

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 2970 0004 1302 0137

5890/DWHZ  
28 February 2013

Shivam, Inc.



Re: Claim Number: N10036-1893

Dear Mr. Niehaus:

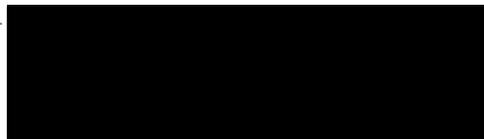
The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on the claim number N10036-1893 involving the Deepwater Horizon oil spill. Please see the attached Claim Summary/Determination 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 N10036-1893.

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	N10036-1893
Claimant	Shivam, Inc.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity/Real Property
Amount Requested	\$7,818,845.42

### ***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 11 January 2013, J. Edward Niehaus, Esq. on behalf of Shivam, Inc., ("the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$7,818,845.42 in financial losses associated with the Claimant's inability to construct and operate a hotel in Houston, Texas.<sup>1</sup> The Claimant has categorized these damages as both loss of profits and impairment of earning capacity damages as well as real or personal property damages.<sup>2</sup>

The Claimant is a subsidiary of a hospitality corporation located in Sugarland, Texas. The Claimant had planned to build an up-scale hotel in Houston, Texas at some point in 2007. However, "due to the general economic downturn creating a scarcity of available funds for purposes of new-business development, the project was held in abeyance until February 2009."<sup>3</sup> The Claimant alleged that thereafter, attempts to move forward with the project were unsuccessful due to "lowered tourism" and other conditions created by the "post spill market" in Houston, Texas.<sup>4</sup> As a result of the oil spill, the hotel was not constructed and thus failed to open in 2010 as the Claimant had hoped.

The Claimant seeks to recover losses stemming from three sources: (1) The Claimant seeks to recover losses equal to "profit that Claimant would have realized had Claimant been able to open and operate a [hotel] at the location selected by Claimant prior to the oil spill."<sup>5</sup> The Claimant uses various market performance statistics in coming to the conclusion that the hotel would have generated profits of \$3,423,845.42, had it opened as planned on 1 July 2010. The exact time period for which the Claimant is seeking to recover lost profits is not made clear by the Claimant's documentation; (2) The Claimant also seeks to recover costs it expended in attempts to salvage the project. The Claimant refers to these costs as

<sup>1</sup> Sum certain statement, received on 16 January 2013.

<sup>2</sup> Optional OSLTF Claim Form, signed on 30 December 2012.

<sup>3</sup> Claim Cover Letter.

<sup>4</sup> Optional OSLTF Claim Form, signed on 30 December 2012; Claim Cover letter, "Shivam's Claim for Mitigation Expenses."

<sup>5</sup> Claim Cover Letter, "Claimant's Damages for Lost Earning Capacity."

“mitigation expenditures” and places their value at \$3,400,000.00;<sup>6</sup> and (3) Finally, the Claimant seeks to recover \$995,000.00, which the Claimant alleges is the value of the land on which the Claimant had planned to build the hotel.<sup>7</sup> This financial loss was categorized by the Claimant as “real or personal property damage.”<sup>8</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 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**

<sup>6</sup> Claim Cover Letter, “Shivam’s Claim for Mitigation Expenditures.”

<sup>7</sup> Claim Cover Letter, “Shivam’s Claim for Loss of Value of Land.”

<sup>8</sup> Optional OSLTF Claim Form, signed on 30 December 2012.

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

- Optional OSLTF Claim Form, signed on 30 December 2013;
- Shivam, Inc., Officers and Directors;
- Shivam, Inc., Claim Valuation Methodology;
- Smith Travel Research Trends Report, including various market statistics from 2007 – 2011;
- Financial Feasibility Study, 10 September 2007;
- First National Bank, Renewal, Modification and Extension Agreement;
- Notice of Final Agreement, 5 February 2009;
- Document Correction Agreement, 5 February 2009;
- Attorney Representation and Fee Letter, 5 February 2009;
- 2010 Form 1120S, showing gross sales of \$700,572.00, including schedules and attachments;
- Memorandum of Option Contract, filed on 11 Feb 2011;
- Option Contract, effective as of 3 February 2011.

The Claimant alleged that this claim was first presented to the Responsible Party through the BP Claims Program on 19 November 2012.<sup>9</sup> According to the Claimant, the Responsible Party has not resolved the claim within 90 days from the date of presentment.<sup>10</sup>

On 11 January 2013, the Claimant submitted this claim to the NPFC seeking \$7,818,845.42 in losses resulting from the Claimant's inability to move ahead with scheduled construction of a hotel in Houston, Texas. The Claimant stated that these losses were previously presented to the BP Claims Program. At the time that the claim was submitted to the NPFC, the Claimant had not satisfied OPA presentment requirements as the Responsible Party had not denied the claim, nor had the claim been left undetermined by the Responsible Party for a period of more than 90 days. However, after 90 days from the date of presentment to the Responsible Party, the NPFC deemed OPA presentment requirements to have been met and officially accepted presentment of claim N10036-1893.

Furthermore, evidence in this claim submission indicates that the Claimant is not a member of the Deepwater Horizon oil spill economic and property damages class action settlement (the E&PD Settlement).<sup>11</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.

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.

Here, the Claimant has failed to provide evidence sufficient to prove that any losses associated with the failed hotel project were caused by the discharge of oil resulting from the Deepwater Horizon oil spill. In establishing a connection between the oil spill and the failure of the project, the Claimant alleged that the oil spill, "lowered tourism, ending the Claimant's ability to continue the business venture."<sup>12</sup> However, other evidence provided by the Claimant indicates that hotel occupancy percentages in Houston, Texas in

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<sup>9</sup> Optional OSLTF Claim Form, signed on 30 December 2012.

<sup>10</sup> 33 C.F.R. § 136.103(a).

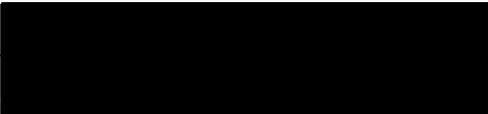
<sup>11</sup> Optional OSLTF Claim Form, signed on 30 December 2012.

<sup>12</sup> Optional OSLTF Claim Form, signed on 30 December 2012.

2010 actually increased each month as compared to 2009.<sup>13</sup> While RevPAR<sup>14</sup> for the same statistical area appears to have decreased for the months of January through March of 2010, it actually increased for every month of 2010 after the oil spill, with the exception of July.<sup>15</sup> The Claimant has not presented any evidence which might support their claim that the oil spill caused tourism in Houston, Texas to decrease, or to prove that a decrease in tourism was a factor preventing the Claimant from constructing the hotel as planned. Rather, evidence in this claim submission indicates that tourism and hotel occupancy rates in Houston, Texas actually increased in 2010 following the oil spill.

Furthermore, it appears as though for at least three years prior to the oil spill, several factors had been causing the Claimant to be unsuccessful in his attempt to bring this project to completion. According to this claim submission, the project had been held in abeyance from sometime in 2007 until February 2009. It is unclear how the Claimant was advancing toward completion of the project from February 2009 until the oil spill, which began in late April of 2010. The Claimant has not provided any evidence to indicate that the project was actually progressing as planned in the period leading up to the oil spill. In sum, the Claimant has not provided sufficient evidence to prove that the discharge of oil resulting from the Deepwater Horizon oil spill resulted in the inability of the construction project to move forward as the Claimant had anticipated.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that they sustained a financial loss in the amount \$7,818,845.42, 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:  *Claims Administration Division*

Date of Supervisor's Review: *2/28/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

<sup>13</sup> See, e.g., "Tab 2" – Data by Measure, Houston, TX Selected Properties.

<sup>14</sup> Revenue per available room.

<sup>15</sup> See, e.g., "Tab 2" – Data by Measure, Houston, TX Selected Properties.