

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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5890/DWHZ
18 March 2014

SmithCal Realty Trust
[REDACTED]
[REDACTED]
[REDACTED]

Re: Claim Number: N10036-2020

Dear Mr. Calianos:

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 N10036-2020 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 N10036-2020.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
[REDACTED]
[REDACTED]
[REDACTED]

Sincerely,

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

Enclosure: Claim Summary/Determination

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-2020
Claimant	SmithCal Realty Trust
Type of Claimant	Corporate
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$200,000.00

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 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. Jonathan Calianos submitted a claim for his company, SmithCal Realty Trust (the "Claimant") to the Oil Spill Liability Trust Fund (OSLTF) seeking \$200,000.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.

At the time of the spill, the Claimant states that the property involved was a fully-furnished, high-end vacation rental in Bonita Springs, FL. The Claimant marketed the home as a "turn-key vacation experience" with rent starting at \$3,200 per month for a rental period of a six month minimum. The home is located in a gated country club community, approximately two miles from the beaches of the Gulf of Mexico. The Claimant states that while the home was rented in January 2010, the tenant left a little early in April 2010 shortly after the spill, threatening to sue if they were not provided a refund of \$5,000.00. Claimant further stated that they did not provide a refund and no law suit has been filed to date. From May 2010 to December 31, 2010, the Claimant states it did not get any serious rental inquiries and had no commitments. In 2011, the Claimant did not get any returning clients and had few rental inquiries. The Claimant finally rented the property last-minute from August 1, 2011 to March 30, 2012, but for a deeply-discounted price total of \$10,750. For 2012, the Claimant had no rental income and no firm commitments for future rentals. Claimant states all of this was as a result of the negative stigma associated with the oil spill, and the perceived health risks of dining/vacationing along the Gulf.

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:

- Claimant Statement of Damages;
- Claimant Statement of Value of Real Estate;
- Claimant Rental Log for claimed property;
- Claimant's General Ledger for claimed property, 2007-2012.

The Claimant alleged that this claim was first presented to the Responsible Party and that the RP denied payment on this claim.¹ On 13 March 2014, the Claimant presented this claim to the NPFC, seeking \$200,000.00 in loss of profits or impairment of earning capacity. The NPFC will adjudicate the claim to the extent presentment requirements have been satisfied. If any damages subject of this claim were not first presented to and denied by the RP, these damages are denied for improper presentment.²

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).³

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, as the location of the investment property indicates that it is in Economic Loss Zone A. 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, it lost income for its Bonita Springs, FL vacation rental home, namely, \$75,000.00 in projected lost income and \$125,000.00 in lost market value for the property. However, simply because a property is not rented does not mean it is a result of the oil spill. First, the Claimant shows its rental history for this property, but fails to produce documentation that it lost actual contracts as a result of the spill. It appears that, from 2007-2010, it had two sets of repeat customers, for half of each year, but does not provide why these same tenants chose not to continue renting this property. The Claimant also states that the tenants renting from January 2010 through June 2010 left early, abandoning their leasehold, but, again, does not provide documentation as to how this was a result of the spill. The tenants' decision to break the contract—which it appears that it was under a contract with the Claimant and disputed payments—may have been for any number of reasons; therefore,

¹ Claimant Statement of Damages letter.

² 33 C.F.R. § 136.103(c)(2).

³ At the time of the spill, the Claimant's property was located within Economic Loss Zone D.

without proper documentation, it cannot be ascertained that they broke their lease because of the oil spill. Additionally, the Claimant does not provide copies of previous and post-spill contracts, how it advertised the property, or anything that would show that the decline was again, a result of the spill and not other factors.

It should be noted that the Claimant's lost rental damages are projected costs based on a five-year scale of \$15,000.00 per year. These claimed losses are speculative/prospective, and as such, are not *incurred* losses. Speculative losses are not payable under OPA; rather, only actual damages incurred. Thus they are denied.

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 \$200,000.00, 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 and is therefore, not eligible for OSLTF compensation.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *3/18/14*

Supervisor's Action: *Denial approved*

Supervisor's Comments: