

U.S. Department of  
Homeland Security

United States  
Coast Guard



Director  
United States Coast Guard  
National Pollution Funds Center

NPFC CA MS 7100  
US COAST GUARD  
4200 Wilson Blvd., Suite 1000  
Arlington, VA 20598-7100  
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CERTIFIED MAIL - RETURN RECEIPT REQUESTED  
Number: 7011 1570 0001 2446 1080

5890/DWHZ  
06 June 2012



RE: Claim Number: N10036-1749

Dear Ms. Tindell:

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 claim number N10036-1749 involving the Deepwater Horizon oil spill. Please see the enclosed 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 N10036-1749.

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

CERTIFIED MAIL - RETURN RECEIPT REQUESTED  
Number: 7011 1570 0001 2446 1097

Dave Houpt  
6901 Bryan Dairy Road, Suite 110  
Largo, FL 33777

Enclosure: Claim Summary/Determination Form

## CLAIM SUMMARY / DETERMINATION FORM

Claim Number	N10036-1749
Claimant	Athco Partners, Inc. d/b/a Home Pro
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$341,041.00

### ***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 10 April 2012, Athco Partners, Inc. (Claimant) presented an optional Oil Spill Liability Trust Fund (OSLTF) claim form seeking \$341,041.00 for loss of profits and impairment of earnings capacity to the National Pollution Funds Center (NPFC) alleging damages resulting from the Deepwater Horizon oil spill.

The Claimant bought Home Pro, Inc. on 05 February 2010 after five years of being a “consultant” for the sunroom and window company based in Largo Florida.<sup>1</sup> The Claimant asserts that monthly cancellations historically were 8-12% of gross sales.<sup>2</sup> The Claimant alleges damages resulting from the Deepwater Horizon oil spill because the cancellation rate increased in April to 25%, May 54%, June 36%, July 32%, and August to 29% of gross sales. The Claimant further alleges that sales began to decline after 20 April 2010.<sup>3</sup> The Claimant had negative net income in the amount of \$341,041.00 on their 2010 taxes and requests the same amount in damages.<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 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.

<sup>1</sup> Explanation Letter from Claimant dated 28 November 2011 and Intro letter from attorney dated 30 March 2012.

<sup>2</sup> Explanation Letter from Claimant dated 28 November 2011.

<sup>3</sup> Explanation Letter from Claimant dated 28 November 2011.

<sup>4</sup> Intro letter from attorney dated 30 March 2012 and 2010 Form 1120S US Income Tax Return for an S Corporation.

- (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.

## ***DETERMINATION OF LOSS***

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

To support their claim, the Claimant submitted:

- Optional OSLTF claim form dated 29 March 2012
- Intro letter from Attorney dated 30 March 2012
- Second letter by Attorney dated 02 April 2012
- Home Pro Inc profit and loss from January 2009 through October 2009 (allegedly from previous owner)
- Home Pro Inc Balance Sheet as of October 2009
- Athco Partners Inc d/b/a Home Pro Statement of Revenues and Expenses – Modified Cash Basis for year ending 31 December 2010
- Third letter from Attorney dated 12 December 2011
- Gulf Coast Claims Facility Full Review Final Payment Claim Form
- Letter of explanation from Home Pro letterhead dated 28 November 2011
- 2009 Form 1120S U.S. Income Tax Return for an S Corporation
- 2008 Form 1120S U.S. Income Tax Return for an S Corporation
- Athco Partners Inc Statement of Assets, Liabilities, and Equity – Modified Cash Basis as of 31 December 2010
- 2010 Form 1120S U.S. Income Tax Return for an S Corporation
- Athco Partners Sales Report from January 2009 through December 2010 showing cancellations
- Letter in response to NPFC's request for additional information dated 08 May 2012
- GCCF denial letter on Interim payment/Final payment claim dated 06 April 2012
- Home Pro cancellation calculation page and 2009 to 2010 comparison worksheet
- Athco Partners Inc. statement of revenues and expenses for 1 year ended 31 December 2010
- Athco Partners Inc. statement of assets liabilities and equity as of December 31 2010

- Customer list with contact information from April 2010 through the end of December 2010
- 2011 Sales report with cancellation percentages by month

Claimant seeks lost profits and impairment of earnings capacity in the amount of \$341,041.00.

Prior to presenting their claim to the NPFC, the Claimant filed a Full Review Final claim (FRF) with the GCCF on 14 December 2011 in the amount of \$341,041.00.<sup>5</sup> They were assigned Claimant ID #1638400 and claim # 9548188.<sup>6</sup> This claim was denied.<sup>7</sup>

Based upon the evidence provided by the Claimant, it appears that the subject matter for the GCCF claim is the same as the subject matter of their claim before the NPFC, i.e., that the company lost sales and had increased cancellations as a result of the Deepwater Horizon oil spill. The NPFC deems the Claimant's denied GCCF claim to be properly presented to the responsible party and properly presented to the NPFC. Accordingly, this Claim Summary determination for NPFC Claim N10036-1749 considers and addresses the earnings presented to the responsible party, specifically; GCCF Claim # 9548188 (FRF).

### **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 or destruction or loss of real or personal property or 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 the claim. The NPFC considered all the documentation submitted by the Claimant.

Here, in order to prove a claim for loss of profits and impairment of earning capacity damages, a claimant must provide documentation sufficient to prove (1) that the claimant sustained an actual financial loss, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

The Claimant alleges damages in the amount of \$341,041.00,<sup>8</sup> the same amount as line 21 on their 2010 Form 1120S U.S. Income Tax Return for an S Corporation.<sup>9</sup>

The Claimant asserts that starting the last 10 days of April after the Deepwater Horizon oil spill cancellations increased significantly year over year.<sup>10</sup> The Claimant states "cancellations were both seasonal and permanent residents who did not want to spend money as seasonal residents did not visit, tourism was greatly affected, thereby reducing seasonal rentals, and incomes were down due to job losses associated with the oil spill."<sup>11</sup> The Claimant further asserts that "customer cancellations skyrocketed as soon as the spill occurred and did not slow down until the spill was contained."<sup>12</sup>

The Claimant continued stating "Seasonal residents cancelled orders because they did not visit, rental owners cancelled because they could not rent the properties to tourists and local residents cancelled due to their own job reductions/losses due to the spill."<sup>13</sup>

<sup>5</sup> Report from the GCCF dated 21 May 2012.

<sup>6</sup> Report from the GCCF dated 21 May 2012.

<sup>7</sup> GCCF Denial Letter dated 06 April 2012.

<sup>8</sup> Optional OSLTF claim form dated 29 March 2012.

<sup>9</sup> 2010 Form 1120S U.S. Income Tax Return for an S Corporation at line 21.

<sup>10</sup> 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> letter from attorney and explanation letter from Home Pro dated 28 November 2011.

<sup>11</sup> First letter from attorney dated 30 March 2012.

<sup>12</sup> GCCF Full Review Final Payment Claim form at page 8 C.14.

<sup>13</sup> GCCF Full Review Final Payment Claim form at page 8 C.14.

The NPFC requested via certified letter that the Claimant provide contact information for all cancellations for 2010.<sup>14</sup> The Claimant provided contact information for 41 cancellations on 16 May 2012.<sup>15</sup> NPFC staff called the 41 customers who cancelled via telephone on 31 May 2012.<sup>16</sup> All customers that the NPFC spoke with stated that the oil spill had nothing to do with their decisions to cancel their respective orders.<sup>17</sup> As such, the Claimant has not established by a preponderance of the evidence that their alleged cancellation loss of earnings was due to the Deepwater Horizon oil spill.

The Claimant bought Home Pro 05 February 2010 and is unable to provide historical documentation needed for an accurate accounting of the company prior to the oil spill.<sup>18</sup> The Claimant has a one page profit and loss statement allegedly from Home Pro's previous owners for 01 January 2009 through October 2009 showing positive net income.<sup>19</sup> However without corroborating evidence such as invoices, tax returns, monthly breakdowns, affidavits, etc., the one page document is not sufficient evidence of a profitable company prior to the oil spill.

Furthermore even if the company was profitable before the oil spill, it is not evident that the company was operated the same way under the new ownership because the cost of goods sold increased as a percentage of sales year over year and expenses increased as a percentage of sales year over year while, at the same time, sales reduced from 2009 through the end of 2010.<sup>20</sup> Without accurate financial data from 2008, 2009 and 2011<sup>21</sup> the NPFC is unable to do a proper accounting of the financial performance of Home Pro. Accordingly, the Claimant has not established their sum certain (alleged loss) as presented to the NPFC by a preponderance of the evidence.

This claim is denied because the Claimant failed to meet their burden to demonstrate (1) that they have an alleged loss in the amount claimed, and (2) that their 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: *6/6/12*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

<sup>14</sup> NPFC's request for additional information at question 4.

<sup>15</sup> Claimant's response to NPFC's request for additional information complete customer list with phone numbers and by date.

<sup>16</sup> NPFC call log spreadsheet dated 31 May 2012.

<sup>17</sup> NPFC call log spreadsheet dated 31 May 2012. The NPFC was told by 13 clients that the oil spill had nothing to do with the cancellation, 7 numbers were either disconnected or the wrong number and 21 individuals were unavailable when called. The 13 clients who cited reasons other than the oil spill, by themselves, cast substantial doubt on the Claimant's assertions regarding causation.

<sup>18</sup> Claimant's response to NPFC's request for additional information at question one's answer dated 08 May 2012 stating they are unable to get past tax returns for Home Pro.

<sup>19</sup> Home Pro Inc Profit and Loss for January through October 2009.

<sup>20</sup> Home Pro Inc comparison of 2009 to 2010 submitted 08 May 2012.

<sup>21</sup> Claimant states they requested an extension and cannot provide 2011 tax data as of this date at response to the NPFC's request for additional information at question 2 response dated 08 May 2012.