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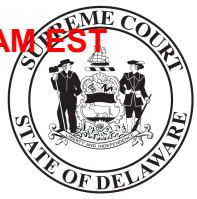

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WORTHINGTON STEEL COMPANY,	:	
Defendant/Counterclaim Plaintiff Below, Appellant,	:	No. 541, 2013
v.	:	On Appeal from C.A. No. 11C-10-235-JRJ [CCLD] in the Superior Court of the State of Delaware in and for New Castle County
AGERE SYSTEMS, INC. *et al.*,	:	
Plaintiffs/Counterclaim Defendants Below, Appellees.	:	

CORRECTED ANSWERING BRIEF OF APPELLEES

Dated: December 26, 2013

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NATURE OF PROCEEDINGS

Plaintiffs / Appellees Cytec Industries Inc. ("Cytec"), Ford Motor Company ("Ford"), SPS Technologies, LLC ("SPS"), Agere Systems Inc. ("Agere"), and TI Group Automotive Systems, L.L.C. ("TI") agree with the description of these proceedings provided by Defendant / Appellant Worthington Steel Company ("Worthington"). This is Plaintiffs' Answering Brief.

SUMMARY OF ARGUMENT

I. The Trial Court correctly held, based upon the four corners of the Settlement Agreement, that Worthington clearly and unambiguously must pay 13% of Future Costs irrespective of the source of funding for the remaining 87% of those costs. The definition of "Future Costs" describes a set of costs without specifying the identity of who is to pay those costs. (A457 at § 1.4). That definition includes costs to which Worthington had already contributed, and thus cannot be limited to sums paid first by Plaintiffs. Worthington is the only party to the contract that is obligated to pay any share of that set of costs. (A457 at § 7.1). The Settlement Agreement language is consistent with a "payment" contract, not a "reimbursement" contract. Worthington's first payment obligation is triggered by the next PRP Group *assessment*, not by an invoice from Plaintiffs seeking costs *they alone* first paid. (A457 at § 7.1). The contract does not even mention Carpenter Technology, much less include language that would be necessary if Worthington were to somehow share in the proceeds of any then-future Carpenter Technology settlement. The Trial Court accordingly did not consider the extrinsic evidence relied upon by Worthington, and otherwise rejected Worthington's CERCLA arguments. Those arguments additionally fail because: Under CERCLA jurisprudence a person "incurs" response costs when it performs response actions itself; the parties did not intend CERCLA "meaning" to apply to

the definition of Future Costs; the extrinsic evidence is consistent with the clear and unambiguous text of the Settlement Agreement; and Plaintiffs in any event used their own money to pay their share of Future Costs. Plaintiffs therefore deny each and every allegation in paragraph I of Worthington's Summary of Argument.

II. CERCLA's prohibition against a plaintiff making a "double recovery" in a CERCLA contribution action has nothing to do with the interpretation or enforcement of the Settlement Agreement, which is a contract governed by Pennsylvania law, not CERCLA law. Nothing in CERCLA and nothing in CERCLA decisional law says that such *contract rights* are impacted by CERCLA. Moreover, there is no basis in the trial record to conclude that Plaintiffs are making a "double recovery" or receiving a "windfall." Work at the Site must continue indefinitely, so that there is no way today to know how much it will ultimately cost to remediate the Site. (A151). The 2011 cost projections Worthington references are already demonstrably low, (A281-82), and even then totaled over $19,000,000. (A571; A282-83). Plaintiffs therefore deny each and every allegation in paragraph II of Worthington's Summary of Argument.

III. Worthington's argument that only those entities that executed the OU-1 Consent Decree are "legally obligated" to pay the costs of that work is legally incorrect. Plaintiffs therefore deny each and every allegation in paragraph III of Worthington's Summary of Argument.

STATEMENT OF FACTS

Plaintiffs generally accept Worthington's recitation of the facts, but not its characterization of those facts. However, Plaintiffs' claims in the litigation in the United States District Court for the Eastern District of Pennsylvania (the "District Court Action") included claims under Pennsylvania law, so were not limited to claims under CERCLA, contrary to Worthington's suggestion. (A550-551). The Settlement Agreement resolved *all* claims raised in the District Court Action, (A459-450, 461-462), but includes no requirement that anyone other than Worthington pay a share of Future Costs as defined therein.

Worthington was a member of the OU-1 Group, a group of companies that agreed to jointly perform and fund the work required in the 2000 Consent Decree with the United States Environmental Protection Agency ("EPA"). (A146). That work was paid for from the OU-1 Group trust accounts, never by any individual members of that group. (A247; 278-279). Worthington was neither a plaintiff in the District Court Action nor even a party thereto. (A148-149). Worthington has never contributed a cent to Plaintiffs' costs of that litigation. Worthington is neither mentioned in nor otherwise has any rights pursuant to the settlement agreement between Plaintiffs and Carpenter Technology. (A501-516).

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT THE SETTLEMENT AGREEMENT CLEARLY AND UNAMBIGUOUSLY REQUIRES WORTHINGTON TO PAY 13% OF FUTURE COSTS IRRESPECTIVE OF THE SOURCE OF FUNDING FOR THE REMAINING 87% OF THOSE COSTS AND CORRECTLY REJECTED WORTHINGTON'S CERCLA ARGUMENTS

Question Presented

Whether the Trial Court correctly held that the Settlement Agreement clearly and unambiguously requires Worthington to pay 13% of Future Costs irrespective of the source of funding for the remaining 87% of those costs.

Standard and Scope of Review

Plaintiffs agree with Worthington's statement of the standard and scope of review.

Merits of the Argument

The Trial Court correctly held that the June 21, 2008 Settlement Agreement between Plaintiffs, Worthington, and NRM Investment Company ("NRM") (the "Settlement Agreement") clearly and unambiguously requires Worthington to pay 13% of all "Future Costs," costs "incurred or to be incurred" remediating the Boarhead Farms Superfund Site (the "Site") no matter who pays the remaining 87% of those costs. Judge Jurden's analysis was based solely upon the four corners of the Settlement Agreement, and, thus, upon what the actual language of that agreement does and does not say.

Worthington argued at trial, and continues to argue now, that the Settlement Agreement must be interpreted in accordance with what Worthington contends is "CERCLA terminology." (Worthington's Op. Brf. at p. 13). Such an interpretation, Worthington says, leads to the conclusion that Plaintiffs have not "incurred" the undisputed costs of remediating the Site because they have not spent their "own money" doing so. (*Id.* at 17-21). Worthington repeatedly suggests that the Trial Court somehow relied upon "testimony" when holding that the Settlement Agreement clearly and unambiguously requires Worthington to pay 13% of all Future Costs no matter who pays the remaining 87% of such costs. (Worthington's Op. Brf. at pp. 2-3, 14).

The Trial Court, however, did no such thing. The Trial Court repeatedly stated that its key holding was "based on the clear and unambiguous language in the Settlement Agreement setting forth Worthington's obligations …." (9/13/2013 Trial Court Opinion at pp. 2; 23 hereinafter cited in the form "Opinion at p. __") ("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.").[1] Nowhere in the Trial Court's analysis of the Settlement Agreement did the court reference, much less rely on, anything other

[1] Worthington has not appealed from the Trial Court's rejection of its two "mistake" counts.

than the actual language of the Settlement Agreement. (*Id.* at pp. 19-21). The Trial Court's discussion of testimony and other extrinsic evidence is contained solely in the "Facts" or "Mutual Mistake" sections of the opinion. (*Id.* at pp. 3-17 and pp. 23-28). Indeed, it is Worthington, not the Trial Court, who continues to rely on extrinsic evidence to support its argument that the Settlement Agreement means what Worthington says it means.

This Court therefore must first determine whether the Trial Court was correct in holding that the Settlement Agreement clearly and unambiguously requires Worthington to pay 13% of Future Costs regardless of who pays the other 87%. If so, then this Court should ignore the extrinsic evidence relied upon by Worthington in its Argument I and Argument III, just as did Judge Jurden.

A. The Settlement Agreement Is Clear And Unambiguous

The Settlement Agreement resolved CERCLA and Pennsylvania law claims against NRM in return for a payment by NRM of $500,000 and a contractual commitment of Worthington to pay 13% of "Future Costs." With respect to Worthington, the Settlement Agreement states:

> 7.1 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 be [sic] 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.

(A457 at § 7.1). "Future Costs" is defined as:

> all costs incurred and to be 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 associated 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.

(*Id.* at § 1.4).

This definition clearly and unambiguously describes *a set of costs without specifying the identity of the payor(s) of those costs*. The only requirement is that the costs must "be incurred … at the Site." As such, the Future Costs definition encompasses 100% of the dollars incurred at the Site for which a payment obligation arises. If the set of costs defined as Future Costs were to be limited to costs incurred by any particular person or persons, then the definition would have to expressly so state. For example, if Worthington's 13% was to apply only to dollars Plaintiffs themselves spent, as Worthington contends, "Future Costs" would have to be defined as "all costs incurred or to be incurred *by Plaintiff Settling Parties.*" It does not. The absence of any such words has to mean that there is no such limitation on the set of costs. Judge Jurden agreed. (Opinion at pp. 19-20).

This clear meaning is consistent with the other relevant Settlement Agreement provisions. While § 7.1 unmistakably requires Worthington to pay 13% of Future Costs, nothing in the definition of Future Costs, nor any other language in the Settlement Agreement, commits the Plaintiffs here, the Smiths Settling Parties, *or anyone else*, to pay some or all of Future Costs. The sole obligations in the Settlement Agreement of the Plaintiff Settling Parties and the Smiths Settling Parties are to jointly (with NRM) move the court in the CERCLA Action for entry of an enumerated Order dismissing NRM and, effective upon the date of entry of that Order, to release and covenant not to sue NRM and Worthington. (A457 §§ 4.1, 6). Had the parties intended to require that Plaintiff Settling Parties, or anyone else, pay the remaining 87% of costs, they would have said so. They did not. The Settlement Agreement fixes only *Worthington's* obligation, irrespective of who pays the other 87%. Judge Jurden agreed. (Opinion at pp. 19-20).

Indeed, the Settlement Agreement is clearly a "payment" contract, not, as Worthington tacitly suggests, a "reimbursement" contract. Worthington's argument that it is obligated only to pay 13% of costs the Plaintiff Settling Parties themselves "incur," is in reality a suggestion that the Plaintiff Settling Parties must first themselves pay 100% of Site costs, and only then seek reimbursement from Worthington for its 13% of what the Plaintiff Settling Parties have already paid.

However, the word "reimburse" does not appear in the Settlement Agreement. If the parties intended the contract to be one for reimbursement, it would simply say: "Worthington shall reimburse 13% of costs incurred by the Plaintiff Settling Parties at the Site." It does not. Rather, the Settlement Agreement is a firm obligation to pay a defined share of the set of costs defined as "Future Costs," which are all costs due and owing to contractors and third-parties in relation to the work conducted at the Site as well as other Group costs.

Similarly, if the Settlement Agreement was really a contract of reimbursement, there would be detailed provisions covering how contractor invoices would be paid *by Plaintiffs*, what documentation would have to be submitted to Worthington, what rights of review or objection Worthington would have, in what time frame Worthington would have to pay its share to Plaintiffs (and *not*, as has always been the practice, into a group trust account), whether, if Worthington chose to dispute some or all of Plaintiffs' documentation, it nevertheless had to pay the full amount due pending resolution of the dispute and, likely, dispute resolution provisions. As a contract must be interpreted as a whole, the absence of any such language is striking. Judge Jurden agreed. (Opinion at p. 20).

That the Settlement Agreement is not a contract of reimbursement is also clear from the "credit" language in Section 7.1: "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." (A457 § 7.1). (emphasis added). This language can only mean that Worthington's payment obligation is triggered *at the time of each PRP Group assessment*, and cannot mean that the rest of the group first pays individual contractor invoices and then seeks reimbursement from Worthington. Judge Jurden agreed. (Opinion at pp. 20-21).

The clear meaning that Worthington is obligated to pay 13% of Future Costs regardless of who pays the remaining 87% is also consistent with the fact that the definition of Future Costs *expressly includes* costs to which Worthington (and NRM) themselves *had already contributed*, and thus cannot be limited to sums paid out of pocket first 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 upon 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 thus includes costs paid indirectly by NRM and Worthington, not just by Plaintiffs. Future Costs therefore *cannot* be read to mean only those sums first paid by the Plaintiff Settling Parties. Judge Jurden agreed. (Opinion at p. 20; fn 87).

Finally, Worthington's argument at its root is that Worthington has a right to share in every single dollar Plaintiffs ultimately recovered from Carpenter and from Handy. If so, 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. For example, certainly Plaintiffs would be required to regularly inform Worthington of all developments at trial, post-trial, appeals, etc. and of any settlement discussions with Carpenter and Handy. No doubt Worthington would also have the right to be consulted regarding, and to approve, any actual settlement with Carpenter or Handy as well as the disposition of any settlement funds or payments of judgments. There are no such terms. Judge Jurden agreed. (Opinion at p. 20).

The Settlement Agreement clearly and unambiguously requires Worthington to pay 13% of all Future Costs regardless of who pays the other 87%. Accordingly, the extrinsic evidence relied upon by Worthington to argue otherwise must be rejected. *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).[2]

[2] There is no dispute that the Settlement Agreement is governed by Pennsylvania law.

B. Worthington's Statement Of "CERCLA Law" Is Incorrect. A Person "Incurs" Response Costs Under CERCLA When It Performs The Response Actions Itself, And Does Not Simply Reimburse Another For The Costs Of Response Actions That Person Performs

Worthington relies on various pieces of extrinsic evidence to argue that the words "incurred or to be incurred" in the definition of Future Costs must be interpreted according to what Worthington says is the applicable CERCLA case law. (Worthington's Op. Brf. at Argument I). According to Worthington, such law means that Plaintiffs have not "incurred" the millions of dollars they are spending to remediate the Site, because Plaintiffs are paying for those costs using monies they recovered in the settlement with Carpenter Technology that was concluded *three years after* execution of the Settlement Agreement.

Worthington's suggestion that, under "CERCLA meaning" only someone who pays response costs out of his own pocket "incurs" response costs, is directly contrary to the holdings of the United States Supreme Court in *United States v. Atlantic Research Corp*., 551 U.S. 128 (2007) and in *Burlington Northern and Santa Fe Railway Co., et al. v. United States*, 556 U.S. 599 (2009). The Supreme Court in *Atlantic Research* looked at the precise language in the CERCLA statute relied upon by Worthington here, Section 107(a). That section sets forth the costs for which four categories of "covered persons" are liable, as relevant here: "(B) any other necessary costs of response incurred by any other person consistent with

the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). According to the Supreme Court, response costs are "incurred" when the work resulting in those costs is performed directly by a private party CERCLA plaintiff and the costs are not simply paid to reimburse another for work done by that person. *Atlantic Research*, 551 U.S. at 139-140. The Supreme Court said nothing about "paid" or "paid out of its own pocket" when discussing this meaning. That is the meaning understood by CERCLA practitioners, not some arcane meaning suggested in the context of insurance coverage disputes being decided by certain District Courts, the opinions relied upon by Worthington to show "CERCLA meaning."

This meaning is also consistent with the Supreme Court's later holding that, where CERCLA does not *define* a term or phrase, that term or phrase must be given "its ordinary meaning." *Burlington Northern*, 556 U.S. at 610-11. Neither the phrase "incurred and to be incurred" nor even the word "incur" are defined in CERCLA. *See* 42 U.S.C. § 9601 (definition section). The ordinary meaning of "incur," "to become liable and subject to," must therefore be applied here. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1986). Nothing about this definition of "incur" is inconsistent with the clear meaning that Worthington must pay 13% of Future Costs regardless of who pays the other 87%. Judge Jurden agreed. (Opinion at p. 22).

Each of the opinions upon which Worthington continues to rely for its twisted meaning of "incurred and to be incurred" was issued prior to the Supreme Court's holding in *Burlington Northern.* Thus, to the extent these opinions suggest meanings of "incur" as used in CERCLA that are different from the ordinary meaning of that word, they have been effectively overruled.

This is particularly true of the opinion most relied upon by Worthington, *Basic Management Inc. v. United States*, 569 F. Supp.2d 1106 (D. Nev. 2008). The United States urged the court there to look to the dictionary definition of "incur" as "to become liable or subject to," precisely because "incur" is not defined in CERCLA. 569 F. Supp.2d at 1119. The court *rejected* that suggestion, stating instead "that the term incurred' costs is more specific than that"*in the context of a CERCLA contribution claim*. It *added* to the ordinary meaning of the word "incurred" the requirement that a responsible party "has or will incur the specific cost for which it seeks contribution." *Id*. at 1120. Indeed, the court acknowledged that plaintiff *had incurred* the costs they sought if the ordinary meaning of "incur" applied, because plaintiffs were "ultimately liable, under CERCLA" for the costs of remediating the site. *Id*. Nevertheless, and based upon its own reading of "incurred," the *Basic Management* court found that all of the remediation costs for which plaintiffs there sought CERCLA contribution were paid directly by insurance policies specifically purchased to cover those costs, such that those

plaintiffs would receive a "contribution windfall for a cost they will never incur or have to pay." *Id*. at 1119.

Worthington's citation to other CERCLA cases to support its argument that Plaintiffs must spend their "own money" to have "incurred" response costs is also in vain. *Trimble v. ASARCO Inc*., 83 F. Supp.2d 1034 (D. Neb. 1999), decides facts totally unrelated to the facts here. Plaintiff class action lawyers there spent their own money for studies to determine onto which other properties contamination from the ASARCO Superfund site might have migrated. 83 F. Supp. 2d at 1038. They then enlisted proposed class action representatives to sue ASARCO under CERCLA and various tort theories for, *inter alia*, future remediation costs. *Id*. at 1037. The *Trimble* court understandably reasoned that allowing the putative class to obtain a CERCLA declaratory judgment rendering ASARCO liable for future costs of remediation "absent any binding commitment to incur these costs … would circumvent two important principles of CERCLA private litigation," *id*. at 1039-40, and would be counter to a key purpose of CERCLA, to encourage cleanup of contaminated sites. *Id.* at 1040. This reasoning has absolutely no application to Plaintiffs' contract claims here because this action is not CERCLA private party litigation. In any event, Plaintiffs here *are* liable to clean up the Site, *have* spent millions of dollars doing so since 2000, and *are*

spending their own money doing so now. The *Trimble* court's reference to the word "incurred" in section 107(a) of CERCLA is irrelevant here.[3]

For the same reasons, the opinions in *A. Shapiro & Sons, Inc. v. Rutland Waste & Metal Co.*, 76 F. Supp.2d 82 (D. Mass. 1999), and *Pennsylvania Real Estate Investment Trust v. SPS Technologies, Inc.*, 1995 U.S. Dist. LEXIS 17361 (E.D. Pa. Nov. 20, 1995), have no application to interpretation of the Settlement Agreement. The *A. Shapiro* CERCLA plaintiff had a CERCLA judgment against it, but had not satisfied that judgment or otherwise done anything whatsoever to remediate contamination, had no legal obligation to do so, and thus was not entitled to a declaratory judgment under CERCLA for future costs. 76 F. Supp.2d at 86. The third-party plaintiff in *Pennsylvania Real Estate* had incurred no CERCLA remediation costs, had no obligation to do so, and thus had no right to bring a CERCLA § 107(a) claim.[4] 1995 U.S. Dist. LEXIS at *17.

Thus, Worthington's argument that a person can "incur" response costs only when it pays such costs out of its own pocket is just wrong. Because neither the

[3] The *Trimble* court's citation to *Lewis v. General Electric Co.*, 37 F. Supp.2d 55 (D. Mass. 1999) is meaningless. The plaintiff in *Lewis* conceded she had incurred no response costs, and there is thus no discussion whatsoever in that opinion concerning what it means to "incur" such costs. 37 F. Supp.2d at 62.

[4] Judge Jurden correctly ignored her own opinion in *RTN Investors, LLC v. RETN, LLC*, 2011 WL 862268 (Del. Super. 2011). The word "incurred," though included in that opinion, was not included in any of the contracts at issue. Thus, the opinion did not consider the meaning of "incurred" in the context of those contracts or otherwise.

phrase "incurred or to be incurred" nor the word "incur" are defined in CERCLA, that key phrase in the definition of Future Costs must be interpreted in accordance with its ordinary meaning. *Burlington Northern*, 556 U.S. at 610-11. Judge Jurden agreed, and did precisely that. (Opinion at pp. 21-22).

C. Neither The Settlement Agreement Nor The Extrinsic Evidence Suggests That The Parties Intended The Phrase "Incurred Or To Be Incurred" To Be Read In Conjunction With The CERCLA Statute Or CERCLA Case Law

Worthington's CERCLA argument starts from the incorrect assertion that the phrase "incurred or to be incurred" in the definition of Future Costs was intended by the parties to have its "CERCLA meaning." The four corners of the Settlement Agreement, the sole "evidence" relevant to the question whether the Settlement Agreement is clear and unambiguous, simply do not support Worthington's argument. Nor does the key extrinsic evidence.

i. Nothing In The Settlement Agreement Supports Worthington's CERCLA Argument

The sole use of the word "CERCLA" in the Settlement Agreement is the following sentence: "Unless otherwise provided, the terms used in this Agreement shall be *as defined* in CERCLA … *and the Pennsylvania Hazardous Sites Cleanup Act* … and their respective implementing regulations." (A457 at § 1.6) (emphasis added). But neither the phrase "Future Costs", nor the phrase "incurred and to be incurred", nor even the word "incur" are *defined* in CERCLA. There is thus no basis to apply a CERCLA "meaning" to "incurred or to be incurred." Indeed, a

reasonable reading of this section is that terms in the Settlement Agreement that are *not* defined in CERCLA should *not* be given any supposed CERCLA meaning. Judge Jurden agreed, further noting that, because none of those terms are defined in the Settlement Agreement either, the ordinary meaning of those terms must be used to determine the intent of the parties. (Opinion at p. 22).

ii. The Extrinsic Evidence Is Inconsistent With Worthington's CERCLA Argument

As the "plain language" of the Settlement Agreement does not support Worthington's argument that the parties "intended" CERCLA meanings to apply, understandably Worthington relies instead upon extrinsic evidence, while inexplicably (and incorrectly) asserting that the Trial Court did so as well. Worthington Brief at 13-17. The key testimony on this point, though, belies Worthington's argument.

Mr. Mesevage drafted the key provisions of the Settlement Agreement requiring Worthington to pay 13% of Future Costs as well as the definition of Future Costs. (A264-265). He testified that neither he nor Mr. Lonardo *ever* discussed either the meanings of any of the terms in the Settlement Agreement under CERCLA or any CERCLA case law, much less *agreed* that "CERCLA meanings" should apply to the definition of Future Costs. (A259). This testimony was undisputed.

Mr. Mesevage and Mr. Lonardo did, though, have *specific discussions* about the definition of Future Costs, and exchanged emails and drafts of the Settlement Agreement reflecting that discussion. Mr. Mesevage's initial draft of the Settlement Agreement provided that "Future Costs" began on January 1, 2008 and that, because funds that Worthington and NRM had already contributed to the OU-1 trust accounts were being used to pay contractors for work having been invoiced during the prior six months, "Future Costs" in fact included costs *already paid* by NRM and Worthington. (A693 at § 1.4). Accordingly, Worthington received a "credit" for those contributions. Thus, the definition of "Future Costs" *cannot* mean only monies paid by the Plaintiff Settling Parties to remediate the Site.

A633, A672, and A674 are a letter and two emails discussing projected future Site costs. Mr. Lonardo's June 10, 2008 letter to Mr. Mesevage, A633, discusses the concept of Worthington paying a percentage share of "future costs … in connection with the work being done in OU-1," but does not use the word "incurred" and does not say only future costs that Plaintiffs themselves incur. So, from virtually the first discussion of Worthington's payment of future remediation costs there was no suggestion by Mr. Lonardo that those payments would have anything to do with the upcoming trial or that Worthington's obligation would be limited in any way. Then, on June 17 Mr. Lonardo asked Mr. Mesevage about projected annual operation and maintenance costs at the Site. (A672). But he

asked only about *all* such costs, not just about Plaintiffs' share of those costs. *Id*. The very next day Mr. Lonardo offered for Worthington to pay 8% of "future costs" based upon the $6.6 million estimate from Mr. Mesevage of *total Site costs*. (A674). It did not say that Worthington would pay only 8% of Plaintiffs' share of those costs, or only of costs "incurred," or that Worthington would only pay 13% of costs that Plaintiffs did not recover ultimately from Carpenter. (*Id*.). These exchanges are fully consistent with the clear meaning of the Settlement Agreement – Worthington was to pay 13% of *total* Site costs, period – and they do not remotely suggest that these provisions would hinge on what the *Basic Management* or any other CERCLA court thought about the word "incur."

Ignoring the *actual* conversations that were had, Worthington points to other extrinsic evidence. It is true that the terms "response action" and "removal" (not "removal actions" as Mr. Mesevage testified) are defined in CERCLA. 42 U.S.C. § 9601(23) and (24). It is not true that either the words "potentially responsible party" or "PRP" are defined, as Mr. Mesevage testified. (A265). It is wholly untrue that Mr. Mesevage conceded that "all the other terms in the Future Costs definition reflect their meaning under CERCLA," as even a casual glance at the testimony cited by Worthington reflects.[5] (Worthington's Op. Brf. at p. 15).

[5] Section 1.4 of the Settlement Agreement, which sets for the definition of "Future Costs" contains over 80 words, almost all of which are "ordinary" words.

Indeed, Mr. Mesevage repeatedly testified that "incurred" is not defined in CERCLA and has many ordinary meanings. *See, e.g.*, (A267). Messrs. Mesevage and Lonardo are environmental attorneys, but none of these facts leads to Worthington's conclusion that they intended the phrase "incurred or to be incurred" to have a CERCLA meaning, much less the CERCLA meaning advanced by Worthington.

Indeed, Mr. Mesevage testified that he did *not* use that phrase in that fashion and explained exactly why he drafted "Future Costs" as he did, which, contrary to Worthington's assertions, Worthington' Op. Brf. at p. 16, more than adequately explains why he did so. Mr. Mesevage *intentionally drafted* the definition of "Future Costs" to make irrelevant who paid the other 87% precisely because he knew that Plaintiffs were proceeding to trial against Carpenter and Handy and that Plaintiffs expected to receive some share of past and future costs from each. (A264; A267). Because Carpenter might ultimately agree to "join the group" and pay a share of Site costs going forward, or even buy out the liabilities of the Plaintiffs and conduct the remediation itself, it was important for him that the definition of Future Costs did not specify who was to pay the 87% not to be paid by Worthington. (A264). He did not use the word "incurred" in the context of CERCLA case law, but because of his understanding that the word "incur" does not mean just costs actually having been paid, but can mean also having incurred

an obligation to pay costs, without having paid them yet. (A267, A272). Finally, the Settlement Agreement is not a "CERCLA settlement." (Worthington's Op. Brf. at p. 13). It is a contract resolving claims brought in the District Court Action that included both CERCLA and Pennsylvania state law claims.

Worthington also insists that Plaintiffs' use of the word "incurred" in Plaintiffs' Complaint and interrogatory responses in the District Court Litigation means that they intended "incurred and to be incurred" to be construed in accordance with CERCLA. (Worthington's Op. Brf. at pp. 16, 30-31). But nothing in the Settlement Agreement says that words therein are to be construed in accordance with how they were used in the District Court Action. Moreover, as is both obvious and as Mr. Mesevage testified, Plaintiffs there used "incurred" the way they did precisely because they were *required* by the CERCLA statute to allege *their* incurrence of response costs and to identify exactly what costs *they, as opposed to anyone else in the world*, had incurred. (A267); 42 U.S.C. § 9613(f). Necessarily, then, "incurred" in the context of the District Court Action *had to* refer to dollars they had actually spent and for which they were seeking recovery.

None of this evidence proves that the parties to the Settlement Agreement intended that the phrase "incurred and to be incurred" within the definition of Future Costs be used in the CERCLA context, much less in the contorted view of its "CERCLA meaning" proposed by Worthington.

D. Other Extrinsic Evidence Is Consistent With The Clear And Unambiguous Meaning Of The Settlement Agreement

The other extrinsic evidence not only refutes Worthington's CERCLA arguments, it is fully consistent with the unambiguous meaning of the Settlement Agreement. This Court thus has a separate basis to affirm Judge Jurden's judgment. The relevant extrinsic evidence consists of: The history of the OU-1 Group; the trial that was impending when on June 6, 2008 the parties began the negotiations that resulted in the Settlement Agreement; the parties' settlement communications, including what was said and what was not said; and the parties' subsequent conduct.

The history of the OU-1 Group is totally inconsistent with a "reimbursement" contract. Each of the contractors that actually did the work at the Site was retained by the OU-1 Group, not by the individual companies in that group. (A278-279). Those contractors were paid out of one or more OU-1 Group trust accounts. (A148). Those trust accounts were funded based upon budget projections for a coming period of time, so that assessments could be made to each of the OU-1 Group's members and be paid by those members into the trust accounts prior to the budgeted work being done, so that there was always money in the trust accounts to pay the contractors in a timely fashion. (A148; A232; A278). The negotiators thus had no reason to think that the parties were now discussing an entirely new situation where, somehow, Plaintiffs alone would pay 100% of all

future contractor invoices and only then seek reimbursement from Worthington of Worthington's 13%.

The history of the District Court Action is also consistent with the plain language of the Settlement Agreement. Mr. Lonardo knew that Plaintiffs expected to receive many millions of dollars from Carpenter towards their past costs and a huge percentage share of their future costs. (A274; A258). Worthington had *never* been a party to that action, much less a plaintiff. (A148-149). Worthington had never, and has never, paid any portion of Plaintiffs' costs of that action, costs which now total almost $4 million. (A241; A276). Despite all of this, there was no mention during any of the settlement discussions of: The settlement being in any way contingent upon what happened in the litigation (A274); whether any recovery from Carpenter would or would not affect Worthington's obligation to pay 13% of Future Costs (A150; A309-310); that Worthington would not pay some or all of its 13% if one or more of the Plaintiffs paid some or all of its share with money it received from Carpenter (A274; A309); that Worthington would somehow become a plaintiff in the litigation or participate in any way in that action (A258); or of Worthington paying any share of Plaintiffs' past and future costs of maintaining that action. (A259). Neither Mr. Lonardo nor Mr. Mesevage even *discussed* Carpenter. (A274).

The total lack of any such discussions is completely consistent with the clear meaning of the Settlement Agreement that *nothing about the impending trial* had anything whatsoever to do with Worthington's obligation to pay 13% of all future Site costs whether Plaintiffs ultimately used some or all of the money they anticipated receiving from Carpenter to pay some or all of the other 87% or whether anyone else paid that share. It is simply impossible to believe that Worthington was somehow to have an interest in Plaintiffs' litigation, especially without contributing in any way to the effort, costs, or risks of that litigation.[6]

Finally, the parties' conduct following the settlement is consistent with the clear meaning of the Settlement Agreement. Worthington's first payment of its 13% of group costs was made *as part of and at the time of the next group assessment*, just as required by Section 7.1 of the Settlement Agreement. (A150; A274; A279-280). Nothing about how the OU-1 Group paid the remediation contractors, did periodic budgets and cash calls, and otherwise operated changed after the trial, except that Worthington began paying 13% of all Group costs into

[6] Numbered paragraph 7 and the next to last sentence in Worthington's Conclusion seem to suggest that, because Worthington was a member of the OU-1 Group, it somehow was entitled to share in any recovery that the Plaintiffs, not the OU-1 Group, received in the trial. (Worthington' Op. Brf. at pp. 34-35). This idea is nowhere contained in either the Summary of Argument or Argument sections of Worthington's Brief. Whatever Worthington means, the OU-1 Group included two entities that were not plaintiffs in the District Court Action – Worthington and NRM (a defendant in the District Court Action) – the two groups are not the same. So it cannot be that Worthington was to receive the benefits of being a plaintiff just because it was in the OU-1 Group. This is especially so because Worthington has never paid a dime of the millions of dollars of litigation costs incurred by Plaintiffs.

the Group trust accounts. (A232; A279-A280). This conduct continued *for three years*, until the July 2011 settlement between Plaintiffs and Carpenter Technology. (*Id*.).

Worthington's additional assertion in its Argument III that only Cytec, Ford, and SPS are "legally obligated" to perform remediation of the Site (and thus are the only entities that can "incur" response costs), and that this somehow undercuts the Trial Court's holding that the Settlement Agreement clearly and unambiguously does *not* specify who must pay the 87% of Future Costs for which Worthington is not liable, is also incorrect.[7] The United States Court of Appeals for the Third Circuit *in the District Court Litigation* directly refutes Worthington's argument:

> We disagree and will affirm the District Court in allowing Agere and TI to pursue § 107(a) claims for the amounts they have contributed to trust accounts funding the OU-1 and OU-2 work. *We do not think the Supreme Court intended to deprive the word "incurred" of its ordinary meaning.* Agere and TI put their money in the pot right along with the money from the signers of the consent decrees. The costs they paid for were incurred at the same time as the costs incurred by the signers of the consent decrees and for the same work. Those costs were incurred in the ordinary sense that a bill one obligates oneself to pay comes due when a job gets done.

Agere Systems, Inc. v. Advanced Environmental Technology Corp., 602 F.3d 204, 225 (3d Cir. 2010) (emphasis added) (referencing the Supreme Court's holding in

[7] Worthington included in its Argument III section discussion of other extrinsic evidence that it also referenced in its Argument I. That evidence is addressed in Argument I(D) of this brief.

Atlantic Research, 551 U.S. at 139-140). Even Worthington admits that *Worthington itself* incurred response costs as a member of the OU-1 Group.[8] (Worthington's Op. Brf. at p. 29). "Incurred or to be incurred" thus cannot mean that Worthington must pay 13% of only those costs Plaintiffs themselves first pay.

In sum, all of the extrinsic evidence is consistent with the clear meaning of the Settlement Agreement and directly contrary to Worthington's position that it is only obligated to pay 13% of sums Plaintiffs first pay out of their "own pockets"; that is, not including the money Plaintiffs ultimately received from Carpenter.

E. Plaintiffs, In Any Event, Have Been Incurring And Will In The Future Incur Future Costs

Finally, Plaintiffs are now and have been themselves incurring Future Costs. Hundreds of thousands of dollars are being paid each year for Site remediation work, and *somebody* must be incurring those costs. Worthington certainly isn't, Carpenter certainly isn't, so Worthington is essentially saying that *no one* is incurring those costs.

Carpenter merely paid money to Plaintiffs to settle the District Court litigation. Carpenter did not agree to *itself* pay any dollars to the Group's contractors or to otherwise pay any costs whatsoever to remediate the Site, as

[8] Worthington's assertion that Mr. Shea testified "that only the three parties obligated to perform and fund OU-1 could incur costs'" is disproven by simply reading the testimony actually quoted in its brief. (Worthington's Op. Brf. at pp. 28-29).

Worthington admits.[9] (Worthington's Op. Brf. at pp. 9-10). Indeed, the whole point of the Carpenter Settlement is that Carpenter *now has no legal obligation* to pay any such costs, thereby escaping the District Court judgment that required it to pay 80% of all such costs. Plaintiffs, not Carpenter, funded the QSF. (A151; A501; A517; A525). They did so with *their own money*. Carpenter relinquished all right, title, and interest to its settlement payment the second its funds were electronically transferred into Ballard Spahr's IOLTA account. (A151). The $21.8 million became *Plaintiffs' money* at that second. Money is fungible. It is irrelevant whether Plaintiffs used money in their "own" bank accounts instead of money in Ballard's IOLTA account, which was also solely theirs.

Thus, Plaintiffs *are* incurring response costs that are included in the definition of "Future Costs." Worthington must pay its 13% of such costs.

[9] Nothing in the Carpenter Settlement Agreement limits in any way Plaintiffs' use of the money. That agreement simply says: "[Carpenter] shall pay Twenty-One Million Eight Hundred Thousand Dollars ($21,800,000.00) to Plaintiff Settling Parties and the Smiths Settling Parties." (A501 at § 2.1).

II. CERCLA'S PROHIBITION AGAINST A "DOUBLE RECOVERY" HAS NOTHING TO DO WITH INTERPRETATION OR ENFORCEMENT OF THE SETTLEMENT AGREEMENT

Question Presented

Whether the Trial Court erred in rejecting Worthington's argument that CERCLA's prohibition against a "double recovery" somehow impacts the Settlement Agreement.

Standard and Scope of Review

Plaintiffs agree with Worthington's statement of the standard and scope of review.

Merits of the Argument

Worthington argues that CERCLA's "prohibition" against a "double recovery" is an outright bar to Plaintiffs' ability to collect Worthington's 13% of Future Costs. (Worthington's Op. Brf. at pp. 22-24). But Plaintiffs' claim here against Worthington is for breach of contract, which is neither a claim in equity nor a statutory claim under CERCLA. CERCLA equitable principles do not magically become applicable here just because the Settlement Agreement arose out of the settlement, in part, of CERCLA claims.[10] Equitable principles that might be relevant to resolving CERCLA claims thus have nothing to do with the rights and obligations of the parties to the Settlement Agreement.

[10] Plaintiffs in the District Court Action also asserted and settled a claim under Pennsylvania law.

Neither of the opinions relied upon by Worthington, nor any other referenced statutory or decisional law, even remotely suggests that *contract rights* such as those here are "barred" because of a provision of CERCLA. There is no such authority. The courts in *Vine Street LLC v. Keeling*, 460 F. Supp.2d 728 (E.D. Tex. 2006) and *Friedland* premised their decisions upon equitable considerations unique to contribution claims under CERCLA § 113(f). That section requires the court in a contribution action to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f). The *Vine Street* court reasoned that "equity prohibits *a CERCLA claimant* from being reimbursed more than once for the same response costs," 460 F. Supp.2d 765-76 (emphasis added), and so refused to let the plaintiff, a purchaser of contaminated property, seek costs *under CERCLA* that it had already recovered from the insurance companies for the prior owners. *Id*. at 762. Similarly, the *Friedland* court reasoned that "permitting *a CERCLA contribution-action plaintiff* to recoup more than the response costs he paid out of pocket flies in the face of CERCLA's mandate to apportion those costs equitably among liable parties." 566 F.3d at 1207 (emphasis added). Plaintiff there had already recovered from another PRP, from insurers of that PRP, and from its own insurers all of the costs it was seeking under CERCLA. *Id*. at 1204-05. In each case, the courts did what they thought was equitable *under CERCLA*

jurisprudence. Those considerations have nothing to do with this contract action. Indeed, Worthington is really saying that the Settlement Agreement, a contract, became unenforceable several years after the contract was formed because of the result of the District Court Action. That cannot be true. Should Plaintiffs learn, some day, that they actually "made money" on the District Court Action, it would be because of the *judgment against Carpenter Technology*, not because they *first* settled with Worthington.

Moreover, Worthington's attempt to prove that, if it pays its 13% of Future Costs, Plaintiffs will receive a "double recovery" is futile because there is no record evidence from which this Court could determine whether that is true. (Worthington's Op. Brf. at pp. 24-26). The Parties here stipulated: "There is no way today to determine how much it will ultimately cost the OU-1 Group to complete the OU-1 work." (A151). Mr. Bergere testified, without contradiction of any kind: That remediation of the groundwater at the Site must continue until all of the contaminants set forth in the Record of Decision are reduced below stated concentrations; that, technically, this may never happen because "contaminants of [the] kind [being remediated at the Site] reach what is called asymptotic levels," such that the concentrations cannot be further lowered; that remediation will be concluded only when EPA agrees the groundwater system can be stopped; and that

no one will know what the total costs will be for the Site until EPA actually so agrees. (A281-284).

Worthington therefore must resort to "fuzzy math" to "prove" its double recovery argument. It is true that Plaintiffs intended the September 16, 2011 distribution to them of $8,671,816.17 from the Carpenter settlement proceeds to compensate them for all remaining *recoverable response costs* incurred up to that point in time. (A159). It is also true that Plaintiffs *fervently hoped* at the time of the November 7, 2011 funding of the remaining $13,128,183.83 into the Qualified Settlement Fund ("QSF") that those funds would ultimately be sufficient to pay their 87% share of all Future Costs. (A151). It is also true that in May 2011 de maximis provided to the group, including Worthington, three scenarios for the scope of possible future OU-1 work, along with projections of possible costs for each scenario. (*Id.*). However, these three pieces of information prove nothing.

"Future Costs" includes "all costs … necessary to [remediate] the Site," oversight costs billed on an annual basis by EPA, and "PRP group administrative costs …." (A457 at § 1.4). The $13,111,798.03 de maximis value referenced by Worthington is the Net Present Value ("NPV") of future costs to remediate the Site under one of the three scenarios, and *does not include* EPA oversight costs or OU-1 Group administrative costs. (A569). Moreover, the *actual projected cash flow* over the next thirty years for that NPV is *$19,301,125*, far in excess of the total

funds in the QSF.[11] (A571; A282-283). And, the de maximis projection was just that – a best guess based on what the OU-1 Group *then* thought future Site remediation might entail, along with many additional assumptions. (A282-283). Worse, the three May 2011 scenarios are now clearly incorrect. Mr. Bergere and the Group met with EPA just the day before his trial testimony, and were told that EPA wanted one of the ponds on the site to be completely excavated and investigated because EPA suspects there are buried drums filled with wastes that are leaking and contributing to the groundwater problem. (A281-282). EPA also insisted on significant additions to the groundwater recovery system. (*Id*.). There is no record evidence as to what that additional work might cost.

There is thus simply no way for this Court to conclude that the funds in the QSF will be adequate to pay *all* response costs that will ultimately be spent at the Site. Until all of the costs are known, at the time when EPA says the remedy is complete, there is no basis to say that Plaintiffs are making a "double recovery."

[11] The NPV formula uses inputs for future cost inflation and for future interest rates to arrive at a "discount factor" used to estimate the number of dollars needed today to pay a stream of costs over time.

CONCLUSION

For all of these reasons, and in the interest of justice, Plaintiffs respectfully request that the Court affirm the judgment of the Trial Court that Worthington must pay to Plaintiffs 13% of all costs included in the definition of Future Costs irrespective of who pays the other 87% and dismissing Worthington's Counterclaims.

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Respectfully submitted,

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