



SAN DIEGO COUNTY
REGIONAL AIRPORT AUTHORITY
STAFF REPORT

Item No.
6

Meeting Date: **OCTOBER 4, 2012**

Subject:

Authorize the Rejection of the Claim of the San Diego Unified Port District

Recommendation:

Adopt Resolution No. 2012-0107, authorizing the rejection of the claim of the San Diego Unified Port District regarding Carl Wayne Hopkins.

Background/Justification:

On August 22, 2012, the San Diego Unified Port District ("Port") filed a claim (Attachment A) with the Authority alleging that the San Diego County Regional Airport Authority ("Authority") is obligated to defend and indemnify the Port in the wrongful death lawsuit brought against the Port by the surviving heirs of Carl Wayne Hopkins ("Hopkins"). The claim indicates that Hopkins' wrongful death lawsuit against the Port alleges that Hopkins' presence at the former Teledyne Ryan ("TDY") site located at 2701 North Harbor Drive from 1967 through 2010 caused him to be exposed to hazardous materials which resulted in Hopkins contracting non-Hodgkins Lymphoma. Hopkins was employed by the Authority from 2005 until 2010. Prior to that, he was employed by the Port and prior to that he worked for TDY for approximately 30 years beginning in 1967. The Port estimates it has expended over \$30,000 so far in its defense and claims the potential total damages are unknown at this point. The Port bases its claim that the Authority is required to defend and indemnify the Port in the Hopkins' wrongful death lawsuit on language contained in two existing leases between the Authority and the Port.

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In 2003, the Authority leased from the Port, for a term of 65 years, the land upon which the San Diego International Airport is situated. This is known as the Airport Lease. In 2005, the Authority leased, for a term of 63 years, from the Port the former Teledyne Ryan Aeronautical Facility located at 2701 North Harbor Drive. This is known as the "TDY Lease". The Port's claim alleges that the 2003 Airport Lease "contains a provision obligating the Airport to defend and indemnify the Port against any and all environmental liabilities from the airport property", and that the 2005 TDY Lease "includes a provision obligating the Airport Authority to defend and indemnify the Port against any liabilities arising during the TDY Lease period." The wrongful death at the heart of the claim was filed by Hopkins' surviving heirs who allege that on December 12, 2010, Hopkins died as a result of non-Hodgkins Lymphoma, a disease it is alleged was caused as a result of exposure to "toxic materials" while Hopkins worked at the former TDY facility. As stated above, Hopkins was employed by the Authority from April 2005 to December 2010 and prior in time was employed by the Port and Teledyne Ryan. For approximately 60 years, Teledyne Ryan occupied the TDY site and engaged in aircraft manufacturing operations. Teledyne Ryan occupied the TDY site under a lease from the Port. The manufacturing operations of Teledyne Ryan are identified in prior litigation and administrative matters as the source and cause of the chemical contamination at this site. The Authority has never used the type of hazardous materials used by Teledyne Ryan on the TDY site.

The Airport Lease and the TDY Lease contain defense and indemnity obligations (albeit not as broad as described in the Port's claim), however, a Settlement Agreement entered into between the Authority, the Port and TDY in March, 2007 contains the following provision which states that the Authority is not liable for any claims arising from the presence of Hazardous Substances on the TDY Site that existed prior to March 2007 :

- "Notwithstanding the provisions of Section 6.01, the Prior Settlement Agreement, and the Site Lease, Defendants and the Port District, and each of them, on behalf of themselves and their predecessors, successors and assigns, hereby further release, acquit, and forever discharge the Airport Authority . . . from any and all actions, causes of action, claims, demands, liabilities, damages, penalties, fines, debts, losses, costs, expenses and fees . . . of every kind and nature whatsoever, in law and in equity, whether known or unknown, suspected or unsuspected, foreseen or unforeseen, from any future claims arising out of (i) the presence of Hazardous Substances at, on or under the Site, the SWCS and/or Convair Lagoon on or before the Effective Date of this Agreement or (ii) subject to the provisions of Section 6.04, the future deposition of Hazardous Substances in the SWCS and/or Convair Lagoon." [Settlement Agreement, §6.02].

As stated above, the Authority has not used nor deposited any Hazardous Substances on the TDY Site at any time while the Authority has occupied the site.

The Airport Lease, the term of which began January 1, 2003, does not include the TDY site and contains the following language:

- "Authority shall not, by virtue of this Lease, waive any rights or remedies against Port, at law or equity, for any environmental liabilities caused by, arising from or resulting from Contaminants that migrated from Port-owned property adjacent to the Leased premises." [Airport Lease, §36].
- "Authority shall, to the fullest extent permitted by law, defend, indemnify, and hold harmless Port . . . for any and all liability, claims, judgments, or demands [collectively "Liabilities"] related to the Leased Premises to the extent arising during the period commencing on the Commencement Date and ending on the termination date of this Lease, but excluding any Liabilities arising from the gross negligence or willful misconduct of the Port. Port shall, to the fullest extent permitted by law, defend, indemnify and hold harmless Authority and its officers, employees, and agents for any and all Liabilities related to the Lease Premises arising prior to the Commencement Date, but excluding any Liabilities arising from the gross negligence or willful misconduct of the Authority." [Airport Lease, §17]

Under the Airport Lease, the Port is required to defend and indemnify the Authority for any and all claims arising prior to the commencement date of the lease.

The TDY Lease, the term of which began January 1, 2005, contains identical defense and indemnity language as contained in the Section 17 of the Airport Lease, but also contains the following language:

- "The Authority's duties and obligations under this subparagraph shall not apply to the presence, release, or threatened release of any hazardous substance into the environment on or from the Leased Premises connected with TDY's occupation of the Leased Premises. Authority shall be liable and responsible for any Contaminants arising out of its own occupancy and use of the Leased Premises commencing with its entry onto the Leased Premises on October 4, 2004 . . ."" [TDY Lease, §33.E.1.]
- Authority shall defend, indemnify, and hold harmless Port . . . for any and all responsibilities, damages, liabilities, claims, judgments, costs, fines, expenses, and attorney fees therefore related to the environmental liabilities from Contaminants arising out of the Authority's occupancy or use of the Leased Premises during the term of the Lease." [TDY Lease, §36.E.3.]

The TDY Lease states that the Authority is liable only for damages caused by the Authority's use and occupancy of the TDY Site. As stated above, the Authority has never used Hazardous Substances on the TDY Site.

Finally, in March, 2010, the Port and the Authority entered into a Confidential Settlement Agreement regarding insurance proceeds related to the TDY site. The provisions of this agreement may also impact favorably on the Authority's limited defense and indemnity obligations set forth in the Airport Lease and the TDY Lease.

Based upon the provisions contained in the Settlement Agreement, the Airport Lease, the TDY Lease and the Argonaut Confidential Settlement Agreement, the General Counsel does not believe the Authority has an obligation to defend and indemnify the Port for claims made in Hopkins' wrongful death lawsuit and for that reason the Port's claim should be denied.

Fiscal Impact:

Not applicable.

Authority Strategies:

This item supports one or more of the Authority Strategies, as follows:

Community Strategy Customer Strategy Employee Strategy Financial Strategy Operations Strategy

Environmental Review:

- A. California Environmental Quality Act: This Board action is not a project that would have a significant effect on the environment as defined by the California Environmental Quality Act (CEQA), as amended. 14 Cal. Code Regs. §15378. The Board action is not a "project" subject to CEQA. Cal. Pub. Res. Code §21065.
- B. California Coastal Act: This Board action is not a "development" as defined by the California Coastal Act. Cal. Pub. Res. Code §30106.

Equal Opportunity Program:

Not applicable.

Prepared by:

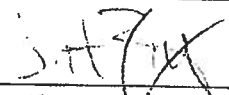
SUZIE JOHNSON
PARALEGAL

8) Describe property damage or personal injury claimed: SEE ATTACHED

9) Owner and location of damaged property or name/address of person injured: Not applicable

10) Detailed list and amount of damages claimed as of date of presentation of claim, including prospective damages. If amount exceeds \$10,000.00, a specific amount need not be included.

The total amount of expenses that has been and will be incurred by the Port is currently unknown, although it has incurred defense fees exceeding \$30,000 to date. The total amount of potential damages is also unknown at this time. The Port contends that the Airport Authority must indemnify the Port and/or contribute to any expenses or damages the Port incurs as a result of the lawsuit.

Dated: 8/20/12 Claimant: 

(Signature) Scott E. Patterson, on behalf of the San Diego Unified Port District

Notice to Claimant:

Where space is insufficient, please use additional paper and identify information by proper section number.

Return completed form to:

Tony Russell, Director, Corporate Services/Authority Clerk
 Corporate Services Department
 P.O. Box 82776
 San Diego, CA 92138-2776

SECTION 5) Description of incident resulting in claim:

The surviving heirs of Carl Wayne Hopkins served a wrongful death lawsuit against the Port on March 5, 2012, seeking general and economic damages, and funeral and burial expenses. The lawsuit alleges that Mr. Hopkins worked at the former Teledyne Ryan Aeronautical Facility (former TDY Facility), 2701 North Harbor Drive, San Diego, CA, from 1967 until 2010. Mr. Hopkins previously testified at deposition that he continued to work at the former TDY Facility under the direction of the Airport Authority for some period after TDY left the property. The lawsuit and related pleadings allege that as a result of his presence at the former TDY Facility from 1967 to 2010, and particularly after TDY left the property, Mr. Hopkins was exposed to a variety of chemicals and hazardous materials which led to him contracting non-Hodgkins Lymphoma. This condition led to Mr. Hopkins death in December 2010. Additionally, the airport property is adjacent to the former TDY facility. As such, there is a possibility that Mr. Hopkins' injuries could be attributed to conditions at or underlying that property as well.

In 2003, the San Diego County Regional Airport Authority (Airport Authority) leased the adjacent airport property from the Port (Airport Lease). The Airport Lease contains a provision obligating the Airport to defend and indemnify the Port against any and all environmental liabilities from the airport property. In 2005, the San Diego County Regional Airport Authority (Airport Authority) leased the former TDY Facility from the Port (the TDY Lease). The TDY Lease included a provision obligating the Airport Authority to defend and indemnify the Port against any liabilities arising during the TDY Lease period.

Based on the allegations in the complaint regarding Mr. Hopkins' continued exposure during the Airport Authority's tenancy and the terms of the Airport Lease and TDY Lease which obligate the Airport Authority to defend and indemnify the Port against these types of liabilities, the Port is entitled to a defense of this lawsuit by the Airport Authority, as well as equitable and contractual indemnity and/or contribution for any potential liability.

As a result of the lawsuit, the Port has and will continue to incur costs defending the lawsuit and faces potential liability for damages.

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SECTION 8) Describe property damage or personal injury claimed:

The Port has incurred and will continue to incur expenses to defend the lawsuit and is facing a potential judgment for damages. The Port has incurred these expenses and been exposed to potential damages responding to plaintiffs' claims, which come within the scope of the defense and indemnity provisions of the Airport Lease and TDY Lease. Additionally, to the extent Mr. Hopkins' illness was caused in whole or in part by his exposure to chemicals during his visits to the former TDY Facility during the Airport Authority's tenancy, the Port would be entitled to equitable indemnity and/or contribution from the Airport Authority.

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RESOLUTION NO. 2012-0107

A RESOLUTION OF THE BOARD OF THE
SAN DIEGO COUNTY REGIONAL AIRPORT
AUTHORITY AUTHORIZING THE REJECTION OF
THE CLAIM OF THE SAN DIEGO UNIFIED PORT
DISTRICT REGARDING CARL WAYNE HOPKINS

WHEREAS, on August 22, 2012, the San Diego Unified Port District filed a claim with the San Diego County Regional Airport Authority for defense, indemnity and/or contribution for any potential liability related to the wrongful death lawsuit brought by the surviving heirs of Carl Wayne Hopkins; and

WHEREAS, at its regular meeting on October 4, 2012, the Board considered the claim filed by the San Diego Unified Port District, the report submitted to the Board, and found that the claim should be rejected.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby authorizes the rejection of the claim of the San Diego Unified Port District regarding Carl Wayne Hopkins.

BE IT FURTHER RESOLVED that this Board determines this action is not a "project" as defined by the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code §21065; nor is it a "development" as defined by the California Coastal Act, Cal. Pub. Res. Code §30106.

PASSED, ADOPTED, AND APPROVED by the Board of the San Diego County Regional Airport Authority at a regular meeting this 4th day of October, 2012, by the following vote:

AYES: Board Members:

NOES: Board Members:

ABSENT: Board Members:

ATTEST:

TONY R. RUSSELL
DIRECTOR, CORPORATE SERVICES/
AUTHORITY CLERK

APPROVED AS TO FORM:

BRETON K. LOBNER
GENERAL COUNSEL

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