

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)
Phone: 1-800-280-7118
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CERTIFIED MAIL - RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 2446 3497

5890/DWHZ
14 May 2012

Daniel Goldstein Esq.
Dadeland Centre – Suite 1012
9155 S. Dadeland Boulevard
Miami, Florida 33156

RE: Claim Number: N10036-1670

Dear Mr. Goldstein, Esq.:

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 N10036-1670 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. 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 N10036-1670.

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

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Enclosure: Claim Summary/Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	N10036-1670
Claimant	311 Tollgate Drive, LLC.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$30,000.00

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 02 February 2012, Daniel A. Goldstein, Esq. as legal representative for 311 Tollgate Drive, LLC (collectively, the Claimant) presented an optional Oil Spill Liability Trust Fund (OSLTF) claim form seeking \$30,000.00 for loss of profits and impairment of earnings capacity to the National Pollution Funds Center (NPFC) alleging damages resulting from the Deepwater Horizon oil spill.

The Claimant was the owner of property for sale located at 311 Tollgate Shores Drive, Islamorada, Florida.¹ The Claimant executed a contract for sale allegedly on 30 April 2010 for the aforementioned property in the amount of \$930,000.00.² The Buyer then allegedly executed a cancellation of the contract with the Buyer on 09 May 2010.³ The Claimant submitted an email stating that the Buyers are offering \$900,000.00 dated 17 May 2010.⁴ The Claimant then submitted an executed contract for sale and purchase for the aforementioned property for \$900,000.00.⁵ The Claimant alleges lost earnings in the amount of the difference totaling \$30,000.00.⁶

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

¹ Explanation letter from the Claimant's representative dated 23 January 2012.

² Contract has date handwritten in the margins and the amount is illegible thus handwritten on the top of the document.

³ Release and Cancellation of Contract for Sale and Purchase dated 09 May 2010 unsigned by the seller.

⁴ Email stating \$900,000.00 and are willing to wait on the short sale dated 17 May 2010.

⁵ Contract has date handwritten in the margin next to two sets of initials.

⁶ \$930,000.00 minus \$900,000.00 equals \$30,000.00.

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.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

To support their claim, the Claimant submitted:

- Optional OSLTF claim form dated 21 January 2012;
- Explanation letter from Claimant's representative dated 23 January 2012;
- As is Contract for sale and purchase page one of five undated;
- Release and Cancellation of Contract for Sale and Purchase dated 09 May 2010 unsigned by the Seller;
- Email dated 17 May 2010 between real-estate agents;
- As is Contract for sale and purchase at \$900,000.00, page one of five undated;

- Claimant's representative response letter to the NPFC's request for additional information dated 23 January 2012;
- Claimant's representative letter dated 29 February 2012;
- Legal representation authorization letter dated 27 February 2012;
- GCCF denial letter on Interim Payment/Final Payment Claim dated 24 November 2011;
- HUD 1 Settlement Statement dated 04 November 2011;

Claimant seeks lost profits and impairment of earnings capacity in the amount of \$30,000.00.

Prior to presenting their claim to the NPFC, the Claimant filed a Final Payment Claim (FP) with the GCCF on 31 August 2010 in the amount of \$30,000.00.⁷ They were assigned Claimant ID #3005302 and claim #9024737, this claim was denied.⁸ Additionally, the Claimant filed two Full Review Final claims with the GCCF, Full Review Final Claim 1 (FRF1) with GCCF #9565544 and Full Review Final Claim 2 (FRF2) with Claim #9397133; one was filed on 09 June 2011 for real property in the amount of \$30,000.00 and the other was filed on 09 June 2011 for lost wages/earnings in the amount of \$30,000.00.⁹ FRF1 was deemed deficient by the GCCF and FRF2 was denied.¹⁰

Based upon the evidence provided by the Claimant, it appears that the subject matter for each of the GCCF claims is the same as the subject matter of their claim before the NPFC, i.e., that they lost earnings on the sale of real property as a result of the Deepwater Horizon oil spill. The NPFC deems each of Claimant's three GCCF claims to be properly presented to the responsible party and properly presented to the NPFC. Accordingly, this Claim Summary determination for NPFC Claim N10036-1670 considers and addresses the earnings claimed in all of the three claims presented to the responsible party, specifically; GCCF Claim #'s 9024737 (FP), 9565544 (FRF1), and 9397133 (FRF2).

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.

The Claimant submitted two contracts for sale and purchase of the property at 311 Tollgate Shores Drive, Islamorada, Florida.¹¹ The Claimant submitted only the first of five pages for each of the contracts.¹² Furthermore, the contracts are illegible as sent, undated, and unsigned, they merely have handwritten initials with the date next to them. NPFC staff sent a request for additional information to the Claimant requesting the full 5 pages of the contract in legible form on 27 February 2012.¹³ The Claimant's legal representative was contacted via certified letter,¹⁴

⁷ Report from the GCCF dated 08 May 2012.

⁸ Report from the GCCF dated 08 May 2012.

⁹ Report from the GCCF dated 08 May 2012.

¹⁰ Report from the GCCF dated 08 May 2012.

¹¹ Optional OSLTF claim form dated 21 January 2012.

¹² See As is contract for sale and purchase dated 30 April 2010 and contract for sale and purchase dated 09 June 2010.

¹³ NPFC request for additional information dated 27 February 2012 at questions 1&2.

¹⁴ USPS 7011 1570 0001 2446 2919.

email¹⁵ and phone¹⁶ by the NPFC requesting that the full contracts be provided. As of the date of this letter, the Claimant has failed to provide the official contracts for the referenced sale.

The Claimant states that the original contract was for \$930,000.00 on 30 April 2010 was cancelled due to the oil spill, and was subsequently sold to the same purchaser for \$900,000.00 on 09 June 2010 totaling a loss of \$30,000.00.¹⁷ The Claimant provided the HUD-1 Settlement Statement for the property dated 04 November 2010. The HUD-1 documents the sales price at \$915,000.00.¹⁸ This contradicts the Claimant's alleged subsequent contract price of \$900,000.00.¹⁹

The Claimant submitted an email from Realty World-Freewheeler regarding an offer on 311 Tollgate referring to it as a short sale, dated 17 May 2010.²⁰ The NPFC requested information relating to the short sale, including whether there was a deficiency note at closing, how many lenders had liens on the property at the time of sale, and whether there was a deficiency judgment entered into a court of law.²¹ As of the date of this letter, the Claimant has not responded to the NPFC's request for information.

The Claimant has provided insufficient documentation to substantiate the alleged loss of profits and impairment of earnings capacity or to show that the alleged loss of earnings was due to the Deepwater Horizon oil spill.

Accordingly, this claim is denied because the Claimant failed to meet the burden to demonstrate (1) that they have an alleged loss in the amount claimed, and (2) 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.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *5/14/12*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

¹⁵ Email from NPFC staff to Claimant's representative dated 10 April 2012.

¹⁶ NPFC staff contacted the representative Daniel Goldstein Esq. on 05 April 2012, the representative stated he would send in the contracts by the end of business 05 April 2012, he never sent them, the lawyer was again contacted 26 April 2012, a telephone message was left and not responded to.

¹⁷ Claimant's explanation letter dated 27 March 2012.

¹⁸ HUD-1 Settlement Statement for 311 Tollgate, Islamorada, FL 33036.

¹⁹ Claimant's explanation letter dated 27 March 2012.

²⁰ Email regarding rejected offer and a counteroffer of \$900,000.00 for 311 Tollgate from the alleged buyers agent dated 17 May 2010.

²¹ Email from the NPFC to Claimant's representative dangoldsteinlaw@bellsouth.net dated 10 April 2012.