

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  
Staff Symbol: (CA)  
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5890  
6 April 2012

CERTIFIED MAIL – RETURN RECEIPT REQUESTED  
Number: 7011 1570 0001 2446 2391

Kempco Development, LLC  
ATTN: [REDACTED]  
125 Woodmont Way  
Ridgeland, MS 39157

RE: Claim Number: N10036-1667

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 N10036-1667 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 N10036-1667.

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 Provided by the Claimant

## CLAIM SUMMARY / DETERMINATION FORM

|                  |  |
|------------------|--|
| Claim Number     | : N10036-1667                          |
| Claimant         | : Kempco Development, LLC              |
| Type of Claimant | : Corporate (US)                       |
| Type of Claim    | : Loss of Profits and Earning Capacity |
| Amount Requested | : \$720,000.00                         |

### ***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 3 February 2012, Mark Shapley, Manager of Kempco Development, LLC, (jointly referred to as “the Claimant”) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$720,000.00 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.<sup>1</sup> The Claimant is a real estate and development company in Ridgeland, Mississippi, owner of investment property on Perdido Key, Florida, which was under contract for sale prior to the oil spill.<sup>2</sup>

The damages presented by the Claimant are associated with the Claimant’s loss of a pre-spill contract for the sale of his Perdido Key investment property.<sup>3</sup> According to his OSLTF claim form, Claimant seeks \$500,000.00 in lost property value and \$220,000.00 in interest resulting from the lost sale of his property, which he alleges is due to the Deepwater Horizon oil spill.

### ***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.

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<sup>1</sup> Optional OSLTF Claim Form received on 3 February 2012.

<sup>2</sup> Claimant’s undated letter to the NPFC received with claim package on 3 February 2012.

<sup>3</sup> Purchase Agreement dated 1 March 2010 between Kempco Development LLC and buyers Jack A. Harris and Howard F. Hunt priced the property at \$1,830,000 plus a value of at least \$300,000 (to be developed later) for 14 boat slips.

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.

## ***DETERMINATION OF LOSS***

### **Claimant's Submission to the OSLTF**

#### **Summary of Evidence Presented**

To support this claim, the Claimant presented the documentation listed in Enclosure (2); a summary of which is below.

The Claimant provided his Full Review/Final Payment Claim form that had been presented to the GCCF in the amount of \$2,193,000.00. Additionally, the Claimant provided correspondence from BP's claim adjusters that requested certain documentation for review of the Claimant's BP claim, including the buyer's withdrawal letter. The Claimant has provided documentation to the NPFC showing ownership of the property,<sup>4</sup> and the contract for its sale executed on 1 March 2010.<sup>5</sup> The Claimant provided a copy of the 15 June 2010 letter from the buyer, serving notice of the buyer's intent to not move forward on the

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<sup>4</sup> Printouts dated 23 February 2012 of Escambia County Property Appraiser records for four parcels— 014S331002110004, 014S331002390004, 014S331002280004, and 014S331002250004.

<sup>5</sup> Purchase Agreement dated 1 March 2010 between Kempco Development LLC and buyers Jack A. Harris and Howard F. Hunt priced the property at \$1,830,000 plus a value of at least \$300,000 (to be developed later) for 14 boat slips.

purchase of the property due to unresolved issues relating to the Gulf oil spill and its impact on the local economy and the environment.<sup>6</sup> The buyer requested release from the purchase contract.<sup>7</sup>

The Claimant explained that the loss of \$722,000.00 was calculated as the difference between the original contract price of \$2.15 million, less the \$1.65 million offered on 15 April 2011,<sup>8</sup> plus \$220,000 in additional carrying costs for interest incurred on the note from the date of the cancellation until the present.<sup>9</sup>

To date, the property has not been sold.<sup>10</sup>

### Presentment

On 3 February 2012, the Claimant presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$720,000.00 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.<sup>11</sup> The Claimant indicated that he submitted a Full Review/Final Payment Claim to the GCCF on 4 January 2011 for Lost Earnings/Profits in the amount of \$2,193,000.00. The Claimant also indicated that this claim has been denied.<sup>12</sup> Additionally, the Claimant indicates having presented a claim to the GCCF on 18 February 2011.<sup>13</sup> The Claimant also indicates that this claim was denied by the GCCF.<sup>14</sup>

The NPFC conducted an independent investigation of claim presentation. The NPFC confirmed presentment of a claim to BP on 18 June 2010 (BP Claim No. 6866-124-529191), an Emergency Action Payment (EAP) Claim for Real/Personal Property Damages to the GCCF on 25 August 2010 in the amount of \$1,830,000.00 (GCCF Claim No. 19991) and a Full Review/Final Payment (FRF) Claim to the GCCF on 6 February 2011 for Lost Earnings/Profits in the amount of \$2,193,000.00 (GCCF Claim No. 9276488).<sup>15</sup> The NPFC also confirmed that the GCCF assigned Claimant ID No. 1105147 to the Claimant and that both the EAP Claim and the FRF Claim have been denied.<sup>16</sup>

Based upon the information provided and independent verification by the NPFC, this claim can be adjudicated in the full amount of damages presented to the NPFC, \$722,000.00. Further, because the subject matter of the Claimant's FRF Claim before the GCCF and this claim appear to be based upon the same subject matter, i.e. that the Claimant lost profits as a result of the Deepwater Horizon oil spill, the NPFC deems this Claim Summary Determination as being outcome determinative for the Claimant's GCCF Claim for Lost Earnings/Profits.

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<sup>6</sup> Letter dated 15 June 2010 from Jack Harris and Howard Hunt to Kempco Development, LLC, which identified the project location as four separate, legally described parcels, Parcel IDs: 01-4S-33-1002-110-004, 01-4S-33-1002-390-004, 01-4S-33-1002-280-004, and 01-4S-33-1002-250-004.

<sup>7</sup> Paragraph 4.d. of the Purchase Agreement provided, "Buyer will be released from all financial obligations due to any drastic economic change in conditions."

<sup>8</sup> Letter of Intent presented to the Claimant on 15 April 2011, offering \$1,650,000.00 for the property. The offer was not accepted.

<sup>9</sup> As described in email of 23 February 2012, the Claimant used 22 months of carrying charges at \$10,000 per month.

<sup>10</sup> Claimant's email of 23 February 2012 to NPFC Staff.

<sup>11</sup> Optional OSLTF Claim Form received on 3 February 2012.

<sup>12</sup> And Optional OSLTF Claim Form received on 3 February 2012.

<sup>13</sup> Claimant's GCCF Full Review/Final Payment Claim Form dated 4 January 2011.

<sup>14</sup> Optional OSLTF Claim Form signed on 9 February 2012 and received on 17 February 2012.

<sup>15</sup> GCCF – U.S. Coast Guard Report as of 16 February 2012.

<sup>16</sup> GCCF – U.S. Coast Guard Report as of 16 February 2012.

## **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.

This claim is denied because the Claimant failed to prove the alleged loss in profits or that its alleged loss is due to the Deepwater Horizon oil spill.

After an initial review of the claim, the NPFC sent the Claimant a letter requesting additional information to further evaluate his claim. The letter requested, among other things, additional financial documentation to support the lost profits claim and documentation supporting how the Deepwater Horizon oil spill caused the Claimant's losses. The Claimant was given 14 days to respond to the letter, dated 15 February 2012.

The Claimant's response to the information request—

- clarified that the last appraisal had been in 2007 and an appraisal had not been done in 2010 because the land sale had not been completed;
- clarified that the properties have not been sold;
- explained how the claim amount had been determined;
- explained that there was no rental income as the property is undeveloped land; and
- stated that the property is not under a formal listing, due to inactivity in the commercial marketplace.<sup>17</sup>

The Claimant's response also provided correspondence with both BP and the GCCF, confirmation that the business is registered to do business in Florida, documentation of ownership of the property, additional state and federal tax documents, the 2007 appraisal, and documentation of Mr. Shapley's authority to act on behalf of the company.

### Failure to Prove Loss of Profits

The Claimant alleged that it experienced a loss of profits in the amount of \$722,000.00 due to the Deepwater Horizon oil spill.<sup>18</sup> The Claimant provided a purchase agreement for the sale of the Perdido Key property for a value of at least \$2.13 million.<sup>19</sup> This agreement was executed before the Deepwater Horizon oil spill.<sup>20</sup> The Claimant asserts a property value after the oil spill of \$1.65 million, based on a subsequent offer on the property made 15 April 2011, but not accepted by the Claimant.<sup>21</sup> To the \$500,000.00 reduction<sup>22</sup> in potential

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<sup>17</sup> The Claimant's 23 February 2012 email to NPFC Staff added that he has made several calls to investors, but without success, and will contact a broker this summer (2012) if interest in the market improves.

<sup>18</sup> Optional OSLTF Claim Form received on 3 February 2012 and Claimant's email of 23 February 2012 to NPFC Staff.

<sup>19</sup> Claimant's email of 23 February 2012 to NPFC Staff.

<sup>20</sup> Purchase Agreement dated 1 March 2010 between Kempco Development LLC and buyers Jack A. Harris and Howard F. Hunt priced the property at \$1,830,000 plus a value of at least \$300,000 (to be developed later).

<sup>21</sup> Letter of Intent from MGF Properties, Inc. presented to Kempco Development Company, dated 15 April 2011, with Exhibits A and B.

<sup>22</sup> So calculated in the Claimant's 23 February 2012 email to NPFC Staff, using \$2.15 million as the pre-spill offer.

sales price, the Claimant added \$220,000.00 in carrying costs for loan interest.<sup>23</sup> The Claimant states that the company currently owns the property.<sup>24</sup>

The Claimant has not provided documentation proving the amount of his loss of profits and earnings because the property has not been sold and, therefore, the loss has not been realized. Although Claimant asserts that the pre spill contract accurately represents the value of the subject property and therefore the reduced contract price post spill represents diminution of value due to the oil spill, this is not the “injury, destruction or loss of real property, personal property or natural resource” contemplated by the statute and regulations. In this case his property was not injured, destroyed or lost due to the oil spill nor was his property injured, destroyed or lost due to damage to the natural resource.

When considering property value diminution, the concept could constitute an economic loss only if the Claimant had realized an actual financial loss by selling the subject property and that loss was due to the injury, destruction or loss of the real property or the natural resource. Additionally, when considering property value diminution, the value should equal only the reduction in market value as a direct result of the damage to the natural resource. Consideration should also be given to any increase in property prices since the end of the oil-spill. These would reduce the Claimant’s asserted loss once the loss is actually realized.

If the Claimant elects to request reconsideration of the determination on this claim, it will be the Claimant’s responsibility to provide evidence sufficient to prove whether, or how much of, the diminution in the property’s value is the result of the Deepwater Horizon oil spill. Further, claimant will have to demonstrate that his alleged loss is the result of the Deepwater Horizon incident, and not other intervening factors such as poor economic conditions affecting the Florida real estate market. Finally, there is no loss until the property has been sold.

With respect to amounts claimed associated with interest asserted by the Claimant, the Claimant would have been responsible for paying property-related expenses regardless of the oil-spill until the property was sold; therefore, these costs are not OPA compensable.

This claim is denied because the Claimant has failed to demonstrate either (1) that he has incurred a loss in the amount alleged or (2) that his alleged loss is due to the Deepwater Horizon oil spill.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor’s Review: *4/6/12*

Supervisor’s Action: *Denial approved*

Supervisor’s Comments:

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<sup>23</sup> Loan interest is the sum of monthly interest payments for the four loans on the parcels that comprise the property.

<sup>24</sup> The Claimant’s 23 February 2012 email to NPFC Staff.

- Optional OSLTF Claim Form received on 3 February 2012.
- Listing of evidence provided by the Claimant with the claim form, also providing contact information.
- GCCF Full Review/Final Payment Claim form dated 4 January 2011.
- Letter to GCCF addressing information requested by the GCCF's escalation group.
- Purchase Agreement dated 1 March 2010 between Kempco Development LLC and buyers Jack A. Harris and Howard F. Hunt.
- Letter dated 15 June 2010 from Jack Harris and Howard Hunt to Kempco Development, LLC.
- Letter of Intent from MGF Properties, Inc. presented to Kempco Development Company, dated 15 April 2011, with Exhibits A and B.
- Notice to Kempco Development, LLC, from Escambia County Tax Collector for 2009 property taxes on property 014S33-1002-110-004.
- Notice to Kempco Development, LLC, from Escambia County Tax Collector for 2009 property taxes on property 014S33-1002-250-004.
- Notice to Kempco Development, LLC, from Escambia County Tax Collector for 2009 property taxes on property 014S33-1002-280-004.
- Notice to Kempco Development, LLC, from Escambia County Tax Collector for 2009 property taxes on property 014S33-1002-390-004.
- Regions Bank Commercial Loan Statement on \$1,957,237.00 due on 5/29/2011.
- GCCF Denial Letter dated 31 January 2012 on Interim Payment/Final Payment Claim for Real Property Damages under Claimant Number 1105147.
- Claimant's letter 23 February 2012 in response to the NPFC's 15 February 2012 regarding N10036-1667, with explanations and additional documents.
- Claimant's email 18 April 2011 to GCCF.
- Claimant's undated letter to BP Oil Claims Service Center.
- Claimant's email 22 November 2010 to GCCF.
- Claimant's email 22 February 2011 to GCCF.
- ESIS letter 25 July 2010 requesting certain documentation for BP claim, File number 6866-124-529191.
- Florida Department of State, Division of Corporations, Certificate of Status Confirmation for Kempco Development, LLC, accessed 23 February 2012.
- Florida Department of State, Division of Corporations, Annual Report Online Filing for Kempco Development, LLC, accessed 23 February 2012.
- Exhibit A from MBFB Properties, Inc.
- Escambia County Property Appraiser records on parcel 014S 33 1002 250 004, accessed 23 February 2012.
- Escambia County Property Appraiser records on parcel 014S 33 1002 280 004, accessed 23 February 2012.
- Escambia County Property Appraiser records on parcel 014S 33 1002 390 004, accessed 23 February 2012.

- Escambia County Property Appraiser records on parcel 014S 33 1002 110 004, accessed 23 February 2012.
- Error codes 1352 and 1501 reported by Drake regarding electronic filing of Kempco Development Company, LLC, tax return. (3 pages)
- 2009 Federal Form 1065 with Schedules K, L, M-1, M-2, K-1, Schedule M-2 worksheet, and Federal Supporting Statements, PG01.
- 2008 Federal Form 7004.
- 2009 Mississippi Partnership Income Tax Return with Partnership Computation of Net Taxable Income, S-Corporation/Partnership Investors Shares of Income, Partnership Balance Sheet, Partnership/LLP/LLC Schedule K-1 (Mississippi Properties II, LLC), Partnership/LLP/LLC Schedule K-1 (Mark Shapley), Partnership Income Tax Declaration for Electronic Filing, MS Business EF Attachments (listing), MS Electronic Filing Messages indicating items that must be corrected before electronic filing is allowed (notes, computations and worksheets attached).
- 11 May 2010 letter from Thomas B Butchard to Kempco Development Company, LLC, requesting filing extension.
- 11 May 2010 letter from Thomas B Butchard to Mississippi Properties II, LLC, regarding disclosure of personal information.
- Form 1065 Tax Return Comparison, 2007/2008/2009.
- Real Estate Appraisal Report for Vacant Old River Property, dated 16 November 2007.
- 2010 Federal Form 1065 with Schedules K, L, M-1, M-2, K-1, and Form 7004.
- 2010 Mississippi Partnership Income Tax Return with Partnership Computation of Net Taxable Income, S-Corporation/Partnership Investors Shares of Income, Partnership Balance Sheet, Partnership Balance Sheet, and Partnership/LLP/LLC Schedule K-1 (Mississippi Properties II, LLC), Partnership/LLP/LLC Schedule K-1 (Mark Shapley).
- Unsigned Second Amended and Restated Limited Liability Company Agreement of Kempco Development, LLC.