

U.S. Department of  
Homeland Security

United States  
Coast Guard



Director  
National Pollution Funds Center  
United States Coast Guard

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5890  
9 August 2012

CERTIFIED MAIL – RETURN RECEIPT REQUESTED  
Number: 7011 1570 0001 2446 4777

Leo A. Ruberto  


RE: Claim Number: N10036-1734

Dear Mr. Ruberto:

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 N10036-1734 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 N10036-1734.

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) List of Documentation Provided by the Claimant

## CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N10036-1734
Claimant	: Leo A. Ruberto
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: \$22,323.19

### ***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.

On 8 March 2012, the United States District Court, Eastern District of Louisiana issued a "Transition Order" (TO) limiting the GCCF's ability to accept, process, or pay claims except as provided in that order. The TO created a Transition Process (TP) to facilitate transition of the claims process from the GCCF to a proposed Court Supervised Settlement Program (CSSP). The Court granted Preliminary Approval of the proposed settlement agreement on 2 May 2012, and the CSSP began processing claims on 4 June, 2012.

### ***CLAIM AND CLAIMANT***

On 26 March 2012, Leo A. Ruberto (referred to as "the Claimant"), presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$22,323.19 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.<sup>1</sup> The Claimant is a licensed real estate agent in the State of Florida and is independently employed by a real estate company in Gulf Breeze, Florida.<sup>2</sup> He claims damages for loss of real estate sales, as well as additional costs, incurred during the Deepwater Horizon oil spill.<sup>3</sup> The Claimant asserts that he lost income because the oil spill caused a decline in real estate sales in Gulf Breeze and along the Gulf Coast.<sup>4</sup>

### ***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

<sup>1</sup> Optional OSLTF Claim Form received on 26 March 2012.

<sup>2</sup> State of Florida Real Estate Sales Associate License dated 29 October 2009, and Independent Contractor Agreement Between Broker and Sales Associate dated 24 November 2009. No other licenses were provided.

<sup>3</sup> Claimant's letter dated 2 May 2011.

<sup>4</sup> Optional OSLTF Claim Form received on 26 March 2012

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.

Pursuant to 33 U.S.C. § 2712(f), payment of any claim or obligation by the Fund under OPA shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.

## ***DETERMINATION OF LOSS***

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

On 26 March 2012, the Claimant<sup>5</sup> presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$22,323.19 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.<sup>5</sup> The Claimant, a licensed real estate agent, is independently employed by a real estate company in Gulf Breeze, Florida.<sup>6</sup> He claims damages for loss of

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<sup>5</sup> Optional OSLTF Claim Form received on 26 March 2012.

<sup>6</sup> State of Florida Real Estate Sales Associate License dated 29 October 2009, and Independent Contractor Agreement Between Broker and Sales Associate dated 24 November 2009.

real estate sales, as well as additional costs incurred in 2010.<sup>7</sup> The Claimant indicates that he submitted a claim the GCCF on 2 May 2011 and that it has been denied.<sup>8</sup>

The NPFC conducted an independent investigation of claim presentation and payments. The NPFC confirmed the Claimant's presentment of an Interim Payment (IP) Claim to the GCCF that was submitted on 4 May 2011 in the amount of \$20,000.00. The NPFC also confirmed that Claimant Identification Number 3518324 and Claim Number 9376320 were assigned by the GCCF.<sup>9</sup> The NPFC also reviewed correspondence with the GCCF, which indicates that this IP Claim was denied on Re-Review.<sup>10</sup>

Based upon the information provided by the Claimant and independent verification by the NPFC, this claim can be adjudicated in the full amount of damages presented to the NPFC to the extent that the damage amount has been presented to the RP/GCCF. Amounts claimed in excess of what has been presented to the GCCF, \$2,323.19, are denied based on lack of proper presentment pursuant to the governing claims regulations. Further, because the subject matter of this claim and the claim before the GCCF appear to be based upon the same subject matter, i.e. that the Claimant lost profits/income 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.

Additionally, the NPFC notes that evidence presented in this claim submission indicates that the Claimant is a member of the Deepwater Horizon oil spill economic and property damages class action settlement (E&PD Settlement).

### **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.

As an initial matter, it appears that the Claimant is a member of the E&PD Settlement. This claim is therefore considered to have been settled, and the Claimant is ineligible to recover funds from the OSLTF. According to OPA, the payment of any claim by the NPFC is subject to the NPFC's ability to obtain, by subrogation, the rights to recover all costs and damages from the responsible party. If a claim has been settled, the Claimant no longer has rights to the claim and therefore cannot subrogate rights to the NPFC.

According to OPA, the payment of any claim by the NPFC is subject to the NPFC's ability to obtain, by subrogation, the rights to recover all costs and damages from the responsible party. If a claim has been settled, the Claimant no longer has rights to the claim and therefore cannot subrogate rights to the NPFC.

While this claim may not have been quantified or paid, it is considered to have been settled by virtue of the Court's preliminary approval of the settlement agreement. If the Claimant disagrees that he is a member of the economic damages class of the E&PD Settlement, he should submit evidence to indicate that he has either opted out or is excluded from the E&PD Settlement in his request for reconsideration of this claim.

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<sup>7</sup> Claimant's letter dated 2 May 2011.

<sup>8</sup> Optional OSLTF Claim Form received on 26 March 2012 and GCCF Denial Letter dated 4 October 2011.

<sup>9</sup> GCCF – U.S. Coast Guard Report as of 17 April 2012.

<sup>10</sup> GCCF Re-Review Denial Letter on Interim Payment/Final Payment Claim, dated 17 May 2012.

The NPFC has considered all documentation and information presented by the Claimant.

Furthermore, this claim is also denied under OPA's loss of profits damage category, as the Claimant has failed to prove that he has sustained a financial loss as a result of the Deepwater Horizon oil spill.

#### Failure to Prove Loss of Earnings

The Claimant asserts damages for a loss of profits and earnings from his employment with an established real estate office in Gulf Breeze, Florida. The Claimant provided a copy of his real estate license in effect in 2010,<sup>11</sup> as well as his contract with the broker.<sup>12</sup> The Claimant provided a statement from the broker indicating that the Claimant had no commissions or other earnings in 2010.<sup>13</sup> The Claimant states that he expected to earn 15,000.00 to \$20,000.00 in his first year in real estate, based on what experienced agents had told him.<sup>14</sup> In his handwritten copy of the GCCF claim form, the Claimant's period of loss is stated as 2010;<sup>15</sup> however, in the electronic submission presented to the GCCF, the period of loss is stated as 1 May 2010 through 31 March 2011.<sup>16</sup> Further, the Claimant requests compensation for his expenses in 2010, such as MLS dues, electronic lock box key costs, office expenses, entertainment expenses, and professional development costs.<sup>17</sup>

The Claimant's business was still in the start-up phase, with the Claimant's license having been issued on 29 October 2009 and his agreement to work as an independent contractor for a broker having been signed on 29 November 2009. The Claimant states that he and his wife, also an independent real estate agent, had disaggregated their financial information,<sup>18</sup> but the Claimant has provided no evidence that his business had created any income before the oil spill. Tax Form Schedule Cs for 2009 and 2010 do not differentiate between the Claimant's income and that of his wife.<sup>19</sup> A Claimant must establish the amount of profits or earnings in comparable periods and during the period when the loss was suffered.<sup>20</sup> The Claimant has established no comparable period of time or income amount as the basis for his asserted loss.

Further, all income from alternative employment or business undertaken during the loss period must be reflected as adjustments to the loss being asserted.<sup>21</sup> The Claimant stated that he could not ride out 2010 without steady income, so he took another job teaching at a university.<sup>22</sup> The Claimant's 2010 Tax Form 2106, which lists employee business expenses, implies that the Claimant was an employee somewhere in 2010,<sup>23</sup> but no W-2 Forms were provided that indicate that employment or its amount. Additionally, no income or tax information was provided for 2011 in support of the Claimant's losses asserted through 31 March 2011.

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<sup>11</sup> State of Florida Real Estate Sales Associate License dated 29 October 2009.

<sup>12</sup> Independent Contractor Agreement Between Broker and Sales Associate dated 24 November 2009.

<sup>13</sup> Coldwell Banker United Gulf Region, Total Closed Income Report for Leo Ruberto for the period 1 January 2010 through 31 December 2010.

<sup>14</sup> Claimant's letter to GCCF dated 2 May 2011 and Claimant's of GCCF Interim Payment Claim Form dated 4 May 2011 (electronic submission).

<sup>15</sup> Claimant's handwritten GCCF Interim Payment Claim Form dated 2 May 2011.

<sup>16</sup> Claimant's GCCF Interim Payment Claim Form dated 4 May 2011 (electronic submission).

<sup>17</sup> Summary Losses (Expenses) and Revenue for Leo Ruberto, Claimant ID #3518324.

<sup>18</sup> Claimant's letter to National Pollution Funds Center dated 14 March 2012.

<sup>19</sup> 2009 and 2010 Tax Forms Schedule C for Leo A. and Patricia A. Ruberto (reported jointly).

<sup>20</sup> 33 C.F.R. 136.233(c).

<sup>21</sup> 33 C.F.R. 136.235(b).

<sup>22</sup> Phone conversation between Claimant and NPFC Staff on 24 May 2012.

<sup>23</sup> 2010 Tax Form 2106.

The Claimant has not established real estate-related income for 2009 2010 or 2011. Schedule C of the Claimant's 2009 and 2010 taxes do not differentiate between his income and that of his wife, also an independent real estate contractor. The NPFC cannot measure the Claimant's losses without accurate information on income, including income from alternative employment or other compensation.

In consideration of incomplete financial information, the Claimant's loss of earnings has not been proven.

#### Failure to Prove Causation

The Claimant asserts that his alleged loss of income is due to the oil spill.<sup>24</sup> The Claimant provided a copy of his wife's letter to the GCCF, which states, "As you may know, once the oil spill became common knowledge and a growing concern, many clients decided not to buy, or list properties for sale".<sup>25</sup> The NPFC will not presume causation or lack thereof based upon business type or location. Causation is an element of every claim that must be proven the Claimant. Statements without supporting documentation are not satisfactory to prove that the alleged loss was caused by the oil spill.

In a letter to the GCCF, the Claimant states that the impact of the oil spill caused [him] to have clients withdraw from potential contracts.<sup>26</sup> However, the Claimant did not provide evidence of any cancelled contracts or verifiable statements from customers who withdrew from their property searches. Similarly, the Claimant has not provided documentation from his broker documenting the company's loss of customers and sales following the oil spill and that his broker's claim for lost sales had been paid by the GCCF. The Claimant has not provided supporting documentation to prove that his alleged loss was caused by the oil spill.

The Claimant has not shown that his alleged loss of income was a consequence of the oil spill.

This claim is denied for the following reasons: (1) the Claimant is considered to have settled his claim by virtue of belonging to the economic damages class associated with the CSSP; (2) the Claimant has failed to adequately demonstrate his alleged loss through financial documentation; and (3) the Claimant has failed to demonstrate that his alleged loss is due to injury or destruction or loss of real or personal property or a natural resource as a result of a discharge or a substantial threat of a discharge of oil (i.e., the Deepwater Horizon oil spill).

Claim Supervisor: **NPFC**  **tion Division**

Date of Supervisor's Review: **8/9/12**

Supervisor's Action: **Denial approved**

Supervisor's Comments:

<sup>24</sup> Optional OSLTF Claim Form received on 26 March 2012.

<sup>25</sup> Patricia Ruberto letter to Mr. Ladd at GCCF regarding her Claim No. 3518327, dated 21 June 2011.

<sup>26</sup> Claimant's letter to GCCF dated 19 July 2011.