

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Number: 7011 1570 0001 4803 7407

5890/DWHZ

07 June 2012

Ms. Melanie Frazier



Re: Claim Number: N10036-1774

Dear Ms. Frazier:

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 N10036-1774 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 N10036-1774.

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: (1) Claim Summary/Determination Form
(2) Documents Submitted in Support of Claim

ENCLOSURE 2
Documents Submitted in Support of Claim
Claim No. N10036-1774

The following is a list of documents submitted by the Claimant to the NPFC in support of his claim:

- Optional OSLTF Claim Form, signed 14 April 2012;
- Hardship Letter, dated 6 January 2012;
- Catering Order for Square Title Entertainment & Marketing, to be filled 13 March 2010 (three copies), signed by Julie Golston;
- Bill for Square Title Entertainment, dated 13 March 2010;
- MapQuest Directions for route from Mobile, AL, to Daphne, AL;
- Monthly Income Statements for January through December 2010;
- Quarterly Income Statements for First through Third Quarters 2010;
- Quarterly Profit & Loss Statements for First through Third Quarters 2010;
- Monthly Profit & Loss Statements for January 2008 through December 2009, and October through December 2010;
- 2009 Form 1040, including Schedules C, SE, and M;
- 2008 Form 1040, including Schedules C and SE;
- Letter detailing loss mitigation efforts;
- Letter from Julie Golston, dated 16 April 2012 (original and photocopy);
- Letter from Jada Dukes, dated 25 April 2012;
- Handwritten copies of questions asked on NPFC request for additional information letter;
- Batman Express Train Menu;
- Handwritten response to questions 2, 3, 4, 6, 7, 8, 9, 11, 12, and 13 in request for additional information;
- Business licenses for 2009 (single copy) and 2010 (two copies);
- Catering Order for Jada Dukes, to be filled 7 May 2010, signed by Jada Dukes;
- Catering Order for Jada Dukes, to be filled 7 May 2010, with cancellation notation 11 May 2010, signed by Jada Dukes (two copies);
- Funk Fest Vendor Contract, signed by Melanie Frazier;
- Receipt from Dominick's Seafood, Inc., dated 20 March 2010;
- Three receipts from Monarch Direct, dated 01 April 2010, 7 May 2010, and 20 May 2010;
- Receipt from Jubilee Foods, Inc., undated; and
- Pictures of Batman Express Train serving trailer.

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1774
Claimant	Ms. Melanie Frazier
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$40,000.00

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 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, Ms. Melanie Frazier (the Claimant) submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$40,000 in loss of profits and impairment of earning capacity damages.¹

The Claimant owned and operated Batman Express Train (Batman), a mobile food service business in Mobile, Alabama.² The menu primarily featured seafood at the time of the Deepwater Horizon incident.³ The Claimant alleged that her customers were worried that seafood from the Gulf of Mexico was unsafe after the Deepwater Horizon incident.⁴ The Claimant alleged that this caused Batman's revenues to decline, forcing her to ultimately close the business.⁵ As a result, the Claimant is seeking \$40,000 in loss of profits and impairment of earning capacity damages.⁶

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:

¹ Optional OSLTF Claim Form, signed 14 April 2012.

² Hardship Letter, dated 6 January 2012.

³ Batman Express Train menu.

⁴ Optional OSLTF Claim Form, signed 14 April 2012.

⁵ Hardship Letter, dated 6 January 2012.

⁶ Optional OSLTF Claim Form, signed 14 April 2012.

- (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.

DETERMINATION OF LOSS

Claimant's Submission to the NPFC

For a list of the Claimant's submissions to the NPFC, *see Enclosure 2*.

Prior to presenting this claim to the NPFC, the Claimant presented three claims to the RP/GCCF. The Claimant submitted the first claim, an Emergency Advance Payment Claim (EAP) seeking \$82,120.00 in lost wages and earnings, on 23 October 2010. The Claimant subsequently submitted a First Quarter Interim Payment Claim (ICQ12011) and a Sixth Quarter Interim Payment Claim (ICQ62012) seeking an unspecified amount in lost wages and earnings damages on 21 December 2010 and 26 April 2012, respectively. The RP/GCCF assigned Claimant ID # 3267217 to the Claimant, and assigned the EAP claim # 323077, the ICQ12011 claim # 9290951, and the ICQ62012 claim #9593541.⁷ The RP/GCCF denied payment on the EAP and ICQ12011 claims;⁸ the ICQ62012 claim is still pending with the RP/GCCF.

On 25 April 2012, the Claimant presented this claim to the NPFC, seeking \$40,000.00 in loss of profits damages.⁹ The NPFC may only review claims to the extent that the RP has received and

⁷ GCCF Denial Letter, dated 22 November 2010; GCCF Denial Letter, dated 8 November 2011.

⁸ GCCF Denial Letter, dated 22 November 2010; GCCF Denial Letter, dated 8 November 2011.

⁹ Optional OSLTF Claim Form, signed 14 April 2012.

either denied or not acted upon within 90 days.¹⁰ Because the Claimant first presented the EAP and ICQ12011 claims to the RP/GCCF, and the claimed damages are well within what the Claimant first presented to the RP/GCCF, the NPFC may properly adjudicate this claim.¹¹ Accordingly, the following will address only the damages that were the subject of those claims. Any damages presented to the RP/GCCF in the ICQ62012 claim are denied for improper presentment.

NPFC Determination

Under 33 U.S.C. § 2702(b)(2)(E) and 33 C.F.R. Part 136, a claimant must prove that any income loss 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.

Here, in order to prove a claim for loss of profits damages, a Claimant must provide documentation sufficiently proving (1) that the Claimant sustained an actual financial loss, and (2) that the discharge of oil resulting from the Deepwater Horizon oil spill caused that loss.

At the time of the Deepwater Horizon oil spill, the Claimant owned and operated Batman, a mobile food service business in Mobile, Alabama.¹² The Claimant alleged that the Deepwater Horizon incident caused her customers to fear that the Gulf of Mexico seafood was unsafe to eat.¹³ As a result, the Claimant alleged that Batman's sales dropped, eventually forcing the Claimant to close her business.¹⁴

The Claimant is seeking \$40,000 in loss of profits damages.¹⁵ The Claimant did not indicate how she calculated her losses and arrived at her claimed damage amount.

1. Failure to Prove Financial Loss

The Claimant has failed to provide financial documentation sufficient to prove that the Claimant sustained a financial loss in the period following the oil spill.

OPA's loss of profits damage category limits potentially available compensation to "the actual net loss of earnings or profits suffered."¹⁶ This requires that a Claimant establish that the Claimant sustained losses in sales and profits over the time period during which the Claimant was affected by the oil spill. The Claimant has failed to provide financial documentation sufficient to meet this requirement.

The Claimant alleged that the drop in sales caused her to lose \$40,000 in profits.¹⁷ To support her claim, the Claimant submitted monthly and quarterly profit and loss statements for 2008, 2009, and 2010, as well as tax returns for 2008 and 2009.¹⁸ The 2010 profit and loss statements indicate that the Claimant suffered a drop in sales beginning in April 2010, and extending

¹⁰ 33 C.F.R. § 136.103(a).

¹¹ 33 C.F.R. § 136.103(a).

¹² Hardship Letter, dated 6 January 2012.

¹³ Hardship Letter, dated 6 January 2012.

¹⁴ Hardship Letter, dated 6 January 2012.

¹⁵ Optional OSLTF Claim Form, dated 14 April 2012.

¹⁶ 33 C.F.R. § 136.235.

¹⁷ Optional OSLTF Claim Form, dated 14 April 2012.

¹⁸ Monthly and Quarterly Profit & Loss Statements for 2008, 2009, 2010; 2008 U.S. Individual Income Tax Return, including Schedules C and SE; 2009 U.S. Individual Income Tax Return, including Schedules C, M, and SE.

through the end of the year.¹⁹ However, the Claimant has not provided documentation that would allow the NPFC to independently verify the accuracy of these records, such as tax returns or bank statements. The NPFC notes that 2008 and 2009 profit and loss statements provided by the Claimant did not match what the Claimant reported on her tax returns. In 2009, for example, the Claimant reported \$139,246 in gross sales and \$70,884 in income.²⁰ The profit and loss statements, however, show gross sales of \$216,152.30 and income of \$151,162.33.²¹ 2008 records show markedly different figures as well.²²

The profit and loss statements, then, do not provide reliable proof that the Claimant sustained a financial loss, as the NPFC cannot independently verify the figures. Accordingly, the Claimant has failed to provide sufficient documentation to establish that she has suffered a financial loss following the Deepwater Horizon oil spill.

2. *Failure to Prove Deepwater Horizon Incident Caused Alleged Losses*

The Claimant has also not met her burden to prove the required causal link between the Deepwater Horizon incident and her claimed losses.

In a letter dated 2 May 2012, the NPFC requested that the Claimant provide certain additional information that would link the Claimant's alleged loss to the oil spill. Among other items, the NPFC requested that the Claimant provide proof that catering events were indeed cancelled as a result of the oil spill, as well as financial documentation to prove that the Claimant sustained losses as claimed.²³ The Claimant failed to adequately respond to either request.

As noted above, the Claimant's 2010 profit and loss statements do indeed show a drop in sales, beginning in April 2010 and continuing through the end of the year.²⁴ However, the Claimant has not provided documentation sufficient to verify this information, providing copies of only two Catering Orders (one of which is dated prior to the Deepwater Horizon incident) in response to the NPFC's request that the Claimant document her catering income for 2010.²⁵

As proof that catering events were cancelled as a result of the oil spill, the Claimant provided testimonials written by former customers.²⁶ However, the Claimant failed to provide proof that deposits were ever made on these events, or that the events were indeed cancelled by customers due to concerns regarding the oil spill. Rather, both testimonials indicate that the Claimant turned away potential business from interested customers.²⁷ One former customer stated that when she tried to retain the Claimant's catering services, "[the Claimant] stated . . . that due to the oil spill she had to close the business and could no longer cater seafood" (emphasis added).²⁸ Similarly, the second testimonial stated that "[the Claimant] advised [the potential customer] that due to the

¹⁹ Monthly and Quarterly Profit & Loss Statements for April 2010 through December 2010.

²⁰ 2009 U.S. Individual Income Tax Return, Schedule C.

²¹ Monthly and Quarterly Profit & Loss Statements for January 2009 through December 2009.

²² 2008 profit and loss statements show gross sales of \$167,167.99 and income of \$133,093.30; the Claimant only reported \$118,897 in gross sales and \$61,586 in income on her 2008 tax returns. Monthly and Quarterly Profit & Loss Statements for January 2008 through December 2008; 2008 U.S. Individual Income Tax Return, Schedule C.

²³ NPFC Request for additional information, 2 May 2012.

²⁴ Monthly and Quarterly Profit & Loss Statements for April 2010 through December 2010. It is worth noting again that the sales figures from the Claimant's profit and loss statements could not be independently verified through tax records or bank statements. And because the Claimant's profit and loss statements from prior years differ from those reported in her tax returns, the 2010 profit and loss statements alone are insufficient to establish an actual financial loss in 2010.

²⁵ Response to NPFC Request for additional information, received on 24 May 2012.

²⁶ Letter from Jada Dukes, dated 25 April 2012; Letter from Julie Golston, dated 16 April 2012.

²⁷ Letter from Jada Dukes, dated 25 April 2012; Letter from Julie Golston, dated 16 April 2012.

²⁸ Letter from Julie Golston, dated 16 April 2012.

deep horizon water [*sic*] incident she can no longer operate anymore” (emphasis added).²⁹ These testimonials therefore fail to establish that customers actually cancelled catering order due to concerns regarding the safety of seafood consumption following the oil spill but rather that the Claimant declined their potential business.

Furthermore, the NPFC requested that the Claimant provide “bank account statements or signed receipts, showing payments made to [the Claimant] for events that [she] had catered” prior to the oil spill.³⁰ The Claimant has also failed to provide documentation sufficient to respond to this request, providing only a copy of a Catering Order, and an unverifiable handwritten receipt, signed by the Claimant.

Based on the foregoing, the Claimant has failed to prove that she was not in fact earning a certain level of income at the time of the oil spill, nor has she proven that the oil spill in fact affected her ability to sell seafood.

Accordingly, this claim of \$40,000 is denied because the Claimant has failed to demonstrate (1) a financial loss in the amount alleged, 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 discharge of oil.


Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor’s Review: *6/7/12*

Supervisor’s Action: *Denial approved*

Supervisor’s Comments:

²⁹ Letter from Jada Dukes, dated 25 April 2012.

³⁰ NPFC Request for additional information, 2 May 2012.