

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
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 800-280-7118
E-mail: arl-pf-npfcclaimsinfo@uscg.mil
Fax: 703-872-6113

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 2970 0004 1302 0038

5890/DWHZ
14 February 2013

ShopSoul Stores, LLC



Re: Claim Number: N10036-1889

Dear Mr. Clary,

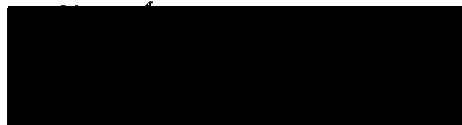
The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on the claim number N10036-1889 involving the Deepwater Horizon oil spill. Please see the attached Claim Summary/Determination 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 N10036-1889.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100



National Pollution Funds Center
U.S. Coast Guard

Enclosure: Claim Summary/Determination

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1889
Claimant	ShopSoul Stores, LLC
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$92,056.70

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 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 08 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 the 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 02 May 2012, and the CSSP began processing claims on 04 June 2012.

CLAIM AND CLAIMANT

On 30 January 2013, Mr. Darrell Clary on behalf of ShopSoul Stores, LLC, (collectively "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$92,056.70 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant alleged to have relocated his clothing and retail shop from Dallas, Texas to Pensacola, Florida in June of 2009. The business had been in operation since 2005, and according to the Claimant, had experienced substantial growth each year since its opening. However, in 2010, the Claimant alleged that "the unfortunate oil spill incident negated all momentum for continued store growth . . ."² The Claimant does not specifically indicate how the oil spill affected their growth potential, but states that "2010 was the first year in company history that the company will report a comp store decrease."³

The Claimant seeks to recover \$92,056.70 in alleged 2010 losses. This amount is the difference between the Claimant's actual 2010 earnings and the Claimant's projected earnings for that year. The Claimant projected 2010 earnings based on 2009 earnings when the store was located in Dallas, Texas. Actual 2010 earnings include a \$55,000.00 payment previously made on this claim.⁴

¹ Claim Cover Letter, 29 January 2013.

² Claim Cover Letter, 29 January 2013.

³ Claim Cover Letter, 29 January 2013.

⁴ The Claimant references "a \$55,000.00 injection from BP." Claim Cover Letter, 29 January 2013.

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 water, adjoining shorelines, or the exclusive economic zone of the United States, as described in § 2702(b) of OPA.

The OSLTF is available to pay claims for uncompensated damages pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136. 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; and
- (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.

Under 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 NPFC

The Claimant submitted the following documentation in support of this claim:

- Claim Cover Letter, 29 January 2013 (2 copies);
- Tax Return Transcript, 2010, showing gross sales of \$38,995.00;
- Resume, Darrell J. Clary;
- Letter from the Claimant to the Deepwater Horizon Claims Center RE Settlement opt out, 31 October 2012;
- 2008 Form 1065, showing gross sales of 73,707.00 (Dallas, TX location);
- 2009 Form 1065, showing gross sales of \$140,444.00;
- Transaction Report on Shopsoul Stores LLC;
- First Quarter 2009/2010 comparison chart;
- Second Quarter 2009/2010 comparison chart;
- Third Quarter 2009/2010 comparison chart;
- Fourth Quarter 2009/2010 comparison chart;
- GCCF Denial Letter on Interim Payment/Final Payment Claim, 2 June 2012;
- Deepwater Horizon Claims Center, Claimant Information print-out;
- Letter from the Claimant to the GCCF, 15 March 2012;
- Optional OSLTF Claim Form (blank);
- Tax Return Transcript, 2008, showing gross sales of \$73,707.00;
- Tax Return Transcript, 2009, showing gross sales of \$140,444.00;

Prior to presenting this claim to the NPFC, the Claimant attempted to recover these damages through the Responsible Party. The Claimant does not provide evidence indicating when this claim was submitted. However, the Claimant does indicate that the business received a \$55,000.00 payment in late 2010 and was also eligible for a \$25,000.00 final payment from the GCCF.⁵

On 30 January 2013, the Claimant submitted this claim to the NPFC seeking \$92,056.70 in loss of profits or impairment of earning capacity damages.⁶ The Claimant has not provided documentation sufficient to prove that this claim concerning the same damage amount was first properly presented to and denied by the Responsible Party or its representative. However, the NPFC will adjudicate the claim to the extent that presentment requirements have been met. Any damages now being presented to the NPFC which were not first presented to the Responsible Party are denied.⁷

Furthermore, evidence in this claim submission indicates that the Claimant has opted out of the Deepwater Horizon oil spill economic and property damages class action settlement (the E&PD Settlement).⁸

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 all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

⁵ GCCF Denial Letter 2 June 2012.

⁶ Claim Cover Letter, 30 January 2013.

⁷ 33 C.F.R. § 136.103(a).

⁸ Letter from the Claimant to the Deepwater Horizon Claims Center, 31 October 2012.

In order to prove a claim for loss of profits damages, a Claimant must provide evidence sufficient to prove (1) that the Claimant sustained a loss or reduction in income, and (2) that the financial loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

The Claimant alleged that the oil spill prevented his clothing store from experiencing an anticipated level of growth in 2010. However, the Claimant does not specify exactly how the business might have been affected by the oil spill. Because the Claimant is a clothing store which also does business online, it is not necessarily clear that the business relies on tourism to such an extent that decreases in tourism would cause the Claimant to sustain a loss of profits. If the Claimant wishes to pursue this claim on reconsideration, the Claimant should provide business records sufficient to demonstrate the store's reliance on tourism. For example, the Claimant could provide business records demonstrating that the store's revenue fluctuations correspond with increases and decreases in Pensacola tourism.

In addition to failing to provide evidence to prove how the oil spill might have caused his alleged losses, the Claimant has failed to provide financial documentation sufficient to prove that his business would have generated greater revenue throughout 2010 had the oil spill not occurred. Should the Claimant wish to pursue this claim on reconsideration, the Claimant should provide evidence of the store's earnings during a comparable period in which the Claimant was not allegedly affected by the oil spill. For example, the Claimant could provide records of 2010 and 2011 earnings to demonstrate the business' earning potential during unaffected periods. Prior earnings during years in which the Claimant's business was located in Dallas, Texas are insufficient to set a baseline by which to determine the Claimant's alleged loss during 2010.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that he sustained a financial loss in the amount \$92,056.70, or (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 discharge of oil.

Claim Supervisor: 

Date of Supervisor's Review: 2/14/12

Supervisor's Action: ***Denial approved***

Supervisor's Comments: