

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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5890/DWHZ  
06 January 2014

Tiger Capital Investments, Inc.  
[REDACTED]

Re: Claim Number: N10036-2009

Dear Mr. Fain:

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 N10036-2009 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 N10036-2009.

Mail reconsideration requests to:

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

Sincerely,  
[REDACTED]

Claims Adjudication Division  
National Pollution Funds Center  
U.S. Coast Guard

Enclosure: Claim Summary/Determination

## CLAIM SUMMARY/DETERMINATION FORM

|                  |   |
|------------------|---|
| Claim Number     | N10036-2009                                       |
| Claimant         | Tiger Capital Investments, Inc.                   |
| Type of Claimant | Corporate   |
| Type of Claim    | Loss of Profits or Impairment of Earning Capacity |
| Amount Requested | \$6,428,210.00                                    |

### ***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 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 04 December 2013, Mr. Brad Fain submitted a claim for his company, Tiger Capital Investments (collectively, "Claimant") to the Oil Spill Liability Trust Fund (OSLTF) seeking \$6,428,210.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.<sup>1</sup>

At the time of the spill, the Claimant states he was involved with a real estate project on Pensacola Beach, Florida. His company was a contractual third-party beneficiary in this project. It was "abruptly halted and cancelled as a direct result of the oil spill." The Claimant states that since the development was "shovel ready" at the time the spill occurred, and the project was then canceled, that his company "received no income and was forced to shut down." His claim amount is based on the percentages that the Claimant was allotted to receive for his investment into the project, based on the contracts between him and other investors.

### ***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.

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<sup>1</sup> Optional OSLTF Form, 25 November 2013.

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, 25 November 2013;
- BP Claim Summary Letter for Claimant, 17 June 2013;
- BP Claims Program Claim Form, 17 January 2013;
- BP Claims Program Claim Form Attachments;
- LLC Agreement between Claimant and Island Empress, LLC, undated;
- AI Response Letter from Claimant, 16 December 2013;
- Island Empress Assumptions and Summary Spreadsheet for 2010;
- Contract between Claimant and Logator Capital.

The Claimant alleged that this claim was first presented to the Responsible BP Claims program and was denied.<sup>2</sup> On 25 September 2013, the Claimant presented this claim to the NPFC, seeking \$6,428,210.00 in loss of profits or impairment of earning capacity.

Evidence in this claim submission indicates that the Claimant is a member of the Deepwater Horizon Economic and Property Damage Class Action Settlement (E&PD Settlement).<sup>3</sup>

### **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.

As an initial matter, it appears that the Claimant is a member of the E&PD Settlement Class. The Claimant was asked, in a letter dated December 6, 2013, to provide documentation of whether or not he was part of the settlement, as the location of the investment property indicates that it is in Economic Loss Zone A. The Claimant simply responded that he is not, but failed to provide the documentation necessary to show that he had “opted out.” Additionally, it appears that Logator Capital, LLC (LC), the company with which the Claimant entered into a contract for this project, has filed with the E&PD settlement. Since it remains unclear that the Claimant had the sole subrogable rights to this claim, he is regarded as a member of the settlement as a result of his contractual involvement with Logator Capital, LLC until he shows otherwise.

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 the NPFC to those rights.

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.

Furthermore, even if the Claimant was not included in the Settlement Class, this claim is denied on its merits. In order to prove a claim for loss of profits or impairment of earning capacity damages, a claimant must provide evidence sufficient to prove (1) that the claimant sustained a loss or reduction in income, and (2) that the loss was caused by damage to real or personal property or natural resources caused by the discharge of oil during the Deepwater Horizon oil spill.

The Claimant alleged that, as a result of the oil spill, the project in which he and other firms invested, was abruptly halted and canceled. He does not provide documentation that connects the spill to the cancelation of this project, nor does he show that it was not simply delayed. The NPFC asked him to provide this in a letter dated 06 December 2013, to which he replied, “This information exists but is not in my possession.” Without it, he has not established that his potential losses are a direct result of the oil spill.

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<sup>2</sup> See BP Claims Program denial letter dated 20 September 2013.

<sup>3</sup> At the time of the spill, the Claimant’s property was located within Economic Loss Zone A.

When asked to clarify how the Claimant is a third-party beneficiary and whether or not he has the sole subrogable rights to amount requested, it became clear that the damages claimed are speculative, projected amounts based on the percentage of revenue the completed project would yield. Speculative losses are not payable under OPA; rather, only actual damages realized are compensable. Additionally, all profits that the Claimant anticipated were reliant on profit earned by its business partner, LC, with which it had a contract. Again, without documentation to show otherwise, it cannot be ascertained that the Claimant had the sole, subrogable rights to the amount claimed as its profits were directly tied to the profits of its partner, LC.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that it sustained a financial loss in the amount of \$6,428,210.00, 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. Additionally, this claim is considered to have been settled by virtue of the Claimant belonging to the E&PD Settlement via its contractual relationship with Logator Capital who did settle and is therefore, not eligible for OSLTF compensation.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *1/6/14*

Supervisor's Action: *Denial approved*

Supervisor's Comments: