

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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Number: 7011 2000 0001 1246 7288

5890/DWHZ
07 August 2014

Kris'es Wholesale Seafood, Inc.
14110 Aston Street
Houston, TX 77048

Re: Claim Number: N10036-2000

Dear Mr. Medina:

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 N10036-2000 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 N10036-2000.

Mail reconsideration requests to:

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

Sincerely,

A handwritten signature in black ink, appearing to be "M. G. Medina".

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

Enclosure: Claim Summary/Determination

CC: The Law Offices Francisco G. Medina
ATTN: Mr. Francisco G. Medina
Park Central Plaza
1111 North Loop West, Suite 820
Houston, TX 77008

CERTIFIED MAIL NUMBER:
7011 2000 0001 1246 7295

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	NI0036-2000
Claimant	Kris'es Wholesale Seafood, Inc.
Type of Claimant	Corporate
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$320,662.56

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 23 October 2013, Mr. Francisco G. Medina submitted a claim for his client, Kris'es Wholesale Seafood, Inc. ("the Claimant") to the Oil Spill Liability Trust Fund (OSLTF), seeking \$320,662.56 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant is a wholesaler of seafood that sells to grocery store chains, stores, restaurants, hotels and seafood markets. As a result, the Claimant states that the oil slowed down the catch of crabs, shrimp, fish and oysters. It also claims that, because customers refused to eat Gulf seafood, it lost customers, sales and relationships. Additionally, it was also impacted by the fishermen and vendors who went out of business or did not have anything to sell. In an attempt to mitigate its losses, the Claimant purchased either frozen seafood or product from other geographic locations.

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, 01 October 2013.

- (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:

- Optional OSLTF Claim Form, 01 October 2013 2013;
- Internal Balance Sheet Summary for Claimant, 2009-2011;
- GCCF Claim Submission for Claimant and supporting documentation;
- Deepwater Horizon Claims Center Denial Letter, 19 June 2013;
- Federal Income tax Returns for Claimant, 2007-2012;
- Various Documentation for Claimant's Suppliers;
- BP Claims Program Denial Letter, 24 September 2013;
- Internal Claimant Calculation of Loss;
- Examples of Documentation for Louisiana Customers of the Claimant;
- GCCF Interim Payment documentation.

Prior to submitting this claim to the NPFC, the Claimant attempted to recover loss of profits or impairment of earning capacity damages through both the Deepwater Horizon and BP Claims programs.

Both denied payment due to lack of documentation to support that the loss of income was due to the oil spill.²

On 23 October 2013, the Claimant presented this claim to the NPFC, seeking to recover \$320,662.56 in loss of profits or impairment of earning capacity damages resulting from the Deepwater Horizon oil spill. Because this claim has previously been presented to and denied payment by the Responsible Party, the Claimant has satisfied OPA presentment requirements.³

Evidence in this claim submission indicates that the Claimant is likely a member of the Deepwater Horizon Economic and Property Damage Class Action Settlement (E&PD Settlement).⁴

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.

This claim is 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 and had not signed a Release in exchange for final payment, 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.

On 14 November 2013, the NPFC sent a letter requesting additional information in order to properly adjudicate this claim,⁵ but has not received the requested documentation at the time of the writing of this determination. Without the proper documentation, a loss cannot be determined therefore this claim is denied. More specifically:

The Claimant was asked to specify its "Management Fees" in the P&I statements in order for the NPFC to understand these costs and to date, it has not done so. The Claimant was also asked to provide a

²BP Claims Denial Letter, dated 24 September 2013 and Deepwater Horizon Claims Program Denial Letter, 19 June 2013.

³ 33 C.F.R. § 136.103(a).

⁴ See Deepwater Horizon Direct Filing Short Form, signed 20 April 2011, and received by the U.S. District Court for the Eastern District of Louisiana on 22 April 2011.

⁵ This letter was received by the Claimant's counsel, Mr. Francisco Medina, on 18 November 2013; the letter sent directly to the claimed was returned to the NPFC unclaimed on 24 December 2013.

breakdown of payments received by the GCCF and/or BP claims programs, as well as documentation that was provided to support these payments. It was also requested that the Claimant provide for what costs or months such payment is reflected. Without this documentation, the NPFC cannot ascertain whether or not the Claimant subrogated all or some of its rights to a claim away, or what costs claimed have been mitigated by the receipt of payment.

Finally, it was asked to provide itemized listings of every species product category from 2008 through 2011, as well as a listing of all customers who ordered, specific products bought, price and quantity for each product category by month and year, and a monthly listing of customers and suppliers. Such evidence would confirm whether or not the Claimant changed species during the spill thus mitigating costs. It would also demonstrate if there was regular fluctuation in catch type and seasonality. Without this information, the NPFC is unable to make a proper determination.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove how it determined what its alleged loss actually is or that it is a loss in the amount of \$320,662.56 as alleged, and also that this 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. Finally, this claim is considered to have been settled by virtue of belonging to the E&PD Settlement.



Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *8/7/14*

Supervisor's Action: *Denial approved*

Supervisor's Comments: