

CLAIM SUMMARY / DETERMINATION FORM

Date	: 11/10/2010
Claim Number	: N08057-0081
Claimant	: Jahda Muhammad
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: [REDACTED]
Amount Requested	: \$30,000.00

**I. Facts**

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision and discharged oil into the Mississippi River, a navigable waterway of the United States.

**II. Responsible Party**

American Commercial Lines LLC (ACL) owned the barge at the time of the incident and is a responsible party (RP) under the Oil Pollution Act.

**III. Claimant**

The claimant allegedly owns an event hall in New Orleans, LA.

**IV. Claim Description**

The claimant claims a total of \$30,000. The claimant alleges that her losses were a result of customers cancelling reservations because they “were afraid of the water.”

**V. APPLICABLE LAW**

All claims for removal costs or damages shall be presented **first to the responsible party** or guarantor of the source designated under section 2714(a) of this title. 33 U.S.C. §2713(a).

If a claim is presented in accordance with subsection (a) of section 2713 and

- (1) each person to whom the claim is presented denies all liability for the claim, or
- (2) the claim is not settled by any person by payment within 90 days after the date upon which
  - (A) the claim was presented, or
  - (B) advertising was begun pursuant to section 2714 (b) of this title, whichever is later,the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund. 33 U.S.C. §2713(c).

The uses of the OSLTF are described at 33 U.S.C. §2712. It provides in relevant part that:

“(a) Uses generally

The Fund shall be available to the President for –

- (4) [T]he payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages; . . .

Damages include damages for injury to natural resources, injury to or economic losses from the destruction of real or personal property, loss of subsistence use of natural resources, Government loss of revenues, loss of profits or earning capacity as a result of loss or destruction of real or personal property or natural resources, and costs of increased public services. 33 U.S.C. §2702(b). Damages are further defined in OPA to include the costs of assessing the damages. 33 U.S.C. §2701(5).

Damage claims must be presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care. 33 U.S.C. §2712(h)(2).

Under 33 CFR 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. Further, a claim presented to the Fund should include, as applicable:

“[T]he reasonable costs incurred by the claimant in assessing the damages claimed. This includes the reasonable costs of estimating the damages claimed, but not attorney’s fees or other administrative costs associated with preparation of the claim.” 33 CFR 136.105(e)(8).

With regard to claims for loss of profits and impairment of earning capacity, the NPFC must independently determine that the proof criteria in OPA and the implementing regulations, at 33 CFR Part 136, are met, including the general provisions of 33 CFR 136.105, and the specific requirements for loss of profits and earning capacity claims in Subpart C, 33 CFR 136.231, et seq.

Pursuant to the provisions of 33 CFR 136.231, claims for loss of profits or impairment of earning capacity due to injury to, destruction of, or loss of real or personal property or natural resources may be presented to the Fund by the claimant sustaining the loss or impairment.

In addition to the requirements of Subparts A and B of 33 CFR Part 136, 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 the 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.
- (d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant receives 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. 33 CFR 136.233 (a) – (d)

If a third party claimant or an RP is able to establish an entitlement to lost profits, then compensation may be provided from the OSLTF. But the compensable amount is limited to the actual net reduction or loss of earnings and profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for the following: all income resulting from the incident; all income from alternative employment or business undertaken; potential income from alternative employment or business not undertaken, but reasonably available; any saved

overhead or normal business expenses not incurred as a result of the incident; and state, local, and Federal tax savings. 33 CFR 136.235 (a) – (e).

Under 33 CFR 136.115(d), the Director, NPFC, will, upon written request of the claimant or the claimant's representative, reconsider any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request for reconsideration must be received by the NPFC within 60 days after the date the denial was mailed to the claimant or within 30 days after receipt of the denial by the claimant, whichever date is earlier.

## **VI. DETERMINATION**

The NPFC finds that the claimant has failed to prove that she presented her claim to the responsible party (a prerequisite to submitting a claim to the NPFC). Therefore, since the claim has not been presented first to the responsible party as required by 33 U.S.C. §2713(a), the claimant's submission cannot be considered a proper claim to the NPFC. The claim must be denied for this reason.

Additionally, the claimant failed to provide proof of the following with documentation:

1. That she owns the business she claims lost profits.
2. That the spill caused her to lose profits.
3. That she even lost profits.

The claimant claimed \$30,000, but only stated that she is seeking \$20,000 in lost profits. The NPFC cannot determine what the additional \$10,000 represents. The claimant's total submission only includes a claim form and copies of invoices with "Paid" stamped upon them, each also containing a handwritten note stating "Refund" – "Cancelled due to water concern." There are no details as to what the water concern was. The claimant provided no objective evidence showing a loss, details of a loss, or proof that any loss sustained resulted from the oil spill (i.e. spill caused damages). She also did not provide financial statements, tax records, or records of saved expenses. There is a complete lack of documentation and details of the amount being claimed.

The claimant seeks reimbursement of lost profits. She alleges that customers of her event hall cancelled reservations due to concerns about the water. The claimant initially submitted the Optional OSLTF Claim Form with no other documentation. The NPFC sent the claimant a letter, via her attorney, requesting additional information on August 4, 2010. By September 7, 2010, the claimant had not provided any of the information requested, so the NPFC sent an email requesting the claimant to respond to the initial request. On September 29, 2010, having received no information from the claimant or her attorney, the NPFC sent a 30-day notice requesting documentation. The claimant's attorney finally sent some information partially responding to the NPFC's request on October 7, 2010. That response included some invoices with handwritten notes on them. On October 8, the NPFC sent another email to explain that the documentation submitted was insufficient and to remind the claimant's attorney that much more information was requested that had not been provided to support the claim. On November 3, 2010, the NPFC extended the deadline to provide information by an additional five days. As of the date of this determination, the claimant provided no further responses to our requests for information.

Because the claimant has not diligently pursued her claim and has not proven the threshold requirements for presenting a claim to the NPFC, the claim is denied.

**VII. AMOUNT: \$0.00**

Claim Supervisor:

Date of Supervisor

Supervisor Action:

*Denial Approved*

Supervisor's Comments: