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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WORTHINGTON STEEL COMPANY, Defendant/Counterclaim Plaintiff Below, Appellant, v. AGERE SYSTEMS, INC. *et al.*, Plaintiffs/Counterclaim Defendants Below, Appellees.	No. 541, 2013 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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Appellant Worthington[1] respectfully submits this Reply Brief in further support of its appeal of the Trial Court's Opinion and judgment in favor of Plaintiffs. For the reasons stated herein as well as in its Opening Brief, Worthington maintains that the Trial Court erred and the judgment in favor of Plaintiffs should be reversed.

I. The Settlement Agreement Must Be Interpreted in the Context of a Settlement of CERCLA Claims in the Underlying CERCLA Litigation.

A. This is a CERCLA Settlement.

The Trial Court erred in ignoring a fundamental principle of contract interpretation which requires that the circumstances and context of the agreement must be considered. Instead of considering the CERCLA context of this settlement, the Trial Court went beyond the four corners of the document and relied on the extrinsic testimony of Plaintiffs' representatives to determine the Settlement Agreement's meaning. Plaintiffs, in their Answering Brief ("Ans. Br."), argue that the statutory meanings and principles of CERCLA do not become applicable in interpreting the Settlement Agreement even though the agreement arose out of a settlement of CERCLA claims (Ans. Br. at 30). Plaintiffs' response, and the Trial Court's Opinion, rely almost exclusively on the testimony of Mr. Mesevage for this proposition:

[1] Capitalized terms not otherwise herein define shall have the same meanings ascribed to them in Appellant's Opening Brief.

> 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.

(Opinion at 14). The Trial Court ignored established CERCLA precedent, which informed the meaning of the Settlement Agreement, rationalizing its decision by saying: "this suit is not a CERCLA claim" (*id.* at 22).[2]

Plaintiffs ask the Court to interpret the definition of Future Costs at § 1.4 of the Settlement Agreement without regard to CERCLA, apparently because Mr. Mesevage never specifically mentioned that the terms he used to settle the underlying CERCLA action were meant to implicate its principles (Ans. Br. at 22). Yet, in taking this position, Plaintiffs ignore the fundamental principle of contract interpretation set forth by the Supreme Court of Pennsylvania in *Fischer & Porter Co. v. Porter*, 72 A.2d 98, 101 (Pa. 1950):

> It was error for the court below not to interpret the written contract as a matter of law. The contract was neither ambiguous nor of doubtful meaning. The several technical terms which it contained were but appropriate words of art, essential in the circumstances to clear and adequate definition of the intended subject matter. It is fundamental that "technical terms and words of art are [to

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[2] The Settlement Agreement provides at ¶ 1.6 that the terms used in this Agreement shall be as defined in CERCLA 42 U.S.C. §§ 9601, *et seq.* Despite this direct reference, Plaintiffs ask the court to disregard the established meaning of the Future Costs' definition terms used, and only understood by reference to CERCLA, because the reference should be limited to the CERCLA statutory definition section (Ans. Br. at 18-19). This is despite the fact that other courts have already interpreted the meaning of words such as "incur" in a context to CERCLA. *See Basic Mgmt. Inc. v. U.S.*, 569 F. Supp. 2d 1106 (D.C. Nev. 2008); *Trimble v. ASARCO Inc.*, 83 F. Supp. 2d 1034, 1038 (D. Neb. 1999).

> be] given their technical meaning unless the context or a usage which is applicable indicates a different meaning": Restatement, Contracts, § 235(b). And, this rule is especially applicable where the words of art used are legal terms.

In *Fischer & Porter*, the Pennsylvania Supreme Court construed the term "overpayment" in the Internal Revenue Code, stating:

> It was incumbent upon the court below to construe the word "overpayment" as a matter of law in strict accordance with its well-known intendment as used in the Internal Revenue Code and as affected by the "carry-back" provision of the Act of 1942, *supra*.

Fischer & Porter, 72 A.2d at 102.

While this Pennsylvania law is controlling to interpret the Settlement Agreement, Delaware law mirrors Pennsylvania law and provides some guidance on this issue. For example, in *City Investing Co. Liquidating Trust v. Continental Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1992), this Court wrote:

> If a writing is plain and clear on its face, *i.e.*, its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent. *Citadel Holding Corp. v. Roven*, Del. Supr., 603 A.2d 818, 822 (1992). However, if the words of the agreement "can only be known through an appreciation of the context and circumstances in which they were used" a court is not free to disregard extrinsic evidence of what the parties intended. *Klair v. Reese*, Del. Supr., 531 A.2d 219, 223 (1987).

This same legal principle was applied by the Delaware Court of Chancery in *Smartmatic International Corp. v. Dominion Voting Systems International Corp.*,

2013 Del. Ch. LEXIS 110, at *13-14 (Del. Ch. May 1, 2013), where the court was attempting to determine whether the contractual term "in the United States" included Puerto Rico. The Chancery Court stated:

> "[E]xtrinsic, parol evidence cannot be used to manufacture an ambiguity in a contract that facially has only one reasonable meaning." If the words of a contract, however, "can *only* be known through an appreciation of the context and circumstances in which they are used[,] a court is not free to disregard extrinsic evidence of what the parties intended" (citations omitted).

The Chancery Court then decided that to the extent the agreement's language "can only be understood through an appreciation of the context and circumstances in which it is used, [the court] may consider undisputed background facts to place the Agreement in its historical setting." *Id.* at *15.

Here, the Trial Court ignored the fact that the Settlement Agreement was based on a form that Mr. Mesevage admittedly "used ... in many Superfund settlements" (A265 [47:3-4]). Moreover, the Settlement Agreement was negotiated by two CERCLA practitioners[3] and drafted to settle claims in a CERCLA cost-recovery action (A266 [51:7-11]). Moreover, Plaintiffs repeatedly

[3] Both Mr. Lonardo and Mr. Mesevage are experienced environmental attorneys with experience in handling CERCLA matters. This lends more credence to the notion that the words in the Settlement Agreement were not chosen carelessly. "Courts are not to assume that a contract's language was chosen carelessly or that the parties were ignorant of the meaning of the language they utilized." *Seven Springs Farms v. Croker*, 801 A.2d 1212, 1215 (Pa. 2002).

used the phrase to "incur costs of response" in communications, discovery responses, and pleadings in the CERCLA Litigation which was the context for the Settlement Agreement to mean the costs that Plaintiffs had incurred, that is paid, as required under CERCLA. *See* A266 [52:15-54:3]; A267 [57:14-58:16]. Despite all this context, the testimony of Mr. Mesevage, that he avoided using any CERCLA parlance when drafting the "Future Costs" provision of the Settlement Agreement, is totally at odds with the history and context of the Settlement Agreement. Mr. Mesevage resists, because, by applying meanings understood in the CERCLA context, Plaintiffs will not "incur" costs to be shared by Worthington under the Settlement Agreement when the same "Future Costs" are paid from the proceeds of the Carpenter settlement.

B. CERCLA Prohibits Double Recovery.

There really is no dispute that Plaintiffs, by their interpretation of the Settlement Agreement, are seeking a double recovery of their future costs. Plaintiffs counter that Worthington cannot make a double recovery argument because "there is no record evidence from which this Court could determine whether that is true" (Ans. Br. at 32). Plaintiffs further say that Worthington resorts to "fuzzy math" to "prove" its double recovery argument (*id.* at 33). Neither argument has merit—and both are at odds with the record.

Worthington presented evidence at trial supporting its double-recovery

argument. *See* Opening Br. at 24-26 (outlining exhibits related to response costs). Additionally, the math necessary to support this argument is hardly "fuzzy." To be clear, Worthington's argument is that the payment by Worthington of 13 percent of the same future costs covered by the $13,128,183.83 proceeds in the Qualified Settlement Fund from the Carpenter settlement proceeds results in Plaintiffs recovering the same costs twice. Whether future costs ultimately exceed this amount is absolutely irrelevant to the discussion because, prior to trial in the Trial Court, Worthington stipulated that it would pay its 13 percent of any future costs not covered by the Carpenter settlement funds. Specifically, the stipulation filed with and accepted by the Court provided:

STIPULATION OF WORTHINGTON

> Worthington stipulates that, consistent with its litigation position, when and if the QSF [Qualified Settlement Fund] containing the undistributed proceed[s] of the Carpenter settlement becomes depleted, Worthington is obligated to pay its 13 percent share of the Future Costs incurred by Plaintiffs as defined in the Worthington Settlement Agreement.

(A153).

Worthington does not seek to avoid its obligation under the Settlement Agreement. It commits to pay its 13 percent share of any future costs over and above the amount paid by Carpenter in its settlement and deposited in the QSF. Plaintiffs' attempt to cloud the circumstance of their double recovery is a

diversion. There is no question that Plaintiffs ask this Court to interpret the Settlement Agreement in a manner resulting in a recovery by Plaintiffs from two defendants in the *same* underlying litigation of the *same* future costs.

Plaintiffs ask this Court to ignore the CERCLA precedent prohibiting double recovery, by settlement or judgment in a CERCLA case, by arguing: "CERCLA equitable principles do not magically become applicable here just because the Settlement Agreement arose out of the settlement, in part, of CERCLA claims" (Ans. Br. at 30). While conceding that Worthington has properly read and recited the holdings in *Vine Street LLC v. Keeling*, 460 F. Supp. 2d 728 (E.D. Tex. 2006) and *Friedland v. TIC-The Industrial Co.*, 566 F.3d 1023 (10th Cir. 2009) (Ans. Br. at 30-31), Plaintiffs characterize these as courts simply applying equity under CERCLA jurisprudence.[4] In Plaintiffs' view, these opinions do not suggest "that *contract rights* such as those here are 'barred' because of a provision of CERCLA" (Ans. Br. at 31). Yet, the CERCLA terms, as defined in the statute and by unassailable case law principles, do govern and inform the interpretation of the parties' contract obligations in the Settlement Agreement.

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[4] Plaintiffs also endorse, without explanation, the Trial Court's decision to ignore her own prior decision applying an ordinary meaning to the term "incur." *See* Ans. Br. at n.6 (where Plaintiffs mention that the Court "correctly ignored her own opinion in *TRN Investors, LLC v RETN, LLC*, 2011 WL 862268 (Del. Super. 2011)"). There, the Court ruled that the term "incur," not in a CERCLA context, meant that the party claiming recovery must have paid it.

Moreover, these cases stand for the proposition that Plaintiffs do not "incur," *i.e.*, do not establish a right of reimbursement, and do not have a claim for an allocation percentage of the same future costs for which they have already recovered from a party such as Carpenter. *Vine Street* and *Friedland* are determinative of the characterization of those "response costs" which are "incurred" by Plaintiffs under the terms of the Settlement Agreement. These cases inform the manner in which this Court must interpret the provisions of a CERCLA settlement of CERCLA litigation for future costs at a Superfund site as between parties allocating the liability for these costs.

C. Plaintiffs' Efforts to Undermine Worthington's CERCLA Case Law through Reliance on *Burlington Northern* is Unavailing.

Plaintiffs claim that Worthington's interpretation of the word "incur" in line with CERCLA case law is somehow a "twisted" and "arcane" reference to an obscure concept (Ans. Br. at 14-15). In fact, Worthington's interpretation of what it means to "incur costs of response" is a fundamental principle embedded in the CERCLA statute and in a myriad of case law.

In *Trimble v. ASARCO Inc.*, 83 F. Supp. 2d 1034, 1038 (D. Neb. 1999), the court specifically addressed the meaning of the term "incurred" in a CERCLA context. The *Trimble* court cited *Lewis v. General Electric Co.*, 37 F. Supp. 2d 55, 62 (D. Mass 1999), to state the CERCLA requirement that to recover costs under CERCLA § 9607, "a plaintiff must have actually incurred response costs." The

court explained this, stating this means that the "plaintiffs must actually spend some money in the clean-up or investigation of the contamination before they seek reimbursement for their 'response costs.'" This meaning of "incurred" under CERCLA—to require the actual outlay and expenditure of funds by the person claiming reimbursement—is a universally and well-settled rule in CERCLA-related jurisprudence. *See, e.g., A. Shapiro & Sons, Inc. v. Rutland Waste & Metal Company*, 76 F. Supp. 2d 82, 86 (D. Mass 1999). *See* also *Pennsylvania Real Estate Investment Trust v. SPS Technologies, Inc.*, 1995 U.S. Dist. LEXIS 17361 (E.D. Pa. Nov. 20, 1995) (providing that to recover costs under CERCLA §107, the party must have actually incurred recoverable costs to maintain a cost recovery action under §107—but finding in that case that SPS had not sufficiently pled a basis for recover of its costs because another entity had actually incurred, *i.e.*, paid, the response costs for which SPS was legally obligated).

Plaintiffs seek to sidestep the cases by arguing that the Supreme Court in *Burlington Northern and Santa Fe Railway Co. v. U.S.*, 556 U.S. 599 (2009), "effectively overruled" case law interpreting what "incur" means under CERCLA (Ans. Br. at 15). There is no basis whatsoever for this desperate argument. In the four years since the Supreme Court's decision in *Burlington*, there has not been one decision which has modified or altered, much less overruled or criticized, the cases which have interpreted the CERCLA phrase "to incur costs of response" to

require that the party claiming reimbursement must have paid the costs themselves. The reason is simply that the sound bite from *Burlington* relied on by Plaintiffs does not suggest in any sense that prior cases considering the meaning of the term "incurred" are "arcane," "twisted," or limited by their facts.

Reference to the actual context and holding of *Burlington Northern* may serve to further explain Worthington's position. In *Burlington Northern*, the Supreme Court sought to define the application of an entirely separate concept of "arranger liability" under the CERCLA statute. The Court explained its inquiry as follows:

> To determine whether Shell may be held liable as an arranger, we begin with the language of the statute. As relevant here, § 9607(a)(3) applies to an entity that "arrange(s) for disposal … of hazardous substances." It is plain from the language of the statute that CERCLA liability would attach under § 9607(A)(3) if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance. It is similarly clear that an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination. Less clear is the liability attaching to the many permutations of "arrangements" that fall between these two extremes—cases in which the seller has some knowledge of the buyers' planned disposal or whose motives for the "sale" of a hazardous substance are less than clear.

566 U.S. at 609-10 (citations omitted). In answering the question, the Supreme Court reasoned:

> Although we agree that the question whether § 9607(s)(3) liability attaches is fact intensive and case specific, such liability may not

> extend beyond the limits of the statute itself. Because CERCLA does not specifically define what it means to "arrang(e) for" disposal of a hazardous substance, we give the phrase its ordinary meaning. In common parlance, the word "arrange" implies action directed to a specific purpose. Consequently, under the plain language of the statute, an entity may qualify as an arranger under § 9607(a)(3) when it take intentional steps to dispose of a hazardous substance.

Id. at 610-11.

Burlington Northern has nothing to do with the interpretation of the statutory phrase "incur costs of response." Therefore, Plaintiffs' claim that *Burlington Northern*'s language overrules all of the established precedent governing this phrase is an unfounded effort to brush aside reasoning which compels an interpretation of the Settlement Agreement in Worthington's favor based on established case law.[5]

While on the one hand Plaintiffs ask this Court to disregard all jurisprudence which governs CERCLA claims for recovery of costs, contribution, and settlement, Plaintiffs then draw the Court into consideration of these principles in their defense. Plaintiffs selectively cite the 3rd Circuit's decision in the underlying CERCLA Litigation, *Agere Systems, Inc. v. Advance Environmental Technology Corp.*, 602 F.3d 204 (3rd Cir. 2010) (*see* Ans. Br. at 27), in an effort to argue that

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[5] The narrow scope of the *Burlington Northern* decision was later highlighted by the 1st Circuit in *United States v. GE*, 670 F.3d 377, 383 (1st Cir. 2012) stating that, "In *Burlington Northern*, the Supreme Court offered some clarity as to when liability should attach in this more ambiguous type of case." Facing an interpretation issue, the 1st Circuit determined GE's liability "within the CERCLA scheme" (*id.* at 382) and disagreed with GE "that *Burlington Northern* so narrowed the scope of § 9607(a)(3)" so as to exclude GE's responsibility in that case. *Id.* at 380.

others beyond those legally obligated under the EPA Consent Decree can "incur" response costs. Specifically, the 3rd Circuit responded to an argument made on appeal by Carpenter that Plaintiffs Agere and TI could not bring a claim in contribution under CERCLA to recover their own costs because Agere and TI paid these costs pursuant to settlement agreements with the other three Plaintiffs, Ford, SPS, and Cytec. *See Agere*, 602 F.3d at 225 (citing *U.S. v. Atl. Research Corp.*, 551 U.S. 128, 139 (2007) for proposition that "[w]hen a party pays to satisfy a settlement agreement or a court judgment, it does not incur its own costs of response. Rather, it reimburses other parties for costs that those parties incurred").

Just after the paragraph quoted by Plaintiffs (Ans. Br. at 17) in *Agere*, the 3rd Circuit explained its ruling, permitting TI and Agere to pursue their claims:

> When a company in the position of Agere and TI has not yet been sued by the EPA but appreciates that it bears some responsibility for cleaning up hazardous waste, the language of CERCLA, which is intended to encourage cleanup, ought not be interpreted to discourage participation in cleanup if a more consistent construction of the statute is plausible. Private actors are not likely to settle and step forward unless they know that they can seek some of the amounts they will contribute, just like those who have been sued by the EPA or a PRP, or those who voluntarily clean up a site in the first instance. To encourage participation in environmental cleanup, the statute should be read in a way that assures PRPs like Agere and TI that they can later bring a § 107(a) cost recovery claim for the amounts they pay to help with the cleanup, even if those costs are related to a settlement obligation.

The upshot of the 3rd Circuit ruling is that a company in the position of Agere and TI, but also Carpenter, which has itself paid to fund the obligation of the three parties which had signed the OU-1 Consent Decree, has its own claim for cost recovery and contribution against others. Given this fact, the 3rd Circuit decided merely that parties which actually paid the costs have a CERCLA claim to recover their costs because they had incurred them.

II. Worthington's Membership in the PRP Group Means that It Has a Right to Share in the Reduction of Future Costs Allocated among the Group's Members under the Settlement Agreement.

Plaintiffs, and the Trial Court, disagree with an interpretation of the Settlement Agreement which would permit Worthington to share in the proceeds of the Carpenter settlement because Worthington was not a plaintiff in the CERCLA Litigation. Worthington's position on this point is and always has been clear. *Before* it settled the CERCLA Litigation with Plaintiffs and became a full participating member of the PRP Group, it had no right or entitlement to any of the recoveries made by Plaintiffs in the CERCLA Litigation. However, *after* it agreed to a settlement with Plaintiffs—whereby it became a member of the PRP Group (*see* Settlement Agreement at § 7.1 and § 7.2) and committed to pay a 13 percent share of future costs—it accepted the risk that response costs at the Boarhead Site could increase beyond the estimates, as well as the right to benefit in any potential reduction in those costs.

Worthington argued in its Opening Brief (p. 8) that "Worthington, by its settlement, established its position with Plaintiffs as a full member of the PRP Group subject to pay more than estimated if Future Costs increased, but also with the right to share *pro tanto* in any reduction of costs." Plaintiffs attempt to minimize the effect of Worthington's status as a full participating member of the PRP Group by relegating the response to a footnote in its Answering Brief,

feigning a lack of understanding as to "whatever Worthington means" regarding its rights as a member of the PRP Group (Ans. Br. at 26 n.6). This tactic is intended to ignore, without addressing, an argument to which there is no logical rebuttal.

In fact, from the outset of the settlement negotiations on June 6, 2008, the settlement offer included the understanding that "[t]he participation of NRM & Worthington in the Group would continue on this firm basis. Future payment of their allocated share (as incurred) would be contractually enforceable by the Group" (A631). Again, prior to finalizing the settlement terms, Mr. Mesevage, on behalf of Plaintiffs, indicated that:

> Worthington will continue to participate as a Group member with rights of deliberation and decision-making as exercised in the past. We Plaintiff Group members have from time to time discussed the need to formalize the Group via a PRP agreement. When the dust clears, I think we should (A691).[6]

Additionally, the testimony on this point from arguably the only real neutral party in the litigation, Edward Fackenthal, Esq., counsel for NRM, has gone without any comment from the Plaintiffs. Plaintiffs noticed and took Mr. Fackenthal's deposition. During the deposition, Mr. Fackenthal expressed his understanding that Worthington, after joining the PRP Group, would share with

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[6] §7.2 of the Worthington Settlement confirmed this status: "Worthington shall have the right to participate fully in the activities of the Boarhead Farm PRP Group…." This term was undefined in the Settlement Agreement (*see* A269 [64:8-12]), but Mr. Mesevage admitted that "basically this is the group of companies that are working together to perform the OU-1 and OU-2 work" (*id.* at 65:3-5).

Plaintiffs in the future cost obligations at the Boarhead Site, subject to increases, but would also receive the benefit of any reductions, including the Carpenter settlement. His testimony elicited by counsel for Plaintiffs could not be clearer in this regard:

> Q [By Plaintiffs' counsel]. What was your understanding of how any recovery against Carpenter or Handy & Harman would be applied as it related to the Worthington settlement?
>
> A [By Mr. Fackenthal]. Well, the impression I had was that after NRM settled and Worthington settled that Worthington would be part of the plaintiffs' team, so to speak, that if you hit a home run against Carpenter, that would reduce costs. If you struck out as far as Carpenter was concerned, that that would increase costs. And if something happened in between, that that would adjust the fraction – not adjust the fraction, but it would adjust the dollar amount that Worthington would be responsible for.

(A195:12-A196:2). Similarly, Mr. Fackenthal testified:

> Q [By Plaintiffs' counsel]. I just want to sum up, Mr. Fackenthal. The idea that Mr. Lonardo's clients would essentially ride along with my clients, that understanding or that impression was something you got based on conversations with Mr. Lonardo? …
>
> A [By Mr. Fackenthal]. I don't remember any specific conversations like that with Mr. Lonardo. They may very well have happened, but as I testified to before, my impression was based upon reading the agreement.
>
> I thought, after reading the agreement, that Mr. Lonardo's client was aligned with the plaintiffs in this and that whatever happened after that, whether it be a

> recovery in the litigation or an increase or a decrease in the future costs expectations, that would be participated in pro tanto with the rest of you.

(A204:12-17, 20-A205:1-9).

Mr. Fackenthal's testimony is in complete accord with the view that there was one group sharing in the costs at the Boarhead Site. At the trial in this matter, Mr. Bergere, common counsel, was quite clear on his understanding as to the fact there was only one PRP group after the Worthington Settlement:

> Q. Now, after the Worthington settlements, it's accurate to say that there was only one group which had responsibility for the payments of the work and performance of OU-1 Consent Decree; isn't that true?
>
> A [By Mr. Bergere]. That is correct.

(A295 [170:6-10]). Moreover, Mr. Mesevage conceded, "There's only ever been one group" (A268 [62:12-16]) even though the "membership has changed over time" (*id.* at [62:18]).

Plaintiffs concede, and the parties have agreed, that the Settlement Agreement contains no specific language which addresses the impact of the proceeds of the settlement from the Carpenter Technology judgment (A269-70 [66:6-67:2]). The parties also agree that it was never discussed. *See* Stipulation of Plaintiffs and Defendant (A146) at ¶ 37. While Plaintiffs argue that, if Worthington expected to benefit from the proceeds of the settlement, it should have placed such language in the Settlement Agreement; they also admit that they

never communicated their position nor did their settlement draft contain direct language which precludes Worthington from sharing. The draftsman of the Settlement Agreement, Plaintiffs' Thomas Mesevage, told the Court that he had in mind that the Settlement Agreement was "unchanging" and that whatever happened at the Carpenter trial would not affect it (A270 [67:12-15]). This prompted the Court to question why, if Plaintiffs wanted the settlement to be firm and immutable, they did "not simply state no settlement is going to affect [Worthington's] obligation to pay 13% of the future costs?" (*id.* at [67:19-21]). The only answer Mr. Mesevage could offer was: "I didn't think I needed to do that because the way future costs was drafted as the set of total costs, they were paying a share of the total costs." (*id.* at [67:22-68:2]). The accurate response is that the Settlement Agreement says nothing of the kind.

Correspondingly, despite Plaintiffs' position the language of the Settlement Agreement was crystal clear, their drafting of the Boarhead Farms PRP Group Site Participation Agreement (A761), after the Carpenter Settlement, contradicts this claim. The Plaintiffs recognized their predicament and inserted a specific, new provision to provide that Worthington would be excluded from the benefit of reductions of the future costs from the Carpenter settlement. The *draft* Site Participation Agreement for the Boarhead PRP Group tucked the following provision in at ¶ 25 (A781):

> Additionally, nothing herein is intended, nor shall it be construed as conveying or vesting in Worthington any interest in or to any monies obtained by any other Member of Carpenter Technologies or any other defendant in the Cost Recovery Litigation.

The Plaintiffs never mention why such a provision was necessary. The Plaintiffs never explain why the Settlement Agreement was not sufficient to deprive Worthington of the benefit of the reduction of future costs. Simply stated, it did not contain any such language or any language which could be so interpreted.

Finally, while arguing that the Settlement Agreement is unambiguous, Plaintiffs never really explain which position is supported by the language of the Settlement Agreement: is Worthington required to pay 13 percent of future costs not actually paid by Plaintiffs because the Settlement Agreement does not specifically identify the payors of the 87 percent—so it does not matter who incurs the costs; or is Worthington required to pay 13 percent because Plaintiffs are actually incurring costs but using Carpenter's money? The fair reading of the Settlement Agreement, in its context, is: to the extent the Future Costs are paid from the proceeds of the Carpenter settlement, Plaintiffs do not incur costs of response to be shared by Worthington under the terms of the Settlement Agreement. This interpretation avoids a double recovery of the same Future Costs by Plaintiffs, and defines Worthington's obligation under the applicable CERCLA meaning.

CONCLUSION

For the reasons stated herein as well as in Worthington's Opening Brief, Worthington respectfully requests that the judgment of the Trial Court be reversed and that judgment instead be entered in favor of Worthington on its interpretation of the Settlement Agreement.

Dated: January 6, 2014

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