

APPEAL PANEL DECISION FORM

I. CLAIMANT AND CLAIM INFORMATION

Claimant Name	Last/Name of Business ██████████	First ██████████	Middle ██████████
Claimant ID	██████████	Claim ID	██████████
Claim Type	Start-Up Business Economic Loss		
Law Firm	██████████		

II. DECISION

Denial Upheld

Denial Overturned

III. PRIMARY BASIS FOR PANELIST DECISION

Please select the primary basis for your decision. You may also write a comment describing the basis for your decision.

- Claim should have been excluded.**
- Claim should have been denied.**
- Claim should not have been excluded.**
- Claim should not have been denied.**
- No error.**

Comment (optional):

Claimant ██████████ a ██████████, based energy wholesaler, appeals the denial of its Start-Up Business Economic Loss claim. The Settlement Program ("the SP") concluded that ██████ had not shown it was doing business or in operation before April 20, 2010. ██████ is an energy wholesaler. It clearly was preparing to start-up its business before April 20th, but booked no revenue until a small amount in September 2010, gradually increasing each month October through December. ██████'s P&Ls reflect that it continued to generate revenue, of several thousand dollars per month, throughout 2011, for a total of \$59,974.21, but appears to have stopped posting revenue in March of 2012. The information in the record reflects that ██████ was definitely taking steps during January-April 19, 2010 to launch its business venture, but the question is whether it did enough to establish an operating history during that time frame. Under Policy 362 v.2, in determining whether a business had begun doing business pre-April 20, 2010, the SP is to consider the "totality of the circumstances," with a focus on, as here potentially applicable, "when the business began to a) sell products in the Gulf Coast Areas . . . c) perform its full time services while physically present in the Gulf Coast Areas, . . . or e) incur substantial costs or expenses of a nature indicative of the actual start-up of business operations." A totality of the circumstances test necessarily involves some degree of subjectivity, although designed to look to objective factors. The record shows that ██████ engaged the consulting services of ██████████ to assist it in



implementing its business venture, and the two entered into a "Consulting Agreement," undated but stated in its introduction to be effective January 1, 2010. [REDACTED] was identified therein as an entity that was "in formation." Although the agreement called for payments by [REDACTED] of \$7,500 per month commencing on June 1, 2010, it referenced the fact that those payments would be "in addition to compensation already provided to" the consulting firm. The record reflects active engagement of the consultant's principal, [REDACTED], early in 2010 and a March 15, 2010 email from him to [REDACTED], President of [REDACTED], and [REDACTED], its sole owner, reflects the concrete stage his work product had reached by then. (Doc. ID [REDACTED]) Therefore, "in addition" to the monthly fee to be paid his company starting June 1, 2010, he was paid by [REDACTED] \$5,000 on January 4, 2010; \$2,000 on January 22nd; \$3,500 on February 26th; \$2,500 on March 4th; \$2,500 on March 15th and \$2,500 on April 7th, for a total of \$18,000 pre-April 20th. (Doc. ID [REDACTED]) In addition, [REDACTED] had expenses pre-April 20, 2010 of \$3,000 to [REDACTED] of \$3,000 for [REDACTED] (March 24th); to [REDACTED] of \$32.06 for registration of four versions of the [REDACTED] domain name (i.e., .biz; .com; .info; and .net) and had paid over \$2,000 for travel fees and meals for [REDACTED], who was based in California. Neither the SP, as far as anything in the record discloses, nor BP question that [REDACTED]'s charges were for anything other than the gearing up of [REDACTED]'s business venture. An email sent March 30, 2010, on behalf of [REDACTED], to the [REDACTED] [REDACTED] clearly reflects the active organizational operations of [REDACTED], and the support offered by it for the training of "new hires" by brokers it had put in place. (Doc. ID [REDACTED]) Involved in all of that was Ms. [REDACTED], whose email address was [REDACTED] and who had signed as President of [REDACTED] a March 23, 2010 "[REDACTED] Broker Agreement" for [REDACTED] to serve as a "Broker." In point of fact, however, [REDACTED] did not become a formal entity until it was chartered in Delaware on [REDACTED] as "[REDACTED]" Nonetheless, as evident from the transaction mentioned above, [REDACTED] was acting as a [REDACTED] well before April 20, 2010, with registered domain names, a declared President, an [REDACTED] of brokers in place, and an executed Broker Agreement with [REDACTED], a major seller of [REDACTED]. The panelist concludes that the record establishes that before April 20, 2010, [REDACTED] had "incur[red] substantial cash or expenses of nature indicative of the actual start-up of a business operations," and that the totality of the circumstances, including the uninterrupted continuation of business activity subsequent to April 19, 2010, confirmatory of pre-April 20, 2010 actual start-up, reflects an actual operating history as of April 19, 2010. Consequently, the denial of the claim based on absence of a pre-April 2010 operating history is overturned, and the claim remanded for appropriate further processing.