115(d).

The NPFC performed a *de novo* review of the entire claim submission upon reconsideration.

Upon consideration of all information and arguments made by the Claimant on reconsideration, the NPFC still cannot determine whether the \$55,000.00 EAP payment made by the RP to the Claimant fully compensated the Claimant. In the NPFC's initial determination, the NPFC stated that if the Claimant sought reconsideration, she should provide profit & loss statements to allow the NPFC to calculate their lost profits. To date, the Claimant has not provided the requested information. Instead, the Claimant is claiming lost revenue based on their handwritten booking calendar which lists straight rental rates. The Claimant is seeking to recover straight rental revenue plus cleaning fees of \$250.00 a week. The NPFC does not understand how the Claimant would be able to claim a cleaning fee as a loss unless they were doing the cleaning themselves which the NPFC finds unlikely since the Claimant resides in Georgia.

On reconsideration the Claimant asserts that if it were not for the oil spill, their unit would have been booked every single day between September 2010 and May 2011. The Claimant has provided no evidence to support this assertion. Condo occupancy rates for the winter months in Gulf Shores/Orange Beach are closer to 15-20% according to the Gulf Shores/Orange Beach Convention and Visitors Bureau (CVB). The Claimant has not provided evidence on reconsideration to show that this particular unit is always booked throughout the offseason.

The Claimant alleges on reconsideration that Gulf Shores/Orange Beach tourism statistics are not relevant for Orange Beach. The areas, however, are basically indistinguishable. The Gulf Shores/Orange Beach CVB (where the NPFC obtained the stats in the initial denial determination) includes stats from both areas. According to Google maps, the distance between the center of Gulf Shores and the center of Orange Beach is approximately 5 miles. The Claimant has not provided evidence to show why Gulf Shores/Orange Beach statistics are not relevant for Orange Beach.

The Claimant asserts on reconsideration that because the building was new at the time of the oil spill, they could not provide comparables showing that the unit subject of this claim had been booked from the May to September time period of the prior year. However, units at Turquoise were available for rent starting around June 2008, when the first occupancy notices were given. The Claimant should have been able to provide evidence of a similar unit's bookings from September 2009 through May 2010. The Claimant also has not provided booking data past October 2011, so the extent of the Claimant's bookings from September 2011 through May 2012 is not evident. As such, the NPFC cannot determine if the Claimant's condominium would have been booked every day for that period, without, at least being able to make the year-to-year comparison.

Finally, the Claimant still has not provided evidence to actually demonstrate lost profits and the extent to which the RP payment of \$55,000.00 may have fully compensated the Claimant for their alleged losses.

Based on the foregoing, the NPFC has determined that this claim is again denied upon reconsideration because the Claimant has failed to meet the burden to demonstrate a loss in the amount claimed or that the alleged loss 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.

Claim Supervisor: *Thomas Morrison*

Date of Supervisor's review: *8/16/12*

Supervisor Action: *Denial on reconsideration approved*

Supervisor's Comments:

U.S. Department of  
Homeland Security

**United States  
Coast Guard**



Director  
United States Coast Guard  
National Pollution Funds Center

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5890  
8/16/2012

**CERTIFIED MAIL – RETURN RECEIPT REQUESTED**  
Number: 7011 1570 0001 4803 7629

KP LLC  
ATTN: [REDACTED]  
230 West Paces Ferry Road NW  
Atlanta, GA 30305

RE: Claim Number: N10036-1648

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 claim number N10036-1648 involving the Deepwater Horizon oil spill. Please see the enclosed Claim Summary/Determination Form for further explanation.

Disposition of this reconsideration constitutes final agency action.

Sincerely,

Thomas S. Morrison  
Chief, Claims Adjudication Division  
U.S. Coast Guard

Encl: Claim Summary / Determination Form