IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Agere Systems, Inc., Cytec Industries, Inc., Ford Motor Company, SPS Technologies, LLC, and TI Group Automotive L.L.C.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 11C-10-235 JRJ CCLD
Worthington Steel Company,	)	
Defendant.	)	

Date Submitted: June 3, 2013
Date Decided: September 12, 2013

MEMORANDUM OPINION

Decision After Trial
Verdict for Plaintiffs

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Jurden, J.

I. INTRODUCTION

This complex litigation arises from a dispute among the parties with respect to their obligations under the terms of a settlement agreement between Plaintiffs on the one hand, and Worthington Steel Company ("Worthington") and NRM Investment Company, Inc. ("NRM") on the other, to pay costs associated with remediation of environmental contamination at a Superfund Site.

Plaintiffs, Worthington and NRM executed an agreement (the "Worthington Settlement Agreement" or "Settlement Agreement") that obligated Worthington to pay 13% of future costs incurred at the Superfund site. After Worthington failed to contribute its cost share in accordance with the Settlement Agreement, Plaintiffs filed this action for declaratory judgment and breach of contract damages. Worthington counterclaimed, seeking a declaratory judgment and alleging there was mutual mistake as to its obligations.[1] This is the Court's decision after trial,[2] finding for Plaintiffs based on the clear and unambiguous language in the Settlement Agreement setting forth Worthington's obligations, and determining that there was no mutual mistake.

[1] Although Worthington alleged unilateral mistake in its counterclaim, it later withdrew that claim during the bench trial. *See* Worthington's Ans. and Counterclaim, ¶ 33, Trans. ID 41131806; Mar. 14, 2013 Tr. Trans. ("Day 2"), Trans. ID 51741763, at 146:12-23.

[2] The Court appreciates counsel's efficient and effective presentation, professionalism, and civility.

II. FACTS

Upon consideration of the Proposed Findings of Fact and Conclusions of Law, the responses thereto, and the trial testimony, exhibits and arguments, the Court finds the following facts by a preponderance of the evidence:

The November 18, 1998 Environmental Protection Agency ("EPA") Record of Decision

On November 18, 1998, the EPA issued a Record of Decision selecting certain remedial actions to be performed at the Boarhead Farms site in Upper Black Eddy, Pennsylvania (the "Boarhead Site" or "Site") to address environmental contamination from waste disposal generated by several persons and companies.[3] The EPA agreed that the remedial action described in the Record of Decision could be implemented in two operable units, Operable Unit No. 1 ("OU-1") and Operable Unit No. 2 ("OU-2"). OU-1 would address groundwater extraction and air stripping, installation of additional monitoring wells, the implementation of institutional controls and monitoring for OU-1, and residual water treatment. OU-2 would address excavation and off-site disposal of buried

[3] *See* Jt. Ex. ("JX") 12; Stips. of Pltfs. and Deft. ("Stip.") at ¶ 2, Trans. ID 49158110. The Court, again, commends counsel on their extensive and thorough pretrial preparation, which resulted in, among other things, a list of joint stipulations. Counsel's collaborative effort greatly assisted the Court. Feb. 21, 2013 Tr. Trans. ("Day 1"), Trans. ID 51662473, at 60:4-8 (The Court thanked "counsel for their preparation of the stipulations," knowing the drafting "took time and effort and distracted [counsel] from [] trial prep [….]").

drums, soil treatment of volatile organic compound hot spots, and implementation of institutional controls and monitoring for OU-2.[4]

The July 29, 1999 Agreement in Principle

Cytec Industries, Inc. ("Cytec"), Ford Motor Company ("Ford"), SPS Technologies, LLC ("SPS"), TI Group Automotive Systems, L.L.C. ("TI"),[5] Worthington, and NRM [6] entered into an "Agreement in Principle," dated July 29, 1999, by which they agreed to: (1) collectively fund and perform OU-1; (2) comply with all the requirements of the OU-1 Consent Decree which Cytec, Ford, and SPS later entered; and (3) pay other OU-1 Group costs.[7] Until the Group costs, or final allocation, was established, the Agreement in Principal provided an interim pay schedule:[8] Cytec, Ford, SPS, and Agere were each obligated to pay 20% per OU-1 assessment, with TI, Worthington, and NRM each obligated to pay

[4] Stip. at ¶ 3. The OU-1 and OU-2 agreements between the EPA and the companies involved are known as "Consent Decrees," subject to judicial approval. *See* Broun Caroline, et al., RCRA AND SUPERFUND: A PRACTICAL GUIDE § 13:1 (3d ed. 2013) ("Ideally, the collective group of companies that has received the government's notices for the particular site has organized to form a PRP [or Potentially Responsible Parties] group. The PRPs' next goal is to settle with the EPA under the most favorable terms possible through a judicial consent decree or an administrative order on consent.").

[5] Cytec and Ford are Delaware Corporations, TI is a Delaware Limited Liability Company, and SPS is a Pennsylvania Limited Liability Company. *See* Compl., Trans. ID 40579097, at ¶¶ 1-5; Ans., Trans. ID 41131806, at ¶¶ 1-5.

[6] Worthington is a Delaware Corporation and NRM is a Pennsylvania Corporation. JX13 at ¶ 83; Compl.

[7] *See* JX 2. Cytec, Ford and SPS were parties to the OU-1 Consent Decree entered in 2000, TI, Worthington and NRM were not. *See* JX 11, pp 82-83. The OU-1 Consent Decree obligated Cytec, Ford and SPS, as settling defendants "to perform the OU-1 remedial design and remedial action, and to reimburse the EPA for its administrative and oversight costs related thereto." *Id.* At all times, only Cytec, Ford, and SPS have had a legal obligation to the United States under the OU-1 Consent Decree to perform the OU-1 work and to fulfill all other OU-1 Consent Decree requirements. Stip. at ¶¶ 8 and 9.

[8] Stip. at ¶ 5; JX 2 at 2-3.

6.67% per OU-1 assessment.[9] Once determined, the final allocation would apply retroactively. Any Agreement-in-Principal party receiving a reduction from the interim allocation to the final allocation would receive credit for any interim payments, with a corresponding debt due from signatories with an increased share.[10]

The OU-1 Group

Having agreed to join the OU-1 funding, NRM, Worthington, and TI formally organized with Cytec, Ford, and SPS to form the "OU-1 Group." Worthington was represented in the OU-1 Group first by Jack Wilmer, Esq., then later by Joseph Lonardo, Esq. of Vorys, Sater, Seymour and Pease, LLP ("Vorys").[11] NRM was represented in the OU-1 Group by Edward Fackenthal, Esq.[12] Worthington's counsel received group e-mails and other updates about the OU-1 Group's activities and participated in OU-1 Group calls and activities on Worthington's behalf.[13] OU-1 Group decisions were made by consensus,[14] and Worthington was made aware of the costs involved with the OU-1 work, the

[9] Stip. at ¶ 6. As background, in 1986, Worthington purchased an industrial plant from NRM, which NRM had purchased from TI. Worthington and NRM agreed among themselves to share the obligation of the NRM plant's waste disposal at the Boarhead Site, which occurred during NRM's ownership. Because TI owned the plant before NRM, the three of them jointly paid a one-fifth share of the OU-1 costs. *Id*.
[10] Stip. at ¶ 7; JX 2 at 3.
[11] Stip. at ¶ 12. Mr. Lonardo assumed representation of Worthington around the time the complaint in the CERCLA Action was filed. S*ee, infra*, at pp. 7-9, Stip. at ¶ 25.
[12] Stip. at ¶ 13.
[13] *Id*. at ¶¶ 14 and 15.
[14] *Id*. at ¶ 18.

ongoing Site work, the assessments made against Worthington, and the reasons for those assessments.[15]

Timothy J. Bergere, Esq. of Montgomery, McCracken, Walter & Rhoads, LLP, an experienced environmental lawyer who has worked on over fifty Superfund cases, served as Liaison Counsel for many years to the OU-1 and OU-2 Groups with respect to remediation and other activities conducted at the Boarhead Site. Mr. Bergere had primary responsibility for providing legal services relating to the Groups' coordination and remediation efforts, and maintaining and supervising the Groups' finances.[16]

All the remediation contractors performing the work at the Site were retained by the OU-1 Group, not by the Group's individual members.[17] Contractors submitted their invoices to Mr. Bergere for review and approval, and once approved, those invoices were paid from the OU-1 Group trust accounts, never by any OU-1 Group individual member.[18] OU-1 Group assessments replenished the Group's trust accounts, in order to fund upcoming work and cover related costs.[19] The assessments were based upon budget projections prepared by,

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[15] *Id*. at ¶ 16.
[16] Stip. at ¶ 19; Day 2, Bergere at 95:10-23. According to Mr. Bergere, "[…] the liaison counsel role was really to coordinate all the Groups' activities […] to communicate with the federal agency […] raise money and issue assessments, pay the contractors, negotiate contracts to hire the remedial contractors […] and resolve disputes over payment terms and contract issues for performing contractors." *Id.* at 96:16-97:8.
[17] *See* Day 1, Mesevage at 138:10-17; Day 2, Bergere at 102:21-103:1 and 99:21-100:5.
[18] *See* Day 2, Bergere at 101:23-102:17 and 103:2-104:3.
[19] *See* Stip. at ¶ 20; Day 1, Mesevage at 138:2-9; Day 2, Bergere at 104:10-16.

or on behalf of, the OU-1 Group.[20] The OU-1 Group issued the assessments to its members and the members paid their interim, allocated shares as part of an ongoing program.[21]

The OU-2 Group

Cytec, Ford, SPS, and TI became signatories to a further Administrative Order on Consent for remedial design of OU-2 that became effective October 17, 2001, and a Consent Decree entered in 2002 (the "OU-2 Consent Decree") that obligated them to perform the OU-2 remedial design and action, to reimburse the EPA for past response costs, and to reimburse the EPA for certain future administrative and oversight costs.[22] As to OU-2, Agere agreed with Cytec, Ford, SPS, and TI to fund a share of the costs, subject to reallocation. NRM and Worthington did not participate in funding OU-2.[23]

The CERCLA Action

In June 2002, Plaintiffs Agere, Cytec, Ford, SPS, and TI, filed a Complaint in the U.S. District Court for the Eastern District of Pennsylvania against twenty-

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[20] Day 1, Shea at 80:1-11, Mesevage at 138:2-9; Day 2, Bergere at 100:16-101:22.

[21] Stip. at ¶ 17. The OU-1 Group assessments were paid into one or more IOLTA accounts maintained at Mr. Bergere's law firm, and these accounts were used to pay: (1) consultants and remediation contractors hired collectively by the OU-1 Group to perform the OU-1 work; (2) Montgomery McCracken's legal fees and costs; and, (3) periodic oversight cost assessments issued by the EPA with respect to its costs to monitor, evaluate and/or oversee the work of the OU-1 Group (as provided for in the OU-1 Consent Decree). *Id*. at ¶ 21; Day 2, Bergere at 101:23-102:17. These EPA oversight invoices were received by Mr. Bergere on behalf of the OU-1 Group. He reviewed them and issued assessments to each of the OU-1 Group members for their shares of the amounts sufficient to pay the invoices. No OU-1 Group member ever asked where other members were obtaining the money to pay the Group assessments. Day 1, Shea at 67:18–68:13; Day 2, Bergere at 104:17-106:4.

[22] Stip. at ¶ 10.

[23] *Id*. at ¶¶ 10 and 11. NRM was asked to join Cytec, Ford, and SPS in agreeing to perform the OU-2 work and settle the EPA's past costs claim, but declined to do so. JX 13 at ¶ 91.

three defendants seeking cost recovery and contribution under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Pennsylvania Hazardous Sites Cleanup Act ("HSCA"). Specifically, the Plaintiffs sought costs and expenses incurred and to be incurred in response to the alleged release or threatened release of hazardous substances at or in connection with the Boarhead Site (the "CERCLA Action"). The CERCLA plaintiffs filed claims against, *inter alia*, companies that had failed or refused to participate in funding OU-1 and/or OU-2,[24] including NRM.[25]

Mr. Fackenthal represented NRM in the CERCLA Action. Although Worthington was not a party in the CERCLA Action, Mr. Fackenthal kept the Vorys firm abreast of developments in that Action,[26] and the Vorys firm assisted Mr. Fackenthal with matters relating to the NRM Plant and other issues in the CERCLA Action.[27]

As the CERCLA Action progressed, Plaintiffs settled with several defendants. Each of those settlements resolved Plaintiffs' claims for past response costs incurred and for all future response costs until the Boarhead Site was fully

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[24] Stip. at ¶ 22.

[25] The CERCLA Action Complaint stated that NRM had been and continued to be a member of the group funding OU-1, but the Plaintiffs named NRM as a defendant to establish an allocated share of responsibility for OU-1 and OU-2. Based on Worthington's continued OU-1 participation, it was not a named defendant in the CERCLA Action Complaint. Stip. at ¶ 23.

[26] Day 2, Lonardo at 80:5-10.

[27] The CERCLA Action would establish NRM's contribution share for OU-1 and OU-2 past and future costs. Stip. at ¶ 24. Day 2, Lonardo at 80:5-10.

remediated, with each defendant making a cash payment to Plaintiffs.[28] Neither NRM nor Worthington was a party to any of those settlements, and thus neither shared in any of the settlement proceeds.[29] Worthington's counsel, Mr. Lonardo, knew about the settlements, and knew Plaintiffs had recovered money from almost all the CERCLA defendants.[30] Every settlement agreement was produced in discovery with the dollar amounts paid redacted.[31] Neither Worthington nor NRM asked the CERCLA Plaintiffs what was happening with the cash received from the settling defendants.[32] Plaintiffs used some of the settlement monies to pay ongoing litigation costs, and distributed the rest to themselves for whatever purpose each decided.[33]

Prior to the CERCLA Action trial, Plaintiffs served detailed responses to contention interrogatories in which they set forth the equitable shares they attributed to themselves, the settled defendants, and the remaining defendants, of past and future Site costs.[34] Plaintiffs sought 46.26% of those costs from Carpenter Technology Corporation, 25.23% from NRM, and 12.44% from the remaining CERCLA defendants. Plaintiffs attributed 16.07% to themselves and the

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[28] *Id*. at ¶ 27. Agere's witnesses refer to these settlements as "cash out" settlements. *See* Day 2, Bergere at 108:12-109:2.
[29] *See* Day 1, Shea at 75:2-15.
[30] *See* Day 2, Lonardo at 81:18-82:3.
[31] The redactions occurred based on the U.S. District Court's ruling in the CERCLA Action that any remaining defendants would receive a *pro rata* credit for the equitable shares allocated by the court to defendants settling at trial. Stip. at ¶ 28; Day 1, Shea at 73:9-74:1; Day 2, Mesevage at 16:20-19:12.
[32] *See* Day 1, Shea at 69:7-70:5.
[33] Day 1, Shea at 74:8-75:1; Day 2, Mesevage at 19:13-20:2.
[34] JX 41.

parties with which they had settled.[35] Mr. Lonardo, Worthington's counsel, reviewed those interrogatory responses and was aware at the time of his settlement discussions with Mr. Mesevage[36] that Plaintiffs were seeking 25-26% of their past and future response costs from NRM.[37] Mr. Lonardo was also aware at the time of the settlement discussions that Plaintiffs were seeking over 45% of their past and future response costs from Carpenter, which would translate into millions of dollars.[38] Five days before the June 23, 2008 trial,[39] only three defendants remained in the CERCLA action: NRM, Carpenter, and Handy & Harman Tube Company, Inc. ("Handy").[40]

The Worthington Settlement

Settlement discussions among Plaintiffs, NRM, and Worthington commenced in earnest in early June 2008.[41] The settlement negotiations were conducted by Mr. Lonardo, Worthington's counsel,[42] and Mr. Mesevage, Plaintiffs' representative,[43] both experienced environmental lawyers.

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[35] JX 41 at Ex. A (DEF0320).
[36] Mr. Mesevage, an experienced environmental lawyer who represented Cytec and who has drafted many Superfund settlements, took the lead in negotiating with NRM and Worthington. Day 1, Mesevage at 133:3-13.
[37] *See* Day 2, Lonardo at 82:4-13 and 20:7-23.
[38] *See id*. at 83:8-15; Mesevage at 20:7-23 and 21:9-22:4. Plaintiffs' past recoverable response costs through 2007 were $13,678,378.55. Stip. at ¶ 32.
[39] Stip. at ¶ 29.
[40] *Id*. at ¶ 31.
[41] *See id*. at ¶ 33.
[42] Mr. Lonardo was the only participant in the discussions on behalf of Worthington with respect to the settlement. Stip. at ¶ 35.
[43] Stip. at ¶ 34.

During their settlement negotiations, Mr. Lonardo and Mr. Mesevage did not discuss the effect of a potential settlement with Carpenter or a potential judgment against Carpenter.[44] In fact, Carpenter was never specifically discussed.[45] There was no discussion during the negotiations that the Worthington settlement would be in any way contingent upon what happened in the CERCLA Action.[46] In other words, there was no discussion about what impact, if any, the CERCLA Action's outcome would have on Worthington.[47] There was no discussion that Worthington would become a plaintiff in the CERCLA Action or even participate.[48] There was no discussion about Worthington contributing to Plaintiffs' past or future CERCLA litigation costs.[49] There was no discussion that Worthington's obligation to pay 13% of future costs would fluctuate based on additional recoveries that might be had against the CERCLA defendants who had yet to settle.[50] There was no discussion that Worthington would refuse to pay some or all of its 13% share if one or more of the Plaintiffs paid some or all of its share with money received from Carpenter. There was no discussion as to where any of the Plaintiffs intended to obtain the money to pay the remaining 87%,[51] or where any

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[44] It is undisputed that there was no discussion as to whether a potential settlement with, or a judgment against, Carpenter would or would not affect Worthington's obligation to pay 13% of future costs at the Site. Stip. at ¶ 37; Day 2, Lonardo at 226:15-227-4.
[45] *See* Day 2, Lonardo at 84:1-5.
[46] *See id*. at 84:6-10.
[47] *See id*. at 83:16-23 and 226:8-14.
[48] *See* Day 2, Mesevage at 22:5-20.
[49] *Id*. at 23:10-14.
[50] *See* Day 2, Lonardo at 88:13-21.
[51] *See* Day 2, Lonardo at 87:10-14 and Mesevage at 24:7-15.

of the Plaintiffs, NRM, or Worthington obtained the money used to cover their respective assessment.[52] There was no discussion about definitions of undefined terms or CERCLA case law. And, at no point during settlement negotiations, did Mr. Lonardo ever mention or request a credit in the event other CERCLA defendants paid cash to settle.[53]

The Friday prior to the commencement of the CERCLA Action trial, Plaintiffs, NRM, and Worthington reached a settlement in principle.[54] Mr. Mesevage prepared the first draft of the settlement agreement, based largely upon a form agreement used in prior CERCLA Action settlements.[55] Because the cut-off date for past response costs in the CERCLA Action was December 31, 2007, Mr. Mesevage identified January 1, 2008 as the start date for "Future Costs."[56] Mr. Mesevage recognized that as of June 2008, NRM and Worthington had already paid a portion of "Future Costs" based on their OU-1 Group assessments.[57] Therefore, to prevent Worthington from paying 13% of Site costs for which it and

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[52] *See* Day 2, Lonardo at 84:20-85:12.
[53] *See* Day 2, Mesevage at 9:18-10:4 and 24:2-25.
[54] *See* Day 1, Mesevage at 145:4-6. By this agreement, NRM agreed to make a payment of $500,000.00, representing a compromise of the alleged contribution share of costs incurred by the plaintiffs through December 31, 2007 in the CERCLA Contribution Litigation, and had no responsibility or obligation with respect to future costs. Worthington agreed to pay 13% of future costs as defined in the written agreement dated June 21, 2008, effectuating the Worthington Settlement Agreement. The Settlement Agreement was contingent upon entry by the U.S. District Court of a dismissal order. Stip. at ¶¶ 38 and 39.
[55] *See* Day 1, Mesevage at 145:13-20.
[56] *See* Day 1, Shea at 82:10-21; JX 28 Day 2, Lonardo at 204:12-205:2.
[57] JX 28 at § 1.4; Day 1, Mesevage at 138:22-139:15.

NRM already paid, Mr. Mesevage's first draft gave Worthington an assessment credit.[58] This credit is reflected in Sections 7.1 and 1.4.

Section 7.1 of the Settlement Agreement provides:

> As inducement to the Parties to enter into this agreement and in consideration for the release and covenant not to sue from Plaintiff Settling Parties and Smith Settling Parties, Worthington shall pay thirteen percent (13%) of Future Costs. Worthington shall be credited the monies previously paid b[y] Worthington and Defendant Settling Party remaining in the Boarhead Farm PRP Group OU-1 and OU-2 trust accounts as of the Effective Date, it being the intention of the Parties that the first Worthington payment obligation hereunder shall come due upon the first Boarhead Farm PRP Group assessment following the Effective Date.[59]

Section 1.4 provides:

> As used in this Agreement, the term "Future Costs" shall mean all costs incurred after January 1, 2008 necessary to perform removal actions and/or response actions at the Site, including, without limitation, the costs of investigation, monitoring, studies, removal and remedial actions, consultants' fees, oversight costs of governmental agencies, penalties, and reasonable PRP group administrative costs associate with such removal actions and/or response actions. The Future Costs defined in this paragraph are subject to credit treatment as described in paragraph 7.1 of this Agreement.

After reviewing Mr. Mesevage's first draft, Mr. Lonardo asked that these provisions be changed, including the inception date for "Future Costs."[60] Mr.

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[58] *See* Day 1, Shea 79:12-82:22 and 138:18-142:4.
[59] *See* JX 1.
[60] JX 30; Day 1, Mesevage at 147:4-148:5; Day 2, Mesevage at 4:23-5:6 and 6:20-7:8.

Mesevage responded by explaining to Mr. Lonardo why his initial drafting was correct and more beneficial for Worthington, including the fact that "Future Costs" included monies paid by NRM and Worthington for OU-1 Group Assessments.[61] Mr. Lonardo thereafter agreed to substantially the same language initially proposed by Mr. Mesevage,[62] and asked that the final sentence in section 1.4, cross-referencing the credit provision in section 7.1, be added in the final draft.[63] At no point was there any discussion between Mr. Lonardo and Mr. Mesevage about definitions of undefined terms in the Agreement, CERCLA definitions, or CERCLA case law.[64]

Mr. Mesevage suggested the concept of Worthington remaining in the OU-1 Group and paying a percentage of future costs, rather than paying a "cash-out" settlement similar to NRM, because Worthington was already participating in the OU-1 Group and "had a practice of paying costs over time" as they needed to be paid. According to Mr. Mesevage, "it made sense to […] convert what they were doing as part of that group into an obligation that continues, but is enforceable on a contractual basis."[65] Mr. Lonardo did not ask for any particular participation in the

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[61] *See* Day 2, Mesevage at 6:5-17; 7:20-8:6; 5:20-6:2; 11:15-23; Lonardo at 204:12-205:2. As Plaintiffs point out, Mr. Mesevage could have stayed silent and taken advantage of Mr. Lonardo's error, but he did not, because he wanted a very clear inception date for "Future Costs." This was important because the definition of Future Costs encompasses every dollar that is owed to a contractor, and NRM and Worthington had already been funding that work due to payment of previous OU-1 Group assessments. *See* Day 2 at 15:7-16:17.
[62] JX 30; JX 1; Day 1, Mesevage at 138:22-139:15; Day 2, Mesevage at 6:10-17.
[63] *See* Day 2, Mesevage at 13:2-21and Lonardo at 208:6-209:5; J-33.
[64] *See* Day 2, Mesevage at 23:15-19.
[65] *See* Day 2, Mesevage at 43:12-22. Mr. Mesevage further explained, "it seemed to be the way that made it easier for Worthington to settle." *Id*. at 44:9-10.

OU-1 Group, but in a June 20, 2008 email, Mr. Mesevage raised the issue.[66] Ultimately, post-settlement, Worthington continued its participation in the OU-1 Group.[67] The Settlement Agreement was executed on June 21, 2008, and the Court in the CERCLA Action entered a dismissal order June 23, 2008, the first day of trial.[68]

Plaintiffs were successful in their claims against Carpenter at the CERCLA Action trial. Plaintiffs obtained a judgment against Carpenter for 80% of the Boarhead Site's past response costs as of December 31, 2007, in the amount of $10,942,702.84, plus prejudgment interest in the amount of $2,064,521, for a total of $13,007,223.84. Carpenter was also declared liable for 80% of all costs Plaintiffs would incur relating to the Boarhead Site after January 1, 2008.[69]

Following Trial in the CERCLA Action

After the CERCLA Action trial, Carpenter and Plaintiffs engaged in post-trial motions, an appeal to the United States Court of Appeals for the Third Circuit, a Petition for Writ of Certiorari to the United States Supreme Court, and motions to the District Court upon remand.[70] Meanwhile, the OU-1 Group continued its work remediating the Boarhead Site and issuing periodic assessments to Group members

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[66] JX 27; Day 2, Mesevage at 59:5-22.
[67] *See* Day 2, Mesevage at 60:7-23 and 61:11-16. Mr. Mesevage understood the benefits of staying in the Group as having input in decisions about what to do in terms of work at the Site, and being in the flow of information with regard to what the costs were at the Site. *Id*. at 61:1-9.
[68] *See* JX 1; JX 4; Stip. at ¶ 39. Plaintiffs settled with Handy after the trial but prior to verdict. Handy paid Plaintiffs $97,000 in total. Stip. at ¶ 40.
[69] Stip. at ¶ 42.
[70] *Id*. at ¶ 43.

when additional funds were needed.[71] Even after its settlement with Plaintiffs, Worthington continued to participate in the Group. Based on the Worthington Settlement Agreement, and because the OU-2 work was substantially completed, the OU-1 and OU-2 Groups merged, consisting entirely of SPS, Ford, Cytec, TI, and Worthington.[72]

The merged Group continued to function as it always had: preparing periodic budgets, assessing Group members, and Group members paying into the trust accounts. Each assessment was issued in the same manner as all prior assessments, with Worthington assessed 13% of the total amount of money being raised and the other Group members assessed in the collective amount of 87 percent.[73]

The Carpenter Settlement

Three years after the Worthington Settlement Agreement, Plaintiffs reached a cash-out settlement with Carpenter on July 13, 2011 (the "Carpenter Settlement Agreement").[74] Pursuant to the Carpenter Settlement Agreement, Carpenter agreed to pay Plaintiffs and other entities $21.8 million toward Plaintiffs' past and future costs in return for a release by Plaintiffs of all of their claims in the CERCLA Action. As part of the settlement, Carpenter did not become a member of the

[71] *Id*. at ¶ 44.
[72] *See* Stip. at ¶ 41; Day 2, Mesevage at 62:12-18, Bergere at 170:6-10.
[73] *See* Day 1, Shea at 83:16-84:12; Day 2, Bergere at 106:13-108:3.
[74] JX 5.

Boarhead Farms Site Group, nor otherwise agree to fund future response costs.[75] The Carpenter Settlement Agreement includes a broad indemnity from the Plaintiffs to Carpenter.[76] Accordingly, on August 8, 2011, the U.S. District Court dismissed all claims against Carpenter.[77] The Carpenter Settlement payment to the Plaintiffs and other entities in the amount of $21.8 million was wired into an IOLTA account on September 15, 2011, and held there in trust on behalf of Cytec, Ford, SPS, and TI.[78]

Worthington's Conduct After the Carpenter Settlement

Worthington paid every assessment until the first assessment issued after the Carpenter Settlement. Since the Carpenter cash-out settlement, however, Worthington has refused to pay its share of the last three assessments, claiming that pursuant to the Worthington Settlement Agreement, it is entitled to a credit towards its 13% share of Future Costs from the Carpenter Settlement.[79]

III. THE PARTIES' CONTENTIONS

Both parties maintain the Worthington Settlement Agreement is clear and unambiguous, but do not agree upon its proper construction. Agere maintains that the Worthington Settlement Agreement clearly and unambiguously requires Worthington to pay 13% of all "Future Costs" "incurred or to be incurred"

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[75] Stip. at ¶ 46.
[76] JX 5, July 13, 2011 Boarhead Farms Settlement Agreement between Plaintiffs and Carpenter at § 5.
[77] Stip. at ¶ 47.
[78] Stip. at ¶ 48.
[79] *See* Day 2, Bergere at 107:22-108:15.

remediating the Boarhead Site, regardless of who pays the remaining 87%, or where the money comes from to pay that 87% share. Worthington maintains that, under the Settlement Agreement's plain language, Worthington's obligation to pay 13% of "Future Costs" must be interpreted in accordance with the meaning of its terms under CERCLA and CERCLA case law interpreting the definition of "incurred." Accordingly, Worthington claims Plaintiffs have not "incurred" response costs unless they actually spent their own money to pay the 87% future costs share. In other words, Worthington claims that it should reap the benefits from Plaintiffs' Carpenter Settlement Agreement, three years after Worthington's own settlement.[80] In the alternative, Worthington urges the Court to find mutual mistake and set aside the Worthington Settlement Agreement.

IV. CONCLUSIONS OF LAW

The parties agree the Worthington Settlement Agreement is governed by Pennsylvania law. Under Pennsylvania law, "[t]he primary objective of a Court when interpreting a contract is to ascertain the intent of the parties."[81] When a written contract is clear and unequivocal, its meaning must be determined by its contents alone.[82] When determining the intent of the parties to a contract, the Court will construe all provisions together and give each effect. It will not

[80] Worthington's Post-Trial Op. Br. ("Worthington Op. Br.") at 2, Trans. ID 51904083.
[81] *See Seven Springs Farm, Inc. v. Croker*, 801 A.2d 1212, 1215 (Pa. 2002); *Ins. Adj. Bureau, Inc. v. Allstate Ins. Co.*, 905 A.2d 462, 468 (Pa. 2006) ("The fundamental rule of contract interpretation is to ascertain the intent of the contracting parties. In cases of a written contract, the intent of the parties is the writing itself.") (Citations omitted).
[82] *Seven Springs Farm,* 801 A.2d at 1215.

interpret one provision in a manner that annuls another.[83] The Court is not to assume that the contractual language was chosen carelessly or that the parties were ignorant of the meaning of the language they used.[84]

The Clear and Unambiguous Language

The Court's analysis begins with sections 7.1 and 1.4 of the Worthinton Settlement Agreement. Critical here is the statement in section 7.1 that "Worthington shall pay 13% of all future costs," and the "Future Costs" definition in section 1.4 that includes "all costs incurred after January 1, 2008 necessary to perform [Site remediation]." Section 7.1 clearly and unambiguously obligates Worthington to pay 13% of "Future Costs." Importantly, section 7.1 does not mention an 87% share, much less specifically require Agere, Cytec, Ford, SPS, or TI to pay that remaining 87% share.

The definition of "Future Costs" in section 1.4 clearly and unambiguously describes a cost set without specifying the payor. The only requirement is that the costs must be "incurred […] at the Site." Thus, the "Future Costs" definition "encompasses 100% of the dollars incurred at the Site for which a payment obligations arises, including the sums paid by Worthington and NRM from January 1, 2008 to the date of the Settlement Agreement and sums to be paid by

[83] *See LJL Transportation, Inc. v. Pilot Air Freight Corp*., 962 A.2d 639, 647-48 (Pa. 2009).
[84] *Id*.

Worthington […] thereafter."[85] Had the parties intended to require Plaintiffs to pay the remaining 87% of "Future Costs," they would have included language stating that in the Worthington Settlement Agreement.[86] The fact that the provision regarding Future Costs expressly *includes costs towards which Worthington and NRM had already contributed* undermines Worthington's argument that "incurred" means only future costs first paid out-of-pocket by Plaintiffs.[87] If, as Worthington now maintains, the parties' intent was that Worthington was to receive a credit for sums Plaintiffs recovered at the CERCLA trial from the two remaining defendants, the parties would have included language to that effect, and language giving Worthington the right to be advised of, and approve, any settlement.[88]

If, as Worthington maintains, the Worthington Settlement Agreement was intended to be a "reimbursement" contract rather than a "payment" contract, the Agreement would say that. And if the Agreement was a reimbursement contract, it would have included provisions detailing a reimbursement process. Finally, that

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[85] Pltfs.' Post-Trial Op. Br. ("Pltfs.' Op. Br.") at 2, Trans. ID 51914549. (emphasis omitted).

[86] For example, if, as Worthington contends, its 13% share applied only to dollars Plaintiffs themselves spent, "Future Costs" would have been defined as "costs incurred or to be incurred by **Plaintiff Settling Parties**."

[87] As noted by Plaintiffs, sections 7.1 and 1.4 each expressly reference the monies paid into the OU-1 and/or OU-2 trust accounts by NRM and Worthington. Because the Settlement Agreement is dated June 21, 2008, and has an effective date of July 15, 2008, (the date on which the last two of the parties executed the Settlement Agreement), "Future Costs," by definition, *includes costs paid from the OU-1 and OU-2 trust accounts*, and therefore includes costs paid indirectly by Worthington and NRM, not solely by Plaintiffs. Given this, it could not have been the parties' intent that "Future Costs" mean only monies first paid by the Plaintiffs. *See* Pltfs.' Op. Br. at 4.

[88] *See id*. ("If Worthington was to have a vested interest in every single dollar Plaintiffs might recover at trial from the two remaining defendants, then one would certainly expect Worthington to have insisted not just on a clear statement to that effect, but on detailed provisions that would protect such an interest.")

the Settlement Agreement is a "payment" and not a "reimbursement" contract is clear from the "credit" language in Section 7.1 which, again, provides: "it being the intention of the Parties that the first Worthington payment obligation hereunder shall become due upon the first Boarhead Farm PRP Group assessment following the Effective Date." This language means that Worthington's payment obligation for Group assessments is at the time of each assessment, not after the remaining Group members pay contractor invoices and then seek reimbursement from Worthington. As noted above, a contract must be interpreted as a whole, and the absence of any language describing a reimbursement process supports Plaintiffs' interpretation.

Worthington further urges the Court to adopt a definition of "incur" drawn from case law interpreting CERCLA. This the Court cannot do. First, the Worthington Settlement Agreement clearly and unambiguously obligates Worthington to pay a specified percentage of "Future Costs." The issue is not, as Worthington tries to make it, *which* entity actually incurs future costs, it is whether the plain and unambiguous language in the Worthington Settlement Agreement requires *any* particular entity or entities to actually incur, or pay, the costs. The Agreement contains no such requirement.[89]

[89] *See* Pltfs.' Op. Br. at 5-6.

The word "incurred" is not defined in the Worthington Settlement Agreement and, thus, the Court must apply its ordinary meaning.[90] Its ordinary meaning is "to become liable and subject to."[91] Moreover, the term "incurred" is not defined in CERCLA and this suit is not a CERCLA claim. There simply is no basis to adopt Worthington's definition of "incurred." A reasonable reading of section 1.6 of the Settlement Agreement is that terms not defined in CERCLA should not be given a purported CERCLA meaning.[92] Moreover, Worthington's argument fails even if the Court were to adopt some "CERCLA meaning" to determine if the Settlement Agreement is clear and unambiguous. As Plaintiffs correctly point out, "incurred" does not mean, as Worthington contends, "paid out of a party's own pockets."[93] Worthington's argument that, under CERCLA, costs are "incurred" only when a party pays costs out-of-pocket is incorrect and erroneous.[94]

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[90] *Easton v. Washington County Ins. Co.*, 137 A.2d 332, 335 (Pa. 1957). *See* Pltfs.' Op. Br. at 7-9.
[91] *Webster's New Collegiate Dictionary* (9th ed. 1983).
[92] Specifically, section 1.6 states, in pertinent part:

> the terms used in this Agreement shall be *as defined in CERCLA* […] and the Pennsylvania Hazardous Site Cleanup Act […] and their respective implementing regulations.

[93] *See* Pltfs.' Op. Br. at 7-9; Pltfs.' Reply Br. at 6-8.
[94] *See Burlington N. and Santa Fe Ry. Co., et al. v. United States*, 556 U.s. 599, 610-11 (2009); *United States v. Atl. Research Corp.*, 551 U.S. 128, 139-40 (2007). Employing well settled principles of contract interpretation, and giving "incurred" its ordinary meaning, the clear and unambiguous language obligates Worthington to pay 13% of Future Costs incurred at the Site, regardless of the source of funds Plaintiffs use to contribute to the Group trust accounts from which the remediation contractors are paid. Thus, Worthington is not entitled to a credit for the monies paid to Plaintiffs in the Carpenter Settlement. *See also* Pltfs.' Op. Br. at 7-9 and Pltfs.' Reply Br. at 8 (Plaintiffs are paying their 87% of OU-1 Group costs with their own money, funds that ceased being Carpenter's at the moment those funds were wire transferred into Ballard's IOLTA account.")

Extrinsic Evidence

Because the Court finds the Worthington Settlement Agreement to be clear and unambiguous, it did not consider the extrinsic evidence introduced at trial to interpret the Agreement. Rather, it considered the extrinsic evidence only to decide whether there was mutual mistake.[95]

Was There Mutual Mistake?

Under Pennsylvania law, a settlement agreement will not be set aside except upon "a clear showing of fraud, duress or mutual mistake."[96] "Since mistakes are the exception rather than the rule, the trier of facts should examine the evidence with particular care when a party attempts to avoid liability by proving mistake."[97] Mutual mistake begins with proof that there was a "mutual misconception as to an essential element of fact."[98] "A mistake is a belief that is not in accord with the facts."[99] If there is a mutual misconception as to a fact, four additional elements must be proven: (1) the mistake related to a "basic assumption on which the contract was made;" (2) the mistake materially affected the agreed-upon exchange of performances; (3) the mistake was not one "as to which the party seeking relief

[95] During the bench trial, the Court considered whether certain disputed evidence should be admitted for purposes of findings of fact and conclusions of law at the close of the case. In several instances, the Court deferred ruling on evidentiary objections, and allowed the disputed evidence to be introduced. (*See TWA Resources v. Complete Production Svcs. Inc*., C.A. No. N11C-08-100 MMJ CCLD, slip op. at 22 (Del. Super. July 30, 2013)). The Court has not ruled on the disputed evidence in reaching its decision. The Court's findings and conclusions are based on the terms of the Settlement Agreement and on the evidence admitted without objection.
[96] *Step Plan Svcs. v. Koresko*, 12 A.3d 401, 409 (Pa. Super. 2010).
[97] *Id*. at 410 (quoting Restatement (Second) of Contracts § 152, cmt. a).
[98] *Step Plan Svcs*., 12 A.3d at 409.
[99] Restatement (Second) of Contracts § 151.

bore the risk;" and, (4) the parties can be placed in their former position regarding the subject matter of the contract.[100]

Worthington has not met its burden. The preponderance of the evidence establishes there was no mutual misconception as to a *fact*. Mr. Lonardo testified on cross examination that he could point to "no specific fact" in the Worthington Settlement Agreement "as a fact that was mistaken,"[101] and agreed with Agere's counsel that any mistake was the result of *differing interpretations*, not a misunderstanding of fact:

> Q. Okay. So then just to summarize, it's true, isn't it, that any mistake regarding the Worthington settlement was not because there was a misunderstanding of fact, any mistake would have been because of different interpretations about the application of the agreement to any recovery by Plaintiffs from the remaining Defendants, yes?
>
> A. I think so that's a fair statement […] yes.[102]

The preponderance of the evidence also establishes that there was no *mutual* misunderstanding. Mr. Lonardo testified that he assumed, because only those Plaintiffs who were on the OU-1 and OU-2 Consent Decrees were obligated to pay costs, that "Future Costs" meant only costs "as incurred by the Plaintiffs who

[100] *Step Plan Svcs*., 12 A.3d at 410.
[101] Day 2, Lonardo at 237:9-11.
[102] *Id*. at 237:12-19.

would be obligated to pay them at the site."[103] Mr. Londardo never shared this assumption with Mr. Mesevage.[104] Mr. Shea[105] testified that he did not intend for the Settlement Agreement to give Worthington any benefit or credit from any future settlement with, or judgment against, Carpenter:

> Q. Did you have any intent or understanding or view as to whether the outcome of the [CERCLA] trial and any monies that the Plaintiff's group got as a result of that would in any way, shape, or form[,] inure to the benefit of Worthington and/or otherwise reduce how much money they would have to pay of future costs?
>
> A. The simple answer is no […] I mean, Worthington hadn't been paying for the cost-recovery action, Worthington hadn't given an indemnity to Carpenter, and it wasn't a basis on which we settled. We settled for a discrete amount, $500,000, and another amount, 13 percent […] of the Future Costs [….][106]

Mr. Mesevage testified that he intentionally drafted the definition of "Future Costs" to make who paid the other 87% irrelevant, and to require Worthington to pay its 13% of "Future Costs" in any event.[107] Mr. Mesevage did so purposely because he knew Plaintiffs in the CERCLA litigation were proceeding to trial against Carpenter and Handy and expected to receive some share of past and future costs from them.[108] According to Mr. Mesevage, Worthington never requested a credit or reduction of its payment obligation, depending on what monies the

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[103] *See id*. at 197:10-18. Mr. Lonardo's exact testimony included, "[…] at least in our mind […]" meaning, in Worthington's mind." (emphasis added)
[104] *Id*. at 208:17-23.
[105] SPS' in-house counsel and OU-1/OU-2 representative from April 1995 through August 2011. Day 2, Shea at 88:5-8.
[106] *See* Day 1, Shea at 128:16-23 and 128:23-129:1-5.
[107] Day 2, Mesevage at 8:9-9:3.
[108] *See id*. at 46:6-22.

Plaintiffs received from Carpenter or other settling parties.[109] Mr. Mesevage made it clear that it was never his intent to permit Worthington a credit or reduction[110]

Mr. Mesevage explained that because of the expectation that Carpenter would either join the Group and pay a share going forward, or perhaps buy-out the liabilities of the Plaintiffs and perform the remediation itself, it was important that the "Future Costs" definition did not specify that the 87% was to be paid by any particular party.[111] It is clear that, had Mr. Lonardo told Mr. Mesevage he expected Worthington to benefit from Plaintiffs' settlement with the remaining CERCLA defendants, without being a party to the suit and without contributing to the litigation costs, Mr. Mesevage would have advised him that such a benefit was not provided for in the Settlement Agreement and that the Plaintiffs would never agree to it.[112]

Mr. Mesevage used the words "incurred or to be incurred" to reflect the fact that some of the Future Costs had already been incurred by the OU-1 Group, and he intended – and understood – that "incur" meant not just costs actually paid by Plaintiffs, but also future costs obligated to be paid.[113] Mr. Mesevage "certainly

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[109] There is no evidence whatsoever that Mr. Lonardo requested such a credit before or during settlement negotiations, and, as noted previously, Mr. Lonardo and Mr. Mesevage did not discuss the Carpenter settlement.
[110] Day 2, Mesevage at 8:9-10:4.
[111] *Id*. at 46:2-14.
[112] *See* Pltfs.' Op. Br. at 19 ("There was absolutely no reason for Messrs. Mesevage and Shea to think Mr. Lonardo had reached his erroneous conclusion. Indeed, had Mr. Lonardo even hinted that he thought Worthington would benefit from Plaintiffs' potential recovery…[they] would undoubtedly have disabused Mr. Lonardo of such views."
[113] Day 2, Mesevage at 55:23-56:6.

did not use the word 'incurred' in the context of CERCLA case law."[114] Messrs. Mesevage's, Shea's and Lonardo's differing interpretations of "incurred or to be incurred" do not constitute a mutual misunderstanding or a mutual misunderstanding about a fact.

Even assuming, *arguendo*, there was a mutual mistake of fact, Worthington has failed satisfy its burden because the mutual mistake of fact would be one for which Worthington, the party seeking relief, bore the risk. According to § 154 of the Restatement (Second) of Contracts:

> A party bears the risk of mistake when: (a) the risk is allocated to him by agreement of the parties, or (b) he is aware, at the time the contract is made, the he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or (c) the risk is allocated to him by the court on the ground that it is reasonable under the circumstances to do so.

During negotiations, Mr. Lonardo never discussed with Mr. Mesevage whether the potential recovery against Carpenter, by settlement or judgment, would or would not affect Worthington's obligation to pay 13% of Future Costs.[115] Nor did Mr. Lonardo discuss with Mr. Mesevage that he expected the word "incurred" to have a CERCLA meaning.[116] As mentioned, Mr. Lonardo and Mr. Mesevage never

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[114] *Id*. at 77:10-11.
[115] *See* Day 2, Lonardo at 225:10-23 and 227:1-4 ("Mr. Mesevage and I never had any written communication or any communication of any kind as to the effect of a judgment or settlement against Carpenter or the obligation of Worthington under the Settlement Agreement.") *Id*. at 226:20-227:4.
[116] Day 2, Mesevage at 23:15-19.

discussed any CERCLA definitions or CERCLA case law during the settlement negotiations.[117] If it was Mr. Lonardo's intention that Worthington benefit from the Carpenter Settlement or judgment, he should have asked Mr. Mesevage to include language expressly stating that.[118] Similarly, if he believed that "incurred," as used with respect to "Future Costs," was to be defined pursuant to CERCLA case law, he should have insisted that the Settlement Agreement state such.[119]

Worthington's claim of mutual mistake also fails because Worthington has failed to establish that Agere can be placed in its former position regarding the subject matter of the contract. The Worthington Settlement Agreement resolved Plaintiffs' claims against NRM, and Plaintiffs' claims against NRM in the CERCLA Action were dismissed *with prejudice*. Thus, the Plaintiffs cannot be placed in their former position regarding the subject matter of the Settlement Agreement.[120]

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[117] *Id*. at 23:15-24:1.

[118] As Plaintiffs point out, a lawyer "who thought his client would get the benefit of a lawsuit to which it was not a party, especially without paying a nickel of the litigation costs, would insist that the contract expressly so state." Pltfs.' Op. Br. at 19.

[119] There is no evidence to suggest that Mr. Mesevage or Mr. Shea could have or should have known about Mr. Lonardo's expectations in this regard. And, had Mr. Lonardo discussed his expectations with either, the evidence establishes that they would have disabused him of such views.

[120] *See* JX-4; Jt. Stip. at ¶ 39. The Court finds by a preponderance of the evidence that had Mr. Lonardo discussed his belief that Worthington would benefit from the Carpenter settlement or judgment, Messrs. Mesevage and Shea would have told him they would not agree to such a provision, and the Settlement would have either gone forward with no misunderstanding or there would have been no Settlement, given Plaintiffs' clear intent that they alone would benefit from any such recovery. And, if there was no settlement with NRM, Plaintiffs would have proceeded to trial against NRM in the CERCLA Action. Plaintiffs obviously cannot do so now.

V. CONCLUSION

For these reasons, the Court enters judgment in favor of the Plaintiffs.

IT IS SO ORDERED.

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Jan R. Jurden, Judge