

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
)
CHAMPION/LBS ASSOCIATES)
DEVELOPMENT COMPANY)
)
for Review of a Determination of)
the Division of Clean Water)
Programs, State Water Resources)
Control Board, Regarding)
Participation in the Underground)
Storage Tank Cleanup Fund.)
OCC File No. UST-87.)
_____)

ORDER NO. WQ 96-04-UST

BY THE BOARD:

Champion/LBS Associates Development Company
(petitioner) seeks review of a Final Division Decision (Decision)
by the Division of Clean Water Programs (Division) which reduced
petitioner's reimbursement eligibility from the Underground
Storage Tank Cleanup Fund (Fund). For the reasons hereafter
stated, this order determines that the Decision of the Division
should be affirmed.

I. STATUTORY, REGULATORY, AND FACTUAL BACKGROUND

Chapter 6.75 of the California Health and Safety Code,
commencing with Section 25299.10, authorizes the State Water
Resources Control Board (SWRCB) to conduct a program to reimburse
certain owners and operators of petroleum underground storage
tanks (UST) for corrective action costs incurred by those owners

and operators.¹ Section 25299.77 authorizes the SWRCB to adopt regulations to implement the program. On September 26, 1991, the SWRCB adopted the regulations. The Regulations (hereafter referred to as Cleanup Fund Regulations or Regulations) are contained in Chapter 18, Division 3, Title 23, of the California Code of Regulations, and became effective on December 2, 1991. Among other things, the Regulations provide for submittal of reimbursement claims to the SWRCB by owners and operators of petroleum USTs, for acceptance or rejection of these claims by staff of the SWRCB, and for appeal of any discretionary staff decisions to the SWRCB.

Cleanup Fund Regulations provide that if the SWRCB does not act on a petition within 270 days after receipt, the petition shall be deemed to be denied. This time limit may be extended for a period not to exceed 60 calendar days by written agreement of the SWRCB and the petitioner. (Regulations, § 2814.3(d).) The SWRCB did not take action on this petition within either the 270-day period or 60-day extension period. The SWRCB has the discretion to waive any nonstatutory requirements pertaining to processing payment or approval of claims. (Regulations, § 2813(e).) The SWRCB hereby exercises its authority to hear the petition, notwithstanding expiration of the time limits set by

¹ Unless otherwise indicated, all statutory references in this order are to the California Health and Safety Code.

the Regulations. (See also Regulations, § 2814.2(b) authorizing the SWRCB to hear petitions on its own motion.)

The following is a summary of the relevant facts. The petitioner, Champion/LBS Associates Development Company, is a joint venture organized under the laws of the State of California. Petitioner's claim involves a site located at 13662 Newport Boulevard in Tustin, California. Prior to petitioner's acquisition of the property, James White Oil Company, Signal Oil and Gas Company, and World Oil Company owned or operated a gasoline service station with petroleum USTs at the site.

Petitioner ground leased the property in March 1989 from Mr. M. David Yoder. The following May, petitioner discovered petroleum contamination at the site when underground tanks were removed during development of the property. In July of 1989 the Orange County Environmental Health Department demanded that petitioner delineate and clean up the contamination in the soil and ground water. Petitioner remediated the site and received a closure letter from the Orange County Environmental Health Department on April 13, 1990.

Petitioner sought reimbursement for its remediation costs from prior owners, lessors, and lessees at the site. When none of these parties contributed monies, petitioner filed a

lawsuit.² In numerous causes of action, petitioner sought compensation for (1) delayed construction costs and interest carry, (2) water extraction and testing costs, (3) environmental consultant expenses, (4) excavation costs, (5) contamination clean-up costs, (6) lost income, and (7) attorneys' fees. Separately, petitioner sought court costs and punitive damages.

The petitioner applied to the Fund on January 16, 1992, and was granted conditional eligibility pending a detailed review. Prior to a final determination of eligibility, petitioner settled its lawsuit with the various defendants. In settlement, defendants paid petitioner a total of \$645,000. World Oil Company paid petitioner \$475,000; Signal Oil and Gas Company paid petitioner \$125,000; and E-Z Serve Petroleum Marketing Company of California formerly known as James White Oil Company paid petitioner \$45,000.

On March 30, 1994, the Fund completed its detailed review and issued a Letter of Commitment (LOC) to petitioner in the amount of \$150,000. The LOC legally bound the Fund to reimburse the petitioner for eligible remediation costs up to \$150,000. On August 19, 1994, petitioner submitted its first reimbursement request seeking reimbursement for costs totaling \$151,158.84. This amount equals corrective action costs of

² Champion/LBS Associates Development Company v. James White Oil Company, Signal Oil and Gas Company, World Oil Company; Orange County Superior Court, Case No. 616176.

\$161,158.84 less the Fund's \$10,000 deductible. On October 13, 1994, petitioner submitted additional documentation to complete its reimbursement request. Petitioner submitted a Non-Recovery from Other Sources Disclosure Certification, a copy of the complaint in the underlying litigation between petitioner and various defendants, and copies of two related settlement agreements.

Following review of the settlement agreements, Fund staff determined that claimant's eligibility for reimbursement had to be reduced to prevent an improper double recovery. Claimants to the Fund are prohibited from receiving double payment for the same corrective action costs. Several defendants paid a total of \$645,000 in settlement. None of the settlement agreements specified an allocation of the settlement proceeds to specific costs. To determine whether any of the monies paid in settlement were for corrective action costs, Fund staff reviewed the settlement agreements and underlying causes of action in the litigation. Fund staff determined that the damages for corrective action costs were the gravamen of the underlying lawsuit. Based on this analysis, Fund staff determined that some of the monies paid in settlement were actually paid to cover corrective action or remediation costs. Specifically, Fund staff concluded that at least \$161,158 of the \$645,000 paid in settlement was payment for corrective action costs.

To prevent a double recovery, Fund staff reduced claimant's eligibility by \$151,158. Absent this reduction in reimbursement eligibility, Fund staff believed that petitioner would have been compensated for corrective action costs by both the settling parties and the Fund in violation of Cleanup Fund Regulations. As a result of this determination, petitioner was not reimbursed by the Fund for any of its corrective action costs.

Petitioner appealed the Fund staff's determination to the Chief of the Division of Clean Water Programs. The Division Chief modified the Fund staff determination and granted the petitioner eligibility of \$36,272. Because settlement proceeds were applied to corrective action costs that otherwise would have been reimbursed by the Fund, the Division Chief employed the "common fund" doctrine. This doctrine requires that passive beneficiaries (i.e., the SWRCB) pay a proportionate amount of the costs incurred to obtain a given benefit. (Quinn v. State (1975) 15 Cal.3d 162, 124 Cal.Rptr. 1.)

In this case, petitioner incurred attorneys' fees in the process of reaching a settlement. Since some of the settlement proceeds were applied to corrective action costs, the Fund passively obtained a benefit because it otherwise would have had to reimburse petitioner for those costs. Under the common fund doctrine, the Fund is obligated to reimburse the petitioner a proportionate amount of the costs incurred to obtain the

settlement. Here, the benefit to the Fund was \$120,907, the amount it would have reimbursed had there not been a settlement.³ This benefit is 18.7 percent of the total settlement amount of \$645,000 ($\$120,907/\$645,000 = .187$). Therefore, under a strict apportionment scheme, the SWRCB should contribute 18.7 percent of the attorneys' fees of \$319,500.44 or \$59,746.58.

The Division Chief further concluded, however, that application of the common fund doctrine should be applied to cover only reasonable attorneys' fees. The Division Chief concluded that the Fund, a passive beneficiary, should not be forced to contribute a strictly proportionate amount of fees where the petitioner spent an unreasonable amount of money in pursuit of its case. Instead, the Division Chief determined that attorneys' fees that equaled 30 percent of \$120,907 would be a reasonable contribution. Thirty percent of \$120,907 equals \$36,272. Accordingly, the Division Chief granted a credit of \$36,272 to petitioner's eligibility. Petitioner has been reimbursed this amount.

II. CONTENTIONS AND FINDINGS

1. Contention: Petitioner contends that it is entitled to full reimbursement of its eligible corrective action costs, regardless of the settlement proceeds, given the relative

³ During review of petitioner's reimbursement request, Fund staff determined that petitioner was eligible for reimbursement of only \$120,907 of the \$151,158 claimed.

insignificance of the remediation expenses to the underlying legal action.

Finding: Petitioner's first argument is without merit. Petitioner obtained \$645,000 in settlement, an amount that far exceeds the total remediation costs. Prior to settlement, petitioner maintained its claim for costs of corrective action against the settling defendants. The amount of corrective action costs were known with certainty, unlike the amounts for most of the other alleged damages. Thus, it is reasonable to conclude that the defendants would have first contributed monies to settle these certain costs as opposed to damages which were more open to dispute.

Furthermore, neither of the settlement agreements refer to the Fund. At the time that petitioner concluded settlement negotiations, the Fund had not yet prepared an LOC for the benefit of the petitioner. Hence, at the time of settlement, petitioner did not know what costs, if any, would be reimbursed by the Fund. From this perspective, petitioner must have negotiated for corrective action costs. Just as significantly, the defendants must have considered the corrective actions costs in their tender of settlement.

Lastly, a review of the two settlement agreements indicates that the defendants contributed monies to cover clean-up costs. Petitioner received \$645,000 in settlement from three

separate parties. In the first settlement agreement, World Oil Company and Signal Oil and Gas Company paid the petitioner a combined settlement of \$600,000. The settlement agreement does not allocate the \$600,000 to any specific costs. In sum, the settling parties agreed to resolve the disagreements between themselves by releasing each other from all claims that arose out of the litigation. As in most settlements reviewed by Fund staff, the settlement states that the agreement "shall never at any time for any purpose or reason be considered as an admission of liability or responsibility on the part of any party".

(Petitioner's Exh. 5, p. 5.) As noted above, the damages sought by petitioner in the lawsuit included: (1) delayed construction costs and interest carry, (2) water extraction and testing costs, (3) environmental consultant expenses, (4) excavation costs, (5) contamination clean-up costs, (6) lost income, and (7) attorneys' fees. Water extraction and testing costs, environmental consultant expenses, excavation costs, and contamination clean-up costs are all reimbursable from the Fund. Since the underlying lawsuit included claims for clean-up costs, we find it is reasonable to attribute some of the monies paid in this settlement to the actual costs of corrective action, and to reduce petitioner's reimbursement eligibility accordingly. We also find that while the parties did not admit to liability or responsibility, it is reasonable to conclude that they

nevertheless contributed towards the costs of cleanup to resolve the lawsuit.

In the second settlement agreement, E-Z Serve Petroleum Marketing Company paid petitioner \$45,000. As in the World Oil Company settlement agreement, this settlement states that it "does not constitute an admission of liability on the part of E-Z Serve for the alleged damages" (Petitioner's Exh. 6, p. 1.) Unlike the first settlement agreement, however, this settlement provides a clear indication of how the settlement proceeds should be allocated. In the opening recital, the agreement states that ". . . plaintiff [petitioner] brought the Action to recover its cost of investigating, evaluating, and cleaning up gasoline and fuel contamination in the soil and under the Property." (Settlement Agreement and Release, Petitioner's Exh. 6, p. 1.) The settlement later states that the parties ". . . mutually release and discharge one another . . . of all claims, damages and liabilities arising from damage or loss relating to the gasoline and diesel fuel contamination." (Settlement Agreement and Release, Petitioner's Exh. 6, p. 2.) Additionally, the settlement agreement does not refer to claims for damages relating to lost profits, interest expenses, or other alleged damages. Thus, the language of the settlement agreement strongly indicates that defendant James White Oil Company was primarily settling for damages relating to environmental cleanup. As a result, we find it is reasonable to attribute some if not

all of the settlement monies in this settlement to cleanup and to reduce petitioner's reimbursement eligibility to prevent an improper double recovery.

Application of the Settlement Proceeds

Since we have found that a portion of the settlement monies must be attributed to clean-up costs, our remaining tasks are to determine by what amount petitioner's reimbursement eligibility should be reduced and what contribution should be made by the Fund pursuant to the common fund doctrine. These determinations must be made so that the allocation is fair to both the petitioner and to the Fund, recognizing that thousands of other owners and operators of USTs will turn to the Fund for reimbursement of their corrective action costs.

Claimants to the Fund are not eligible for reimbursement of corrective action costs if such costs have been paid by another party. Cleanup Fund Regulation section 2812.2(b) states in pertinent part:

"Only corrective action and third party compensation claim costs incurred by or on behalf of a claimant shall be reimbursable from the Fund. No claimant shall be entitled to double payment on account of any corrective action or third party compensation claim cost. Where a claimant receives reimbursement on account of any cost from the Fund and also receives reimbursement on account of such cost from another source, the claimant shall remit to the Fund an amount equal to the sum disbursed from the Fund on account of such cost." (CCR § 2812.2(b).)

Health and Safety Code Section 25299.74(c) states:

"Payment of any claim by the fund pursuant to this chapter shall be subject to the state acquiring by

subrogation the rights of the claimant to recover those costs of corrective action for which it has compensated the claimant from the person responsible or liable for the unauthorized release."

The Cleanup Fund Regulations are clear that claimants to the Fund may not obtain a double recovery for any costs reimbursed by the Fund. In light of this clear restriction on the use of Fund monies, we begin our analysis of the application of the settlement proceeds.

Initially, it is undisputed that petitioner incurred costs of \$161,158 associated with the cleanup of the site. It is also clear that petitioner incurred interest costs of \$205,283. In contrast, it is unresolved whether petitioner incurred any damages beyond these costs other than attorneys' fees. Petitioner argues that it incurred lost profit damages of \$1,200,000. While it is possible that the delay in construction may have resulted in a lower sales price, there is no independent basis which can be used to verify the correctness of the \$1,200,000 amount. Other appraisals estimated that petitioner's project would be worth between \$4,200,000 and \$4,300,000 upon completion. (Deposition of James P. Regan, pp. 101-103.) Petitioner actually sold the project for \$4,100,000. (Deposition of James P. Regan, p. 97.) In other words, other experts would have concluded that petitioner incurred a loss ranging from \$100,000 to \$200,000.

As discussed above, we believe it is reasonable to conclude that in determining how much to agree to pay in

settlement, the defendants gave great weight to the clearly established and quantified costs of corrective action and gave much less weight to the disputed and more speculative claims of lost profits. The settlement proceeds are sufficient to fully cover all of petitioner's undisputed damages. In fact, after the hard costs of cleanup and additional interest expenses are paid, petitioner retains \$278,559 to apply to other costs, including attorneys' fees (\$645,000 - \$161,158 - \$205,283 = \$278,559). Thus, we find that \$161,158 of the settlement proceeds must first be applied to corrective action costs. Given this finding, claimant's eligibility for reimbursement must be reduced by the full amount of its reimbursable corrective action costs to ensure that claimant does not receive a double payment.

Application of the Common Fund Doctrine

Since petitioner obtained settlement proceeds for costs that would have been reimbursed by the Fund, equity requires that the Fund contribute to the cost of attorneys' fees incurred by petitioner. As the court described in Quinn v. State:

"[O]ne who expends attorneys' fees in winning a suit which creates a fund from which other derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs."

Quinn v. State 15 Cal.3d 162, 167-68, 124 Cal.Rptr. 1, 4-5 (1975) citing Sprague v. Ticonic Bank (1939) 307 U.S. 161. We will refer to this equitable doctrine as the common fund doctrine.

In this case, the Fund is a passive beneficiary because petitioner created a fund (the settlement proceeds) whose monies

were used to pay for costs that otherwise would have been reimbursed by the Fund. Fund staff has determined that claimant would be eligible for a reimbursement of \$120,907. This figure represents 18.7 percent of the settlement proceeds ($\$120,907/\$645,000 = .187$). Thus, under a strict apportionment method, the Fund would be required to contribute \$59,746 towards attorneys' fees (18.7% of $\$319,500.44 = \$59,746$).

In this case, however, we find that the Fund should only contribute an amount equal to reasonable attorneys' fees under the common fund doctrine. The Fund is a limited endowment whose primary purpose is to reimburse owners and operators for reasonable expenses related to cleanup of unauthorized releases from petroleum USTs. Demands on the Fund are great with thousands of claimants waiting to be reimbursed. Even under the common fund doctrine, the SWRCB may only contribute its proportionate share to the extent that eligible corrective action costs exist. The Fund may only be used to reimburse eligible corrective action costs; Fund monies may not be used to reimburse attorneys' fees. A review of the underlying facts and causes of action reveals that there are no novel or sophisticated legal theories relating to petitioner's claims for corrective action costs. Petitioner never operated the USTs that were the source of the contamination. As a purchaser of contaminated property, petitioner could have easily prevailed in its suit for corrective action costs. Compared to the causes of action for economic

losses, the suit for damages relating to clean-up costs is straightforward. The amount of time and experience needed to establish petitioner's claims for corrective action costs should have been slight compared to the efforts needed to establish petitioner's alleged economic damages. Here, a contribution of \$59,746 equals 49.4 percent of the Fund's benefit of \$120,907 ($\$59,746/\$120,907 = .494$). While we will not comment on the reasonableness of the overall attorneys' fees incurred, we find that a contribution amounting to nearly 50 percent of a recovery of \$120,907 for corrective action costs would be unreasonable and excessive. Additionally, this strictly proportional reimbursement under the common fund doctrine would violate the intent of the Legislature in establishing a statutory scheme of limited reimbursement.

Instead, we conclude that attorney fees that equal 30 percent of \$120,907 is a reasonable contribution. In making this conclusion, we note that statutory limits on attorneys' fees are common.⁴ While not establishing a strict upper limit here, we believe that 30 percent is a fair contribution. Considering the points raised above, we emphasize that the focus of any payment from the Fund must be directed toward corrective action costs. While equity may require a contribution from the Fund,

⁴ The SWRCB takes notice that attorneys' fees are regulated in worker's compensation proceedings (Labor Code § 4906), in probate matters (Probate Code § 10810), and in medical malpractice actions (Business and Professions Code § 6146). In each of these codes, attorneys' fees are limited and must be reasonable.

the amount of the contribution must be weighed considering the important policy of ensuring the prompt remediation of the environment and the availability of Fund monies for other deserving claimants. Monies from the Fund must be directed to clean-up costs and cannot be used to finance, directly or indirectly, lost profits or other unfortunate costs incurred by claimants. We conclude that the Fund should contribute and reimburse petitioner an amount equal to 30 percent of its benefit; 30 percent of \$120,907 equals \$36,272.

2. Contention: In the alternative, petitioner argues that allocation of the settlement proceeds must be proportionate to the significance of the clean-up costs in the underlying lawsuit. Assuming remediation costs of \$161,158.85 and total damages of \$1,566,158.85, petitioner argues that remediation costs constituted only 10.3 percent of petitioner's total damages ($\$161,158.85 / \$1,566,158.85 = .103$). Petitioner maintains that after deduction of attorneys' fees of \$319,500.44 from the settlement proceeds of \$645,000.00, \$325,499.56 remains. Hence, petitioner contends that 10.3 percent of \$325,499.56, or only \$33,526.45, should be allocated to corrective action costs.

Finding: Petitioner's second contention is untenable for several reasons. First, petitioner bases its argument on propositions not based in fact. As described above, there is no way to verify the correctness of all of petitioner's alleged

damages. Because the damages are uncertain, the validity of the 10.3 percent ratio is suspect and the ratio cannot be used.

Second, petitioner's allocation is at odds with common sense. Petitioner's allocation suggests that only \$33,526.45, or 5.2 percent of the settlement proceeds be applied to corrective action costs ($\$33,526/\$645,000 = .052$). At the time of settlement, petitioner had incurred over \$161,000 in costs related to cleanup of the unauthorized release of petroleum. These costs were among the first costs that petitioner demanded from defendants and were a fundamental part of the underlying lawsuit. To apply only 5.2 percent of the settlement proceeds to the damages at the heart of the disagreement between petitioner and the settling defendants is unreasonable. Essentially, petitioner's allocation would result in the Fund's reimbursement being used to indirectly secure petitioner's profit.

Third, petitioner allocates the first \$319,500.44 (49.5%) of the settlement proceeds to attorneys' fees. Petitioner's allocation assumes that attorneys' fees of nearly 50 percent of the amount recovered are reasonable. As discussed earlier in this order, however, attorneys' fees at that level would not be reasonable, at least as applied to the corrective action claims in the lawsuit.

3. Contention: In a second alternative, petitioner argues that it should receive 50 percent of its eligible costs

when employing the common fund doctrine because petitioner's attorneys' fees equal 50 percent of the settlement proceeds.

Finding: Petitioner's third contention is without merit because attorneys' fees amounting to 50 percent of the corrective costs would not be reasonable.

Petitioner states that it incurred litigation costs of \$320,000 during the course of the lawsuit.⁵ Petitioner also states that this figure equals nearly 50 percent of the settlement proceeds ($\$320,000/\$645,000 = .496$). Petitioner then summarily concludes that "[w]hen measured by the significance of the attorneys' fees in proportion to the settlement proceeds, Champion should recover 50 percent of the eligible costs." (Petition, p. 9.)

Petitioner does not correctly apply the common fund doctrine. The common fund doctrine requires the passive beneficiary of a recovery to "bear a fair share of the cost of litigation". (Quinn v. State, 15 Cal.3d at 167, 124 Cal.Rptr. at 4.) The doctrine is based on the application of equitable principles to determine each party's reasonable share; it does not necessarily require that attorneys' fees be allocated proportionally based on the amount recovered. (*Id.* at 175-76, 124 Cal.Rptr. at 9, 10.) As discussed in response to petitioner's first contention, an allocation requiring the Fund to bear attorneys' fees of nearly 50 percent of the amount

⁵ Petitioner states elsewhere in the petition that it incurred attorneys' fees of \$319,500.44.

recovered by the Fund would not be fair or reasonable. A reasonable allocation would have the Fund bear attorneys' fees amounting to 30 percent of the benefit to the Fund, entitling petitioner to reimbursement in the amount of \$36,272.

III. SUMMARY AND CONCLUSION

1. In determining whether a claimant to the Fund has been compensated for corrective action costs in a settlement payment, it is appropriate to review the settlement language and causes of action in the underlying lawsuit.

2. A review of the settlement language and underlying causes of action in this case indicate that the settling parties contributed a portion of the settlement proceeds to cover corrective action costs.

3. As petitioner's known damages are less than the amount of the settlement, \$161,158 of the settlement proceeds must be allocated to corrective action costs to ensure that petitioner does not benefit from an improper double recovery. Petitioner's eligibility for reimbursement should be reduced by this amount.

4. In cases where a claimant has incurred attorneys' fees to obtain a judgement or settlement that is applied to corrective action costs, the Fund becomes a passive beneficiary.

5. As a passive beneficiary, the Fund should employ the equitable common fund doctrine and reimburse the claimant for eligible corrective action costs in an amount that equals a

reasonable share of attorneys' fees. When determining a reasonable share of attorneys' fees, the Fund is not bound to contribute to a strictly proportionate share of the attorneys' fees incurred by the claimant.

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

6. In this case, the Fund should credit the petitioner \$36,272.

IV. ORDER

IT IS THEREFORE ORDERED that the final Decision of the Division reducing the eligibility of the petitioner, claim No. 003692, is affirmed.

CERTIFICATION

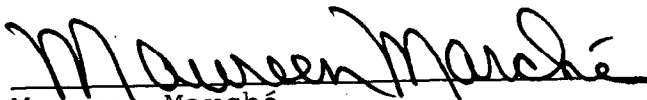
The undersigned, Administrative Assistant to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on March 21, 1996.

AYE: John P. Caffrey
John W. Brown
Mary Jane Forster
Marc Del Piero

NO: None.

ABSENT: James M. Stubchaer

ABSTAIN: None.


Maureen Marché
Administrative Assistant to the Board

