UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re

Chapter 11

Revere Copper & Brass, Inc., et al.

Debtors. Case No. 82-12073 (PCB)

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BEATTY, PRUDENCE CARTER, U.S.B.J.

MEMORANDUM DECISION FIXING AMOUNT OF CLAIM #907 - FAIRCHILD HOLDING CORPORATION

For the reasons which follow, this Court finds Fairchild Holding Corp. ("Fairchild") has an allowable claim of $1,813,600.[1]

## Background

Revere Copper & Brass Inc. et al. ("Revere" or the "Debtors") along with a number of affiliates filed petitions under Chapter 11 of the Bankruptcy Code (the Code")[2] on October 27, 1982. Thereafter a joint plan of reorganization was confirmed on July 29, 1985.

Fairchild Claim No. 907 (the "Claim"), which is in the amount of $3.2 million,[3] is for environmental cleanup expenses for a twelve-acre industrial site located at 6500 East Slauson Avenue, Commerce City, California (the "Site").[4] Revere objected to the Claim on a number of grounds.

From June 1976 until 1988, Greer produced hydraulic accumulators, a component of hydraulic pumps, on the Site. Revere acquired the Site in or about 1947. Revere constructed a

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[1] At the time the claim was filed, Greer Hydraulics, Inc. ("Greer") was a subsidiary of VSI Corporation which was, in turn, owned by Fairchild. Fairchild has succeeded to Greer's interest in the claim.

In 1988 Greer ceased operating and its operating assets were sold for $8.5 million. Following the cleanup of the Site, Fairchild sold the vacant Site for $5.4 million.

[2] All references to the Code are to the Code as in effect prior to the amendments made effective to cases filed on or after October 17, 2005.

[3] This is the amount of the Claim after a reduction of $300,000 for cleanup costs relating to polychlorinated bipheynls ("PCB's") that Fairchild acknowledged were its sole responsibility. See Fairchild Opening Brief at p.6, FN 3.

[4] As set forth in this Court's original decision, the Site, bounded by Slauson Avenue on the North, Garfield Avenue on the East, the Southern Pacific Railroad on the South and two manufacturing facilities on the West, is located in Commerce City California, a city zoned primarily for industrial and commercial use. See Case ECF Doc. No. 624 at FN 15. While Commerce City has somewhat changed since the Court issued its decision, it remains largely non-residential, with current zoning being 6.42 percent residential, 1.17 percent commercial and 67.91 percent manufacturing. See City of Commerce California, General Information and Statistics, Zoning Classifications available at www.ci.us/zoning. (Last visited on January 22, 2009).

brass mill and manufacturing facility to manufacture copper and brass tube and rod on the Site. The manufacturing operation continued until approximately November 1975. In December 1975 Revere sold the Site and all improvements to Greer for $1.55 million.[5]

In 1980, two years prior to the filing of these Chapter 11 cases, there was a large spill from one of neutralization tanks on the Site. As a result, the Los Angeles County Engineer's offices issued notices to Greer to clean up contaminated ground around the neutralization tank on the Site as well as a drainage ditch northwest of an ammonia tank on the Site. Greer installed a continuous neutralization system and demolished some cooling towers. See BR Vol. VI, Tab C at 1442.[6] In or about July 1982, also pre-petition, Los Angeles County cited Greer for a liquid spill at the acid neutralizer on the Site and ordered an investigation and cleanup. See BR Vol. VI, Tab C at 1442. In September 1982, Greer undertook a preliminary cleanup of that spill and began environmental testing on the Site.

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[5] According to the Escrow Agreement between Greer and Revere in connection with the purchase of the Site, "Buyer [i.e. Greer] agrees that is has inspected the Real and Personal Property and agrees to buy such property in its *present condition*" (emphasis added). See Bankruptcy Record ("BR") Vol. VI, Tab B at 1436.

[6] The parties previously agreed in Phase I that the record would could consist of the following documents, which collectively constituted the BR:

A. California Administrative Record (Vols.I-V)
B. Additional Exhibits (Vol. VI)
C. Supplemental Authorities, which include copies of statutes and of published rules and regulations issued by the federal Environmental Protection Agency (the "EPA") or the California Protection Agency and the Guidance Documents issued by each of these agencies to the extent that the California Administrative Record or Additional Exhibits refer to these authorities or Guidance Documents
D. Declarations of expert witnesses filed by the parties to clarify the previously mentioned material.

In addition to the BR, additional materials were submitted on Phase II.

Post-petition, in April 1987, Fairchild and the California Department of Health Services ("DHS") entered into a consent order whereby Fairchild agreed to conduct an investigation and take remedial action to clean up the Site (the "Consent Order"). Fairchild conducted the cleanup between April and August of 1990. In late 1994, DHS approved a final Remedial Design Implementation Report indicating that the cleanup was complete.

In order to provide an orderly process for resolving the Debtors' objection to the Claim, the Debtors and Fairchild entered into a stipulation (the "Stipulation") in order to determine the manner by which this Court would determine the numerous issues raised by the Debtors in its objection to the Claim.[7]

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[7] The Stipulation can be found in the Fairchild Phase II Appendix, Tab 9 at 375. The recitals in the Stipulation reflect that it was entered into after Revere filed a motion for summary judgment and Fairchild had filed a partial cross motion. The Stipulation recites that it was Fairchild's position that, as with other cost recover actions under Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") 42 U.S.C. §§ 9601- 9675, it was entitled to a trial de novo on the liability issues at which the parties would have live testimony and offer evidence. The Stipulation recites that it was Revere's position that the liability issue could be decided by this Court on the basis of a review of the California Administrative Record plus additional exhibits with no live testimony. The Stipulation then states that the parties wished to compromise their differences in regard to the proper extent and nature of the proceedings on the Claim by agreeing on a procedure under which the Court could resolve the issues relating to the Claim in an expeditious and cost-effective manner.

Following completion of Phase I, the Stipulation provided as follows:

> "13. In the event that the Court affirms the decision of the Department in Phase I, the Court and the parties shall proceed to the second phase of the proceeding ("Phase II"), which will encompass all issues not covered in Phase I. It is the intention of the Court and the parties that the decision in Phase II will determine the allowed amount of the Claim."

As to the conduct of Phase II the Stipulation states the following:

> A. Each party shall provide live expert testimony with respect to the appropriate percentage allocation of costs between the parties, the formula used for arriving at such an allocation, and the basis and criteria used for the formula;
> B. Expert and participant testimony and evidence are subject to evidentiary objections and cross examination;
> C. The parties shall each file a principal brief as to the Phase II issues and a reply brief;
> D. Each party will have the option to file proposed findings of fact and conclusions of law;

This Court previously concluded Phase I and issued a decision in which it ruled that the DHS decision was arbitrary and capricious and that Revere had no liability. See Case ECF Doc. No. 624.

Fairchild appealed this Court's decision. On appeal, the District Court reversed and remanded. See Fairchild Holding Corp. v. Revere Copper and Brass, Inc., 291 B.R. 29, 38 (S.D.N.Y. 2003).

In its lengthy and carefully reasoned decision, the District Court held that DHS' decision was not so arbitrary and capricious to preclude a contribution claim. The District Court acknowledged the daunting task that it had confronted as well as the difficulties this Court faced in fully digesting the voluminous record and the highly technical materials submitted by both parties. The District Court noted that while the complex arguments involved "reconstruction of state and federal administrative regulations and the underlying scientific and regulatory assumptions [applicable in an earlier era]" the application of basic legal principles led to a straightforward result. Id at 30, 31.

The District Court disposed of Fairchild's challenge to this Court's jurisdiction over the matter. The District Court found that because Revere was arguing a defense to Fairchild's claim in bankruptcy, the Bankruptcy Court had proper jurisdiction over the Claim and the issue of whether Fairchild was entitled to compensation in the form of an allowable claim. The District Court pointed out that Fairchild's own stipulation stated that the Bankruptcy Court should decide Revere's liability on the basis of whether the DHS actions were arbitrary and capricious. Id. at

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E. Discovery should be conducted with regard to Phase II issues only.

33. To determine whether requiring the cleanup was arbitrary and capricious,[8] the District Court first recognized that Fairchild and DHS entered into a consent order without formal litigation over the adopted Remedial Action Plan ("RAP").[9] The District Court noted that the RAP was therefore not supported by the kind of analysis on the part of DHS that would have resulted from a contested proceeding. In light of the fact that a party looking to prove the arbitrary and capricious standard faces a steeper challenge when arguing about the application of regulatory standards, the District Court found that due respect must be given to the administrative agent's expertise. It found that this Court "failed to give due deference to the state agency's promulgation and application of standards in a highly technical field." Id at 30. "The reviewing court may not substitute its judgment for that of the agency***particularly when that determination is propelled by the agency's scientific expertise." Id at 35 quoting Henley v. Food and Drug Admin., 77 F.3d 626, 620 (2d Cir. 1996).

The District Court also held that "toxicity of the soil and the appropriate remedy *** are highly scientific and technical questions which courts are ill-equipped to resolve." Fairchild Holding Corp. v. Revere Copper and Brass, Inc., 291 B.R. at 38. The District Court found that

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[8] "The deferential arbitrary and capricious standard of review was designed to limit the scope of judicial review of agency action, on the assumption that any objecting party will have participated in the administrative decisionmaking process that required the agency to directly address the best arguments that could have been made on behalf of a different outcome." Fairchild Holding Corp. v. Revere Copper and Brass, Inc., 291 B.R. at 33.

[9] The RAP, dated December 1989 was prepared by Dames & Moore for Fairchild. The RAP incorporates the Remedial Investigation and Feasibility Study (RI) conducted by Dames & Moore from December 1987 to June 1988. The RAP summarizes the data to identify, plan, design, and implement a final remedial action for the Site. It specifically identifies the hazardous substances and eleven areas requiring remediation and explains the industrial neighborhood where the Site is located. The RAP also explained the various work processes that Revere and Greer conducted during their respective operations on the Site.

The RAP can be found in BR Vol.V, Tab 56 as well as in the Fairchild Phase II Appendix.

the method of remediation selected by Fairchild was reasonable because it was selected in accordance with DHS protocol.[10] Again, giving deference to the administrative agency, the District Court determined that it was "not equipped or empowered to dissect this elaborate protocol." Id. The District Court determined that this Court should have given greater deference to the expert determinations. For those reasons, the District Court reversed and remanded.

Subsequently and on March 11, 2005, the Court heard arguments on the allocation phase of the objection to the Claim ("Allocation Hearing").[11] Prior to the Allocation Hearing, Fairchild submitted the affidavit and report ("Fairchild Expert Report")[12] of its expert N. Thomas Sheahan ("Sheahan"), an environmental consultant employed by Geomatrix Consultants, Inc. The Fairchild Expert Report contained an allocation of the costs of the cleanup between Revere and Fairchild as more fully discussed below.

The Debtors did not retain an expert and did not submit a report from any environmental specialist either analyzing or critiquing the methodology employed in the Fairchild Expert Report or otherwise, prior to, at or after the Allocation Hearing. Nor did the Debtors make any

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[10] The RAP contains a lengthy analysis of the possible methods of cleanup that could have been used at the Site. The original 13 were first narrowed to 7 and then further refined. Some choices would have required the onsite decontamination of the soil. Dames and Moore performed various laboratory tests to determine the possible feasibility of different methods of decontamination. While several methods appeared promising in the laboratory, it was not possible to be certain that they could be carried out successfully on the much large scale required. The ultimate recommendation made by Dames and Moore and the cleanup method selected by Fairchild was the total removal of all contaminated soil to an available landfill. While this was among the most expensive options, it had the advantage of eliminating the need for any continuing monitoring of the Site on the basis of the prior contamination. See BR Vol.V, Tab 56 at 1368-1388.

[11] Although it had been agreed in the pre-trial stipulation that the parties would submit live testimony at the Phase II hearing, neither party chose to do so.

[12] The Fairchild Expert Report can be found in the Fairchild Phase II Appendix.

submission in advance of the Allocation Hearing on the subject of the proper allocation. At the hearing, Revere's attorneys made a power-point presentation **("**Revere Phase II Power Point**")** in which they proposed a zero percent allocation to Revere.[13] The proposed allocation started from $3,060,072 [14] of potentially recoverable costs. It then took 77 percent of that number as the allocation made to Revere under the Fairchild model, which resulted in a dollar allocation to Revere of $2,356,255. From that number they deducted $1,968,023 as ½ of the profits received from the sale of the property.[15] Revere then allocated the remaining numerical difference of $388,232 ($2,356,255 minus $1,968,023) to Fairchild for failure to use due care. In this manner the allocation to Revere was brought down to zero dollars.

The Fairchild Expert Report on the other hand purported to offer a scientific basis for the allocation of the cleanup costs. Its conclusions were based on Sheahan's analysis of the documents and reports included in the RAP. As a first step, Sheahan identified eleven areas for remediation on the Site. Within those eleven remediation areas, he identified twenty-eight source

[13] Information in the Revere Phase II Power Point is based on documents in a twenty-five item binder submitted by Revere to the Court after the Allocation Hearing. ("Revere Phase II Exhibit"). The Revere Phase II Exhibit did not include any covering affidavit identifying the particular points in the document the Court was to refer to. Revere did not submit any proposed findings of fact.

[14] This is the original number after reduction for the PCB cleanup and for $22,110 in attorneys fees that Revere states are unrecoverable costs.

[15] Revere did not show how it made the "profit" calculation. However, as the numbers in footnote 1 reflect, Fairchild received from the sale of the business and land, even after deducting cleanup costs, millions of dollars more than it paid to Revere for the Site. The profit calculation probably also includes the $850,000 that Fairchild received from its insurers in settlement of litigation to recover cleanup costs. See Revere Phase II Power Point at 25.

areas ("Sources")[16] that contributed to the contamination of the Site. For each of those Sources, Sheahan then identified which of the two parties used the Source areas.

Sheahan then utilized five factors found in the California Health and Safety Code §25356.3(c) and allocated equal weight to each of them.[17] The five factors he used were the following:

(1) The amount of hazardous substances present for which each party may be responsible. Sheahan determined whether Revere or Fairchild or both used the Source area. In Source areas used by only one party, he allocated full responsibility for the hazardous substance to that party. In Source areas used by both parties, Sheahan allocated equal responsibility for the hazardous substances found. Based on his analysis he concluded that, as to this factor, Revere was 72.8 percent ($465,920) and Fairchild 27.2 percent ($174,080) responsible for the hazardous substances present.

(2) The degree of toxicity of the hazardous substance. The Fairchild Expert Report contains a calculation of the toxicity factor for each of the hazardous substances associated with each Source area.[18] Sheahan concluded that as to this factor, Revere should be allocated 70.7 percent ($452,480) and Fairchild 29.3 percent ($187,520).

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[16] "Sources" were defined as activities and operations that were suspected of being sources of contamination on the Site. The Sources were located within one or more areas of remediation.

[17] By weighting the factors equally, each factor was allocated 20 percent of the total remediation cost of $3.2 million or $640,000 per factor.

[18] The toxicity factor is calculated as the average median lethal dose ("LD50") values for all the substances requiring cleanup divided by the LD50 of each substance. The LD50 is the dose that has been found to be fatal to one-half of the test animals under the stated test conditions. The degree of toxicity attributed to each party is the sum of the products of the proportionate amounts of hazardous substances at the Source areas and the toxicity factors associated with those substances at the Sources areas used by each party. See Fairchild Expert Report at 17.

(3) The degree of involvement of the two parties in the generation, transportation, treatment or disposal of the hazardous substance. Sheahan based his allocation as to this element on a combination of the substances used by each party, the toxicity of those substances and the amount of time each party occupied the Site.[19] He concluded Revere was responsible for 78.2 percent ($500,480) and Fairchild for 21.8 percent ($187,520).

(4) The degree of care exercised by Revere or Greer with respect to the hazardous substance, taking into account the characteristics of the substance. Sheahan found it was likely that parties who used the Site more recently exercised a greater degree of care than parties who used the Site during earlier years due to more recent awareness of the proper handling of hazardous substances. Sheahan stated that "it is likely that parties on the site more recently (Greer) exercised a greater degree of care than parties who were on the site in earlier years (Revere Copper) simply due to the greater awareness in recent years of the importance of proper handling of hazardous substances." Fairchild Expert Report at 18. He allocated 70 percent responsibility to Revere ($448,000) and 30 percent responsibility to Fairchild ($192,000).

(5) The degree of cooperation by the Revere or Greer gave to the federal, state and local officials to prevent harm to human health and the environment. Sheahan reviewed documents evidencing who prepared reports, conducted investigations and paid the costs of the remediation to date. He concluded that Revere should be responsible for 95 percent responsible ($608,000) and Fairchild for 5 percent ($32,000) because the Debtors had not participated in the cleanup, which had been entirely done and funded by Fairchild.

[19] Sheahan found the product of the total hazardous substances at each Source and the toxicity of those substances and multiplied that number by the percentage of time each party operated the Source.

After weighing each factor equally, Sheanan's result was an allocation of 77.3 percent (72.8 + 70.7 + 78.2 + 70 +95 ) or $2,474,880 ($465,920 + $452,480 + $500,480 + $448,000 + $608,000) to Revere and an allocation of 22.7 percent or $725,120 to Fairchild for the costs of the cleanup.

At the Allocation Hearing, the Court advised Fairchild's attorney that it did not agree that the degree of cooperation was a relevant factor on the facts of this case for the reasons more fully set forth in the discussion which follows. The Court further requested that Sheahan recalculate the final allocation without using the degree of cooperation factor, which was done without prejudice to Fairchild's position that it was proper factor. By letter dated March 18, 2005, Fairchild advised the court that the allocation without the degree of cooperation factor would result in an allocation to Revere of 72.9 percent ($2,333,600) and to Fairchild 27.1 percent ($866,400) of responsibility. See Case ECF Doc. No. 647.

In its papers and at the Allocation Hearing, Revere disputed many aspects of the criteria used by Sheahan to allocate responsibility. However, as indicated earlier, Revere submitted no Phase II expert report.

Revere points to a number of what it characterizes as judicial admissions made by Fairchild in its litigation with its insurers seeking to recover the cleanup costs. See Revere Phase II Power Point at 15 referring to Revere Phase II Exhibit, Tab 14. For example, Fairchild asserted in its statement of material facts on a motion for summary judgment that the neutralization tank spills were the primary cause of contamination and that these spills were "extraordinary." Revere Phase II Power Point at 15. It further stated that the Dames & Moore report "indicates that the metals contamination, and subsequent site investigation, were triggered by the overflow of the

neutralization tank." Revere Phase II Exhibit, Tab 14 at 24-25. Fairchild's Statement of Uncontroverted Facts in the insurance litigation included the statement that "the spills from the neutralization tank were responsible for over 95% of inorganic soil contamination at the Greer site." Revere Phase II Exhibit, Tab 14 at 24-25. Duane Blamer, Fairchild's remediation contractor testified in a deposition that spills from the neutralization tanks were the only significant source that they had identified in the data to account for the metals contamination. See Revere Phase II Exhibit, Tab 13 at 9. Blamer also testified at his deposition that even if the metals were laying on the ground they would not have caused the significant contamination down to the depth seen at the Site because there was nothing to cause the metals to significantly dissolve in the soil. Revere Phase II Exhibit, Tab 13 at 9.

Revere also raised other issues regarding liability. However those issues should have been raised or were subsumed within the liability phase of this case.[20] This Court is of the view that having been taken up to the District Court which reversed this Court's finding of no liability, the matter of liability is no longer an issue before this Court. The only issue remaining for this Court is the determination of the amount of the Fairchild's Claim.

Discussion

A filed claim is deemed allowed unless a party in interest objects. Code §502(a). If an objection is made, the court after notice and a hearing shall determine the amount of the claim on the date of the filing of the petition except to the extent that the claim is unenforceable against the

[20] Revere argued for example, that under the Supreme Court decision Cooper Industries, Inc. v. Aviall Services Inc., 125 S.Ct. 577 (2004), Fairchild's claim for contribution under CERCLA fails as a matter of law. This Court declines to look to a case decided so long after the events in question took place. Even if this Court were to look to the Cooper Industries , the Court is of the view that Revere fails to take account of the fact that the agreement that was entered into between Fairchild and DHS does qualify as an "administrative settlement" for the purposes of CERCLA.

debtor and or property of the debtor under any applicable agreement or applicable law for reasons other than because the claim is contingent or unmatured. Code §502 (b)(1).

Standards For Determining Allocation

In environmental cases, a party's share of liability is determined according to those equitable factors the court determines appropriate. 42 U.S.C. § 9613(f); Farmland Industries, Inc. v. Colorado & Eastern R.R. Co., 944 F. Supp. 1492, 1498 (D. Colo. 1996). A court has broad discretion in allocating response costs among responsible parties. FMC Corp. v. Aero Industries, Inc., 998 F.2d 842, 846 (10th Cir. 1993); United States v. R.W. Meyer, Inc., 932 F.2d 568, 572 (6th Cir. 1991). A court has the "power to weigh and consider relevant factors including [relative] fault of the parties, and the relevant Gore factors[21] (noting that the Gore factors are neither an exhaustive or exclusive list of the factors to be considered)." Environmental Transp. Systems, Inc. V. ENSCO, Inc., 969 F.2d at 508, 509. Courts may also consider "the state of minds of the parties, their economic status, any contracts between them bearing on the subject, any traditional equitable defenses as mitigating factors, and any other factors deemed appropriate to balance the equities in the totality of the circumstances." United States v. R.W. Meyer, Inc., 932 F.2d at 571.

[21] The Gore Factors were originally introduced by Congressman Albert Gore as part of an amendment to the 1980 House Superfund Bill which did not pass because Congress did not want the factors to be exclusive. Environmental Transp. Systems v. ENSCO Inc, 969 F.2d 503, 509 (7th Cir. 1992). These factors are (1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished; (2) the amount of hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or environment. The factors set forth in the California Health & Safety Code are virtually identical to the so-called "Gore Factors" which are widely considered in actions under CERCLA. See United States v. Colorado & Eastern R.R. Co., 50 F.3d 1530, 1536 (10th Cir. 1995); United States v. Hercules, Inc., 247 F.3d 706, 718 (8th Cir. 2001)

A court should use its moral, as well as its legal sense in framing an equitable decree. Farmland Industries Inc. v. Colorado & Eastern R.R. Co., 944 F. Supp. at 1498; United States v. R.W. Meyer, Inc., 932 F.2d at 572.

Fairchild urges this Court to rely on the Fairchild Expert Report in fixing the appropriate allocation. Legal authority does not require this Court to accept the judgment of an expert hired by one of the litigants. See General Electric Co. v. Joiner, 522 U.S. 136 (1997); Nimely v. City of New York, 414 F.3d 381 (2d Cir. 2005); Village of Swanton v. 18.9 Acres of Land, More or Less, Inc., 49 F.3d 893 (2d Cir. 1995); United States v. Schwartz, 924 F.2d 410 (2d Cir. 1991). See also Fed.R.Evid. 702. However, in light of the District Court's rulings and the fact that the Fairchild Expert Report is the only available expert report submitted in Phase II, the Court must necessarily use the report as a guide for determining the appropriate allocation due to the many complex scientific issues involved.

Of the five factors utilized in the Expert Report, this Court holds that the fifth factor, the degree of cooperation, should be eliminated from any allocation on the facts of this case. At the time the Debtors filed their Chapter 11 petitions, California had already started proceedings in an attempt to have the cleanup performed. All of Revere's obligations regarding the cleanup arose pre-petition. Revere was no longer in possession of the Site at the Petition Date and had not been for many years. The record also shows that Revere provided substantial information to Fairchild and to the California authorities about the Site and its utilization of the Site. There is nothing that Fairchild has pointed to that indicates it was in any way impeded in the performance of the cleanup by virtue of any lack of cooperation by Revere**.** This Court agrees with Revere that it

was not required to participate in the actual remediation because of the automatic stay provided by Code §362(a).

As indicated earlier, at this Court's request, Sheahan recalculated the allocation tables to eliminate criteria five. Eliminating criteria number five resulted in reducing the allocation to Revere from 77.3 percent to 72.9 percent, a reduction of 3.4 percent.[22]

The four remaining factors which Sheahan used in connection with his allocation are the standard bases on which to allocate liability.[23] To the extent each of the first three of these factors is arguable, in the absence of any professional opinion by an expert that other weighting would have been more appropriate, this Court would be venturing into an area of guesswork. The Court will therefore allocate each party's liability on those three factors which are the basis of the Fairchild Expert Report.

Factor four involves an assessment of the degree of care used by each party. As stated before, in determining the allocation, Sheahan states that "it is likely that parties on the site more recently (Greer) exercised a greater degree of care than parties who were on the site in earlier years (Revere Copper) simply due to the greater awareness in recent years of the importance of proper handling of hazardous substances." Fairchild Expert Report at 18. Sheahan's presumption is obviously not entitled to deference as a scientific opinion beyond the keen of this

[22] Despite the elimination of factor five and the use of Sheahan's of detailed lists of chemicals at numerous sites and analyses of the toxicity of multiple chemicals, Sheahan's allocation differs very little from a simple allocation based purely on the time that each party utilized the Site. An allocation based on utilization alone would result in allocation to Revere of 70 percent and to Fairchild of 30 percent. Sheahan's allocation is also very similar to that of DHS.

[23] With four factors each receiving equal weight, the 25 precent allocation on each factor will be $800,000.

court. Moreover Sheahan's presumption disregards Greer's known history of spills on the Site.[24] But for those spills, there is nothing in the record that suggests that any cleanup would have been directed. In its litigation with its insurers Fairchild's positions make clear that the spills which occurred while it was the owner and operator of the Site were the precipitating cause for the cleanup. See Revere Phase II Exhibit, Tab 14.

The Seventh Circuit's decision in Environmental Transportation Systems, Inc. v. Ensco, Inc., 969 F.2d 503 (1992) is instructive. The plaintiff, a waste disposal firm entered into an agreement to remove and dispose of approximately 100 out-of-service electrical transformers containing PCB fluid. The plaintiff in turn entered into an agreement with Envirnmental Transportation Systems, Incorporated ("ETS") under which ETS would provide tractors, flat-bed trailers equipped with spill-containment measures, drivers and all necessary insurance.

On one trip, an ETS driver hauling a load of three transformers overturned while exiting an interstate highway after he lost control due to excessive speed. One of the transformers leaked. The plaintiff cleaned up the spill an sought contribution from the shipper under CERCLA. Among other allegations was an allegation that improper loading and weight distribution had contributed to the spill.

The district court concluded that CERCLA liability does not necessarily lead to mandatory contribution for cleanup costs and held that ETS was solely responsible because the

[24] Under Fairchild's ownership, from August through October 1980, two spills from the neutralization tank occurred on the Site. Fairchild Industries, Inc. and VSI Corp.v. Zurich Ins. Co., 94 Civ. 5142 SVW (BQRx) (C.D. Cal.); Revere Phase II Exhibit, Tab 14. It was these spills that prompted the California authorities to order an investigation and cleanup of the Site. In 1981 Fairchild was again cited by California authorities for spills from the neutralization tank and a drainage ditch and for the following seven or so years, Fairchild accidentally released hydraulic oil on the Site. Revere Opening Brief at 11; Revere Phase II Exhibit, Tab 14 at 12.

accident was entirely ETS's fault. ETS submitted no expert testimony or lay opinion to support its theory that improper loading of the transformers rather than the fact that the driver was driving too fast to negotiate the curve in the road caused the accident. On appeal, the Seventh Circuit affirmed because neither party submitted evidence supporting other equitable factors the district court could have considered in making the allocation decision. In the instant case as to Factor Four, the primary responsibility lies with Fairchild based on the known spills for which it was cited. A small amount of responsibility can be attributed to Revere.[25]

Conclusion

After weighing each factor equally, Revere is allocated 56.68 percent of the responsibility (72.8 +70.7 + 78.2 + 5) and Fairchild is allocated 43.32 percent ( 27.2 + 29.3 + 21.8 + 95 ) of the responsibility. This means that Fairchild has an allowable claim of $1,813,600 ($217,600 + $234,400 + $174,400 + $760,000).

Settle appropriate order.

Dated: New York, New York
February 2 , 2009

/s/ Prudence Carter Beatty
United States Bankruptcy Judge

[25] The record does not give a clear determination of the condition of the Site when it was sold to Greer. One person familiar with the Site stated that when Greer first started operations at the Site, there were pieces of copper on the Site such as approximately 300 10-pound copper bars, copper disks and numerous small copper "penny-like" pieces that Greer employees would collect. See BR Vol. V, Tab 56 at 1267. In its solid form, copper alone, without being dissolved, is not necessarily a toxic substance and it could not have caused the significant contamination down to the depth seen at the Site. Revere Phase II Exhibit, Tab 13 at 9. Rather it was the spills that caused the metals to breakdown and cause "better than 95 percent of the contamination." Revere Phase II Exhibit, Tab 13 at 9.