

U.S. Department of
Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center
United States Coast Guard

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US COAST GUARD
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4803 9609

5890/DWHZ
15 June 2012

Club Country of FWN, Inc d/b/a The Block


Re: Claim Number: N10036-1773

Dear Mr. Barksdale:

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 N10036-1773 involving the Deepwater Horizon oil spill. Please see the attached Claim Summary/Determination Form for further explanation.

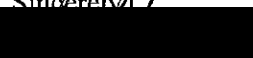
You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you 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 N10036-1773.


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: Claim Summary/Determination Form.

cc: Club Country of FWN, Inc d/b/a The Block


By Certified Mail:
No: 7011 1570 0001 4803 9616

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1773
Claimant	Club Country of FWN, Inc d/b/a The Block
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$1,459,057.00

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 25 April 2012, Arthur S. Barksdale IV, Esq., on behalf of Club Country of FWN, Inc d/b/a The Block (collectively the Claimant), presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$1,459,057.00 in loss of profits damages resulting from the Deepwater Horizon oil spill.¹

At the time of the oil spill, the Claimant was a club in Fort Walton Beach, Florida that regularly hosted musical acts.² The Claimant alleged that a decrease in tourism due to the oil spill, as well as the free concerts put on by BP in the nearby area, caused a steep decline in business.³

In order to calculate his losses, the Claimant subtracted 2010 and 2011 profits from 2008. He then determined average monthly losses and multiplied it by an 'industry effect multiplier' and added the resulting number to his losses reaching the requested sum certain of \$1,459,056.74.⁴

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.

¹ Law Firm Claim Cover Letter, signed 20 April 2012.

² Letter from the Claimant Describing Losses, signed 8 February 2011.

³ Letter from the Claimant Describing signed Losses, 8 February 2011.

⁴ Lost Earnings/Income Worksheet, 8 February 2012.

- (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 undertake, 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 this claim, the Claimant submitted the following documentation:

- Law Firm Claim Cover Letter, signed 20 April 2012;
- NPFC Authorization Agreement, signed 4 April 2012;
- GCCF Full Review Final Payment Claim Form regarding Claimant Mark Hawkins;
- GCCF Denial Letter on Interim Payment/Final Payment Claim, 6 April 2012;
- Monthly Profit and Loss Comparisons, February – December 2008, 2009; December 2007;
- Monthly Profit and Loss Comparisons, January – June 2009, 2010;
- Lost Earnings/Income Worksheet;
- Copy of Claimant's Identification cards and business cards;
- Claimant's Liquor License, 2010;
- Claimant's Food Service License, 2010;
- Claimant's Fort Walton Beach business license, 2010;
- Certificate of Liability Insurance, 2010;
- Letter from the Claimant describing "potential" losses and past dealings with the GCCF, 30 January 2012;
- Letter from the Claimant describing losses, 8 February 2011;

- Contract between Club Country of FWB Inc., and Northwest Florida State College, 5 August 2010;
- Contract to provide catering services for Texas Fest 2010, 5 August 2010;
- Email from the Claimant to BSaliba@caa.com, re: The Block, 12 August 2010;
- Emails between the above mentioned, 13 August 2010;
- Email from the Claimant to KMeads@wmeentertainment.com, 12 August 2010;
- Email from the Claimant to brian@bobbyroberts.com, 12 August 2010;
- Emails re: Josh Thompson November 4, 2010 Fort Walton Beach, FL – PENDING OFFER, 30 July 2010;
- Invoice, 20 October 2011;
- Vender List;
- 2008 Form 1120S, showing ordinary business income of \$23,236.00;
- 2008 Form W-3;
- 2009 Form 1120S, showing ordinary business income of \$24,153.00;
- 2009 Form W-3;
- 2010 Form 1120S, showing ordinary business income of (-\$23,331.00);
- 2010 Form W-3.

On 27 October 2010, the Claimant presented an Emergency Advanced Payment (EAP) claim to the RP/GCCF, seeking loss of profits and wages damages in the amount of \$100,000.⁵ The Claimant was assigned Claimant ID 3301668 and the EAP claim was assigned claim # 358222.⁶ The RP/GCCF denied payment on this claim.

On 17 February 2012, the Claimant presented a Full Review Final (FRF) claim to the RP/GCCF, seeking loss of profits and wages damages in the amount of \$1,459,056.74.⁷ The Claimant retained Claimant ID 3301668 and the FRF claim was assigned claim # 9569641.⁸ The RP/GCCF extended a final payment offer, which has since expired.

On 25 April 2012, the Claimant submitted this claim to the NPFC, seeking \$1,459,056.74 in loss of profits and impairment of earning capacity damages.⁹ The NPFC may adjudicate this claim to the extent that these damages have first been presented to the RP/GCCF.¹⁰ Because the Claimant has presented these damages first to the RP/GCCF in an amount equal to the amount now presented to the NPFC, this determination may properly address the entirety of the claim now before the NPFC, in the amount of \$1,459,056.74.

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, destruction or loss of real or personal property or of 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 this claim.

Here, in order to prove a claim for loss of profits damages, a claimant must provide documentation sufficient to prove (1) that the claimant sustained an actual financial loss, and (2)

⁵ Transition Program United States Coast Guard Report, 13 May 2012.

⁶ Transition Program United States Coast Guard Report, 13 May 2012.

⁷ Transition Program United States Coast Guard Report, 13 May 2012.

⁸ Transition Program United States Coast Guard Report, 13 May 2012.

⁹ Law Firm Claim Cover Letter, signed 20 April 2012.

¹⁰ 33 C.F.R. § 136.103(a).

that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill. This claim is denied because the Claimant has not provided sufficient documentation to prove either requirement.

In a letter dated 1 May 2012, the NPFC requested that the Claimant provide additional documentation to meet the requirements of the law listed above, including (1) profit and loss statements for 2011, (2) attendance records for shows prior to and after the oil spill, (3) contracts or bookings of shows cancelled due to the oil spill and (4) copies of claims and correspondence filed with and received from the GCCF.¹¹

The NPFC requested that the Claimant respond to the additional information request within 14 days of the date of the letter. As of the date of this determination, the Claimant has failed to respond. Information included in the Claimant's original submission is insufficient to prove that the Claimant's place of business actually sustained losses attributable to the Deepwater Horizon oil spill. Without documentation showing the impact any BP sponsored shows had on the Claimant's business, it is impossible for the NPFC to causally link alleged losses to the spill. Furthermore, independent research conducted by the NPFC found that Okaloosa County experienced a record number of tourists in 2011, contradicting the Claimant's assertion that tourism negatively impacted business.

This claim is denied because the Claimant failed to meet his burden to demonstrate (1) that he sustained a loss in the amount of \$1,459,056.74, 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: *6/15/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹¹ NPFC Request for Additional Information, 1 May 2012.