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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 OPENING BRIEF

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NATURE OF PROCEEDINGS

This case is an appeal from a September 13, 2013, Memorandum Opinion (the "Opinion") (attached hereto) issued by the Superior Court of the State of Delaware in and for New Castle County, Complex Commercial Litigation Division (the "Trial Court"), following a two-day bench trial held on February 21, 2013, and March 14, 2013. The Opinion granted judgment in favor of Plaintiffs / Counterclaim-Defendants Below / Appellees Agere Systems, Inc. ("Agere"), Cytec Industries, Inc. ("Cytec"), Ford Motor Company ("Ford"), SPS Technologies, LLC ("SPS"), and TI Group Automotive Systems, L.L.C. ("TI Automotive") (collectively, the "Plaintiffs") and against the Defendant / Counterclaim-Plaintiff Below / Appellant Worthington Steel Company ("Worthington"). *See* Opinion at 29.

Worthington appealed the decision of the Trial Court on October 7, 2013. *See* Supr. Ct. Dkt. 1 (Notice of Appeal). This is Worthington's Opening Brief in support of its appeal.

SUMMARY OF ARGUMENT

1. The Trial Court erred as a matter of law when it found that the Settlement Agreement dated as of June 21, 2008, by and among Plaintiffs and Worthington (the "Settlement Agreement") should not be read in its context as a CERCLA settlement. Even though the Settlement Agreement related to the sharing of environmental response costs related to the remediation of a superfund site, and even though the plain language of the Settlement Agreement provided, *inter alia*, that "[u]nless otherwise provided, the terms used in this [Settlement] Agreement shall be as defined in CERCLA 42 U.S.C. §§ 9601, *et seq.*" (A461)[1] the Trial Court appears to have gone beyond the plain language of the Settlement Agreement and credited testimony of the Appellees' drafting representatives regarding the parties' intent. This failure to read the Settlement Agreement as a CERCLA settlement and to interpret the Settlement Agreement within the language of its four corners led to an incorrect conclusion as a matter of law regarding whether Plaintiffs incurred CERCLA costs of response as was necessary to trigger Worthington's obligation to pay its share with Appellees.

2. The Trial Court erred as a matter of law when it failed to credit, much less address, Worthington's arguments that Plaintiffs' interpretation of the Settlement Agreement would lead to a double recovery of its response costs

[1] References to "A---" refer to Appellant's Appendix to the Opening Brief, filed concurrently herewith.

(A333). Under long-standing CERCLA authority governing contribution claims such as those in the underlying CERCLA litigation between Plaintiffs and Worthington, Plaintiffs are not entitled to a windfall related to their response costs. Uncontroverted evidence was presented at trial that Plaintiffs, following a settlement with a third party, have been fully reimbursed for all of their remediation costs, both past costs and estimated future costs (A335-36).

3. The Trial Court erred as a matter of law and fact when it went beyond the plain language of the Settlement Agreement and determined based on testimony presented at trial that the definition of "Future Costs" does not specify which entity actually had to "incur" future costs for remediation (A409-11). The reading of the Settlement Agreement in this manner leads to an absurd result. Moreover, this reading, based upon the interpretation offered by Plaintiffs' representatives, ignores the circumstance that only Plaintiffs were ever legally obligated to pay costs of response at the Boarhead Farms Superfund site to trigger Worthington's obligation to pay its agreed settlement share. Even if the testimony were somehow pertinent to the interpretation of the agreement, the evidence did not support, and in fact contradicted, the Trial Court's conclusions.

STATEMENT OF FACTS

A. The Boarhead Farms Superfund Site

This case arises out of a dispute in the interpretation and application of the June 21, 2008, Settlement Agreement (A457), which resolved Worthington's liability to Plaintiffs in an underlying Comprehensive Environmental Response, Compensation, and Liability Act 42 U.S.C. §§ 9607, 9613 ("CERCLA") action for contribution, captioned *Agere Systems, Inc.*, et al. *v. Advanced Environmental Technology Corporation*, et al., Civil Action No. 02-CV-3830, in the U.S. District Court for the Eastern District of Pennsylvania (the "CERCLA Litigation") (A550).[2] Plaintiffs brought the CERCLA Litigation seeking to recover their costs incurred or to be incurred in response to environmental contamination at the Boarhead Farms Superfund Site (the "Boarhead Site") located in Pennsylvania (A550-1).

Issues with respect to the Boarhead Site date back to January 4, 1999, when the U.S. EPA issued CERCLA liability notice letters to certain companies, including Plaintiffs Cytec, Ford, and SPS. Cytec, Ford, and SPS entered into an

[2] By way of background to the Court, "'[t]he purpose of CERCLA is to facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for hazardous wastes. Section 107(a)(4)(B) of CERCLA provides a private cause of action by a party to recover its costs from other responsible parties where the release of hazardous substances has caused 'the plaintiff to incur response costs.' In turn, section 113(f)(1) of CERCLA states that 'any person may seek contribution from any other person who is liable or potentially liable to plaintiff under section [107(a)].'" *A. Shapiro & Sons, Inc. v. Rutland Waste & Metal Co.*, 76 F. Supp. 2d 82, 86 (D. Mass. 1999) (internal quotations omitted).

Administrative Order on Consent with the EPA obligating them to pay certain past costs to the U.S. Government and perform certain remedial action for groundwater (A614). This remediation was conducted in stages (A610-630). The pertinent stage for purposes of this litigation was referred to as Operable Unit-1 ("OU-1"), which was also the primary remediation plan of action at the Boarhead Site.

Worthington was not issued a liability notice letter by the EPA. Instead, Worthington became involved with the Boarhead Site after it acquired an industrial plant located in Malvern, Pennsylvania from NRM Investment Company ("NRM"). By agreement dated July 30, 1999, Cytec, Ford, SPS, Lucent Technologies, Inc. (now Agere), Worthington, and NRM entered into an agreement to jointly share the OU-1 costs on a *per capita* basis (A474).[3] This "gentlemen's agreement" remained the basis for the sharing of remediation costs until the Settlement Agreement was entered into by the parties in 2008 (*id.*; A284 [123:16-25]).

B. Negotiation of the Settlement Agreement

Plaintiffs filed the CERCLA Litigation in 2002 against 23 defendants (A148). Worthington was not named as a party defendant to the CERCLA Litigation (A149), but was involved because of its indemnity relationship with NRM. By the time the matter was set to go to trial in mid-June, 2008, only three of

[3] The Malvern, Pennsylvania plant owners were regarded as a single share divided between, NRM Investment and Worthington, and later TI Automotive.

the 23 original defendants remained in the CERCLA Litigation: Handy & Harman, NRM, and Carpenter Technology Corp. ("Carpenter") (A149). While there had been some unfruitful settlement discussions between Plaintiffs and NRM/Worthington back in 2007, settlement negotiations between Plaintiffs and NRM/Worthington did not begin in earnest again until June 2008, just days before trial.

The June 2008 settlement negotiations were primarily conducted by Joseph Lonardo, Esq., Worthington's outside counsel on behalf of NRM/Worthington, and Thomas Mesevage, Esq., in-house counsel for Cytec, on behalf of Plaintiffs, two experienced environmental attorneys (A150; *see also* A259 [25:17-26:22]; A297 [177:7-13]). Specifically, on June 6, 2008, Mesevage contacted Lonardo with terms of a proposed settlement to share costs (A631). Critical to this offer of settlement was Plaintiff's offer 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. This share would not be subject to future reallocation" (*id.*). Following the exchange of various proposals and counter-proposals (*see, e.g.*, A674, A680), an agreement in principle was struck (A691).

The actual agreement terms were hammered out over the course of the weekend of June 20 (*see* A693, A707, A719). However, prior to finalizing,

Worthington's counsel made clear on June 18 his understanding of Worthington's future cost obligation: "Worthington will agree, as part of a full settlement, to accept the responsibility for the settlement percentage of future costs with payments to be made on that basis in the future as costs are incurred" (A683). Mesevage followed up with an email on June 20, describing Worthington's obligations to pay a 13% share. Specifically, with respect to Worthington's participation in the group of PRP (potentially responsible parties), Mesevage wrote:

> While we did not discuss it, certainly because of NRM and Worthington's past participation, I expect 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). Following the exchange of a few drafts of the agreement, the Settlement Agreement was signed and dated as of June 21, 2008.

C. The Settlement Agreement's Terms

Under the terms of the Settlement Agreement, Plaintiffs and Worthington agreed to cooperate as members of the Boarhead Farms PRP Group (the "PRP Group") and to pay a percentage share of the "Future Costs" as defined in paragraph 1.4 of the Settlement Agreement (A460), specifically:

> 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 investigations, 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.

In short, Worthington resolved its liability to Plaintiffs by agreeing to contribute 13% of the Future Costs and Plaintiffs paying the remaining 87%. *See* A285-6 [130:21-131:3].

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 in costs.[4] That said, the parties agreed at trial that the Settlement Agreement does not specifically address the treatment of any funds from any third-party source which would pay the Future Costs in the place of payments by the five parties to the settlement. Mr. Mesevage, the draftsman of the Settlement Agreement, admitted as much:

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[4] Mr. Fackenthal, counsel for NRM, echoed this understanding, when he provided his view of the settlement: "[T]he 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" (A195 [40:16-22]). He repeated this later when he stated: "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 increase or a decrease in the future costs expectations, that would be participated in pro tanto with the rest of you" (A205 [50:2-9]).

> Q. [By Mr. Kittila]: And you and Mr. Lonardo did not discuss the extent to which the Carpenter settlement may or may not impact the obligation of Worthington to pay future costs?
>
> A. [By Mr. Mesevage]: We did not have that discussion. It was clear to me on the terms of the settlement agreement and the form itself that they would not.
>
> Q. And you'd agree with me that there was no document between you and Mr. Lonardo which reflects any discussion of the impact of the Carpenter settlement?
>
> A. Other than the settlement agreement itself.
>
> Q. Settlement agreement itself reflects that?
>
> A. Which reflects that they would not participate.
>
> Q. Well, it doesn't say that in there, does it? It doesn't even say – doesn't even reference the Carpenter settlement, does it?
>
> A. Right. So what right does it give them to participate?

(A269 [65:23-66:16]).

D. The Carpenter Settlement Windfall

After Worthington/NRM settled in the CERCLA Litigation, Plaintiffs went to trial against the remaining defendant, Carpenter. Following the trial and an appeal, Plaintiffs entered into a separate settlement agreement with the remaining defendant, Carpenter, on or about July 13, 2011 (the "Carpenter Settlement"). Under the terms of the Carpenter Settlement, Carpenter paid a cash-out sum of $21,800,000 to Plaintiffs to fully resolve Carpenter's liability at the Boarhead Site (A151). The Carpenter Settlement contained no continuing obligation to share the payment of "Future Costs" or any further obligation to participate in the PRP

Group (*id.*). (In fact, no company that settled its liability in the CERCLA Litigation, other than Worthington, agreed to pay a percentage share of the Future Costs or participate as a member of the PRP Group.)[5]

After Plaintiffs received the $21,800,000 in settlement proceeds from Carpenter in September, 2011, Tim Bergere, Esq., common counsel for the PRP Group, advised Worthington by email that the funds recovered by Plaintiffs under the Carpenter Settlement would be placed in a Qualified Settlement Fund ("QSF") and used to satisfy the Future Costs payment obligations at the Boarhead Site, but only for the benefit of Cytec, Ford, SPS, and TI Automotive (A761).[6] Plaintiffs' effort to exclude Worthington, the only other member of the PRP Group, from participating or benefitting from the Carpenter Settlement proceeds was reflected in a draft "Site Participation Agreement" (A763) sent by Mr. Bergere which stated at ¶ 25:

> 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.

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[5] A262 [37:2-4] (By Mr. Mesevage: "It is fair to say that the only party that settled on the basis of paying future costs was Worthington as part of the NRM/Worthington Settlement.").

[6] Agere had been a plaintiff in the CERCLA Litigation, and a percentage share participant in the payment of future costs, but resolved its liability to the PRP Group. The other Plaintiffs assumed Agere's share.

Upon receipt and review of the draft Site Participation Agreement, Worthington then learned that Plaintiffs were taking the position that the terms of the Settlement Agreement meant that Worthington would be required to pay 13% of the future costs regardless of the fact that they would not be incurring response costs (A307 [217:12-218:1; 218:16-22]).

Worthington objected and refused to execute the Site Participation Agreement stating its position that the Settlement Agreement required Worthington to pay only a 13% share of those future costs actually "incurred" by Plaintiffs (A784). Worthington argued that, any third-party proceeds, from whatever source, which would result in the recovery of funds applied to pay the future costs at the Boarhead Site should reduce the obligation of all of the members of the PRP Group (*i.e.*, Plaintiffs and Worthington) (*id.*).[7]

Following an exchange of letters between the parties, Plaintiffs filed this lawsuit (A43). Worthington counterclaimed alleging, among other things, mutual mistake (A66).

[7] Worthington's letter, dated Sept. 12, 2011 (A784), advised Plaintiffs that the Settlement Agreement established an agreement that Worthington would fund a 13% share of the costs actually incurred and paid by Plaintiffs.

ARGUMENT

I. The Trial Court Erred as a Matter of Law When It Did Not Recognize That, Under the Plain Language of the Settlement Agreement, Any Obligation to Pay Future Costs Must Be Interpreted in Accordance With the Meanings of the Terms Under CERCLA, and Under CERCLA Appellee's Did Not Incur Response Costs.

Question Presented

Whether the Trial Court erred as a matter of law when it found that the Settlement Agreement should not be read in its context as a CERCLA settlement and, thus, did not interpret the plain language of the Settlement Agreement under CERCLA (A381).

Standard and Scope of Review

The standard and scope of review is *de novo* regarding whether the Trial Court properly interpreted the plain language of the contract. *See Honeywell Int'l, Inc. v. Air Prods. & Chems., Inc.*, 872 A.2d 944, 950 (Del. 2005) (holding with respect to review of interpretation of contract, "[t]o the extent those issues involve the interpretation of contract language, they are questions of law that this Court reviews *de novo* for legal error."). Moreover, "[b]ecause the facts material to these claims are uncontroverted, the issues presented are all essentially questions of law that this Court reviews *de novo*." *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010).

Merits of the Argument

A. The Settlement Agreement is a CERCLA settlement.

As recognized by the Trial Court, the Settlement Agreement is governed by Pennsylvania law which provides that the "primary objective of interpreting a contract is to ascertain the intent of the parties." *Seven Springs Farm, Inc. v. Croker*, 801 A.2d 1212, 1215 (Pa. 2002). Similar to Delaware law, "[w]hen a written contract is clear and unequivocal, its meaning must be determined by its contents alone." *Id.* (citations and internal quotations omitted). Moreover, "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." *Id.* (citation omitted).

Perhaps, the fundamental and definitive error in the Trial Court's decision is the failure to read the Settlement Agreement (A457) as a settlement of an underlying CERCLA action in which Plaintiffs sought to recover their past and future costs. The definition of "Future Costs" in the Settlement Agreement cannot be read or understood without reference to CERCLA terminology. As a result, the Trial Court decision does not mention, much less consider or explain, how Plaintiffs' position can be sustained consistent with the CERCLA statute and direct case holdings which impact the interpretation of the Settlement Agreement.

In this regard, the Trial Court relied on the statement of Plaintiffs'

negotiator, Mr. Mesevage, for the proposition that: "there was no discussion about definitions of undefined terms or CERCLA case law." Opinion at 12. Again, the Trial Court notes that: "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. For this reason, the Trial Court rejected, out of hand, any obligation to consider the Settlement Agreement based upon the meaning and application of the terms used in CERCLA. The Trial Court stated that: "this suit is not a CERCLA claim." Opinion at 22.

However, the Trial Court's decision apparently turned on the testimony, not the contract language. Worthington's obligation to pay pursuant to § 7.1 under the Settlement Agreement hinges on the definition of the term "Future Costs" in § 1.4:

> 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 investigations, 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.

(A460). Key to Worthington's interpretation of the Settlement Agreement was the term "incurred" in § 1.4. Section 1.6 of the Settlement Agreement (A461) required that:

> Unless otherwise provided, the terms used in this Agreement shall be as defined in CERCLA 42 U.S.C. §§ 9601, *et seq.*, and the Pennsylvania Hazardous Sites Cleanup Act ("HSCA"), 35 PA CONS. STAT. § 6020.103, *et seq.*, and their respective implementing regulations. Where ambiguities and differences exist between CERCLA and HSCA, the definitions in CERCLA shall be controlling.

While trial testimony is not necessary to reach this conclusion, the trial testimony actually supports Worthington's argument that CERCLA terms pervaded this agreement. Mr. Mesevage, in-house counsel for Appellee Cytec and chief drafter of the Settlement Agreement, agreed that his definition of "Future Costs" in § 1.4 contained terms defined only in the CERCLA statute and/or used in CERCLA parlance, including the terms "response actions," "removal actions," and "PRP" (potentially responsible party). *See* A265-6 [49:4-51:6]. Similarly, Mr. Mesevage in his testimony concedes that all of the other terms in the Future Costs definition reflect their meaning under CERCLA. *See* A65 [49:4-16].

Even if the Court were to look "behind" the plain language, it quickly becomes clear that this settlement was dependant on its CERCLA context for its meaning and application. Specifically, Mr. Mesevage, an experienced environmental lawyer (A259 [25:17-26:22]), drafted the definition of Future Costs in the Settlement Agreement at § 1.4 (*see* A264-5 [46:23-49:14]), which was in return reviewed by another experienced environmental attorney, Mr. Lonardo (A297 [177:7-13]). This was an agreement settling a CERCLA litigation, drafted by

CERCLA attorneys, related to a superfund site. Words, including the word "incurred," carried CERCLA denotations as well as CERCLA connotations.

Despite the plain language of the Settlement Agreement and the clear context in which it arose, Mr. Mesevage protested at trial that, when he drafted the definition of "Future Costs," "I certainly did not use the word 'incurred' in context of CERCLA case law." *See* A272 [77:7-11]. Mr. Mesevage never offered an alternate explanation nor did he explain why the phrase "incur costs of response" did not carry the same meaning as it did in Plaintiffs' Complaint in the underlying CERCLA Litigation (A550) ("Plaintiffs seek cost recovery and contribution from Defendants for the response costs that Plaintiffs have incurred…") or in Plaintiffs' correspondence and discovery responses ("Each individual plaintiff has incurred more than its equitable costs to date.") (A894-5), or in the CERCLA statute itself which relies on the phrase "response costs incurred" by parties seeking contribution from other PRPs. *See* 42 U.S.C. § 9607(a)(4)(B) (CERCLA Section 107(a)—providing for "necessary costs of response **incurred** by any other person consistent with the national contingency plan."). *See also* 42 U.S.C. § 9613 (CERCLA Section 113—providing that costs of response must be "incurred" by a party before they can be claimed in a contribution action).

There can be no serious dispute that the term "costs incurred and to be incurred" in the context of the definition of "Future Costs" in § 1.4 of the

Settlement Agreement is based on its CERCLA meaning and interpretation. The fact that every other term of the definition carries a special meaning or reference understood under CERCLA, along with the widespread, consistent use of this term in the entire CERCLA litigation in reference to costs, past and future, is both persuasive and determinative, of the fact that the Settlement Agreement, and the definition of Future Costs, are to be interpreted under a CERCLA meaning and in its context as a CERCLA settlement.

B. Under CERCLA, Plaintiffs have not incurred response costs.

If the Trial Court had interpreted the term "incur" in its CERCLA context, Worthington's position would have been established by reference to the CERCLA statute and interpretive legal authorities. Even separate from the obvious implications of this CERCLA settlement, the Supreme Court of Pennsylvania, has specifically ruled that an ambiguous or disputed term of an agreement can and should be interpreted by reference to its meaning in an applicable statutory scheme. *See Seven Springs Farm, Inc.*, 801 A.2d at 1216 (resolving dispute over language in buy-sell agreement by resort to Pennsylvania's Business Corporation Law).

Under the meaning of the terms as used in the CERCLA statute and relevant case law, Plaintiffs have not "incurred" response costs. Federal case law outlines that when a party seeks to recover a share of CERCLA costs which it "incurred" in a contribution action, this means, that party must have paid the costs itself. In

Basic Management Inc. v. United States, 569 F. Supp. 2d 1106 (D. Nev. 2008), the U.S. District Court for the District of Nevada considered the meaning of the term "incur" in a contribution action under CERCLA arising from a series of consent agreements in which plaintiffs agreed to perform soil and groundwater remediation at a contaminated site. In *Basic Management*, plaintiffs, three Nevada corporations which owned land on which defendants had allegedly disposed of waste prior to the plaintiffs' ownership, initiated a cost recovery and contribution action to recover defendants' share of expenses allegedly "incurred" by plaintiffs in connection with the remediation. *Basic Management*, 569 F. Supp. 2d at 1112. Plaintiffs had used the proceeds of settlements with other PRPs to purchase two insurance policies specifically covering the costs of remediating the soils and groundwater contamination at a Superfund site. *Id.* The defendants denied liability for contribution based on the fact that plaintiffs did not "incur" response costs, but rather their costs were funded by other settlements with other PRPs which were used to pay plaintiffs' costs of remediation.

The District Court had to decide whether plaintiffs had "incurred" "response costs," as a basis to seek a contribution payment under the CERCLA statute from defendants. The court's analysis of the meaning of the term "incur" under CERCLA provides definitive guidance in the interpretation of the Settlement Agreement:

> In order to seek contribution for costs under CERCLA, Plaintiffs **must actually "incur" costs**. However, CERCLA itself does not define the term "incur," nor does any case law. The United States urges the Court to look to the dictionary definition of "incur" as "to become liable or subject to." American Heritage Dictionary (4th ed. 2000). The United States argues that under this definition, Plaintiffs have **not "incurred"** any costs because they are **not responsible for or subject to the costs. Instead, they obtained two insurance policies**, one covering soils and one covering groundwater, **rendering the insurance company liable for all costs pursuant to the terms of the policies.**
>
> Indeed the vast majority of Plaintiffs' costs have been paid directly by their insurance policies. **Plaintiffs have "incurred" liability for the cleanup. However, the court believes that the term "incurred" costs is more specific than that. Rather the term should include the requirement that a Responsible Party has or will actually incur the specific cost for which it seeks contribution. Otherwise they are only obtaining a contribution windfall for a cost which they will never incur or have to pay.**

Id. at 1119-20 (emphasis added).

It is also instructive to consider the cases holding that, in order to establish a *prima facie* case of CERCLA liability against another in contribution, a plaintiff must show that it has "incurred" response costs. CERCLA §113 cases adjudicating the sufficiency of a plaintiff's contribution claim have uniformly held that "[i]f the plaintiffs have not **incurred** such costs" their CERCLA claim should be dismissed. *Trimble v. ASARCO Inc.*, 83 F. Supp. 2d 1034, 1038 (D. Neb. 1999) (emphasis added).

In *Trimble*, the court explained the meaning of the term "incurred" under CERCLA. The court first noted that, to establish a *prima facie* case of CERCLA liability, a plaintiff must have "incurred response costs." *Id.* The *Trimble* court noted that the plaintiffs have not "incurred" costs because they "have not personally spent any money whatsoever for investigation or remediation." *Id.*[8] Rather, their attorneys had applied money obtained from other litigation against ASARCO to conduct soil testing.

The *Trimble* plaintiffs argued, in fact, that these were their expenses, because plaintiffs were liable for the costs expended by their attorneys. The court disagreed: "in short, the only persons who have incurred response costs are the plaintiffs' lawyers." *Id.* at 1039. The court then made clear that plaintiffs' case must be dismissed because, to "incur" costs under the CERCLA statute, the plaintiffs must have spent the money themselves: "… plaintiffs must actually spend some money in the clean-up or investigation of the contamination before they seek reimbursement for their 'response costs.'" *Id.* (emphasis added). This meaning of "incurred" under CERCLA—to require the actual outlay and expenditure of funds by the person claiming reimbursement—is a universally and

[8] The *Trimble* court then cited to *Lewis v. General Electric Co.*, 37 F. Supp. 2d 55, 62 (D. Mass 1999), where the U.S. District Court for the District of Massachusetts opined that "to recover costs under this provision [42 U.S.C. §9607(a)(4)(B)], however, a plaintiff must have actually incurred response costs." *Id.*

well-settled rule. *See, e.g., A. Shapiro & Sons, Inc. v. Rutland Waste & Metal Company*, 76 F. Supp. 2d 82, 86 (D. Mass 1999).[9]

The take-away from these cases is direct and on point: as used in the CERCLA context, the term "incur" requires a party to have actually spent money itself before it may seek reimbursement from another party.[10] A plaintiff cannot recover response costs for which it is obligated, but which are paid by another. Plaintiffs cannot dodge the result and logic of these cases by arguing that when they recovered the Future Costs from Carpenter, it was their money. The cases reject this position. Unfortunately, the Trial Court did not address this case law even though it was presented in Worthington's briefing. The Trial Court erred.

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[9] Similarly, in *Pennsylvania Real Estate Investment Trust v. SPS Technologies, Inc.*, 1995 U.S. Dist. LEXIS 17361 (E.D. Pa. Nov. 20, 1995), the U.S. District Court for the Eastern District of Pennsylvania found that plaintiffs could not recover in contribution because it had not "incurred" costs of response. To determine whether SPS, which coincidentally is one of the Plaintiffs in the case before this Court, had actually "incurred" response costs, the district court stated, "a plaintiff must allege that it has actually incurred recoverable costs to maintain a cost recovery action under §107." 1995 U.S. Dist. LEXIS 17361, at *16; and the court found the pleading of SPS Technologies to be deficient because another party had actually "incurred response costs for which SPS is liable." *Id* at *17.

[10] Notably, in a non-CERCLA case decided by the Trial Court, *RTN Investors, LLC v. RETN, LLC*, 2011 WL 862268 (Del. Super. Feb. 10, 2011), the Trial Court gave the term "incur" the same interpretation in another context holding: plaintiff could not recover certain damages, because they were not "incurred" meaning paid by the party seeking to recoup them.

II. The Trial Court Erred by Failing to Credit Worthington's Argument that Plaintiffs are Barred from Recovering Amounts Already Reimbursed to Them by Other PRPs in Violation of, Among Other Things, CERCLA's Statutory Prohibition Against Double Recovery.

Question Presented

Whether the Trial Court erred as a matter of law when it failed to credit, much less address, Worthington's argument that Appellee's interpretation of the Settlement Agreement will lead to a double recovery in violation of CERCLA (A333).

Standard and Scope of Review

Again, the standard and scope of review is *de novo* regarding whether the Trial Court erred in interpreting the plain language of the contract and in addressing a question of law. *See Honeywell Int'l, Inc.*, 872 A.2d at 950. *See also Airgas, Inc.*, 8 A.3d at 1188.

Merits of the Argument

A. CERCLA prohibits double-recovery.

Carpenter was a defendant, a potentially responsible party (PRP), in the underlying CERCLA Litigation. The Carpenter Settlement, in the amount of $21,800,000, was a recovery of response costs by Plaintiffs. Plaintiffs have, in fact, now recovered their costs—past and projected future costs at the Boarhead Site—from the proceeds of the Carpenter Settlement. By its settlement, Worthington agreed to pay 13% of Future Costs. To recover these same future

costs from both Carpenter and Worthington would violate well-established principles of CERCLA prohibiting double recovery. In essence, Plaintiffs would profit from their polluting.

In *Vine Street, LLC v. Keeling*, 460 F. Supp. 2d 728 (E.D. Tex 2006), the U.S. District Court for the Eastern District of Texas held that a plaintiff cannot, under CERCLA, recover costs for which it has already been reimbursed. The *Vine Street* court relied upon the prohibition against double recovery in CERCLA. Its discussion is instructive:

> Other CERCLA provisions also reflect Congress's apparent desire to prevent claimants from recovering the same response costs twice. Thus, a court may consider preventing someone from recovering for the same harm twice as an equitable factor in resolving CERCLA contribution claims. This is consistent with the fact that private CERCLA claimants cannot recover damages resulting from contamination, but can only be reimbursed for some or all of their incurred response costs. Vine Street cannot make a profit on the contamination.

Vine Street, LLC, 460 F. Supp. 2d at 765 (citations and quotations omitted). There is no question that, under Plaintiffs' interpretation of the Settlement Agreement, they are being reimbursed twice for the same future response costs. Plaintiffs cannot collect these same future costs from two different contribution defendants. *See id.* at 765. *See also Basic Mgmt.*, 569 F. Supp. 2d at 1125.

In *Friedland v. TIC-The Industrial Co.*, 566 F.3d 1203 (10th Cir. 2009), the U.S. Court of Appeals for the Tenth Circuit ruled that a CERCLA contribution

plaintiff cannot "recoup more than the response costs he paid out of pocket" because it "flies in the face of CERCLA's mandate to apportion those costs equitably among liable parties." *Friedland*, 566 F.3d at 1207. The *Friedland* court, quoting the *Basic Management* case, *supra*, stated:

> … Plaintiffs can only receive reimbursement for the costs they expended beyond their share of actual responsibility for the environmental damage…. The purpose of the contribution element of CERCLA was to reallocate the remedial cost to those who were ultimately responsible for the pollution, not to provide a windfall recovery….

Id. (quoting *Basic Mgmt.*, 569 F. Supp. 2d at 1124) (internal quotation omitted). This fundamental policy against double recovery governs Plaintiffs' CERCLA contribution and cost recovery from other PRPs. The Worthington Settlement cannot, consistent with CERCLA's mandate, allow Plaintiffs to double recover on their contribution claim for future costs.

B. Worthington showed at trial that Plaintiffs were made whole.

Evidence at trial was presented that Plaintiffs have recovered 100% of their recoverable amounts. Plaintiffs recovered $6,984,500 in the CERCLA Litigation before the Carpenter Settlement which were distributed directly to Plaintiffs. *See* A972 (subtracting Carpenter Settlement of $21,800,000 from the total settlement amount of $28,784,500).

After the Carpenter Settlement in July 2011, Plaintiffs entered into the "Agreement Regarding a Distribution of Funds Recovered Via Settlement from

Carpenter Technology and Establishment of a Qualified Settlement Fund for the Benefit of the Boarhead Farm Site Agreement Group" (the "QSF Agreement") (A519). Paragraph 1.0 of the QSF Agreement provided that Plaintiffs Cytec, SPS, Ford, and TI "have calculated their currently unrecovered remedial costs in accordance with Attachment A to this Agreement." The relevant costs recovered were 100% of the "Unrecovered Remedial Costs" with ¶ 2.0 of the QSF Agreement distributing $8,671,816.17 of the Carpenter Settlement proceeds to Cytec, Ford, SPS, and TI Automotive.

Member	Unrecovered Remedial Costs	% Recovery	Signatory Payout
Cytec Industries	**$2,373,935.70**	**100%**	**$2,373,935.60**
Ford	**$2,363,377.69**	**100%**	**$2,363,377.69**
SPS Technologies	**$2,363,377.69**	**100%**	**$2,363,377.69**
TI Group	**$1,571.125.19**	**100%**	**$1,571.125.19**
			$8,671,816.17

Fig. 1 – Portions of Attachment A (A524)

As the chart reflects, Cytec, Ford, SPS, and TI have reimbursed themselves 100% of their recoverable costs paid up to June 10, 2011. After this, these same four parties agreed to use the remaining Carpenter Settlement proceeds to pay future costs at the Boarhead Site. *See* QSF Agreement at ¶ 3 (A519) ("[T]he primary purpose of the Qualified Settlement Fund [QSF] shall be to pay Future Site Costs at the Boarhead Farms Superfund Site."). As noted in the Boarhead Farms Superfund Site Qualified Settlement Fund Agreement (A525), a trust was

"established to resolve payment obligations underlying CERCLA claims that have resulted from the release or threatened release of hazardous substances at the BHF site [Boarhead Site] …" (A529), and that the QSF was intended to "fulfill the obligations of Grantors [Plaintiffs] under the OU-1 and OU-2 Consent Decrees and in respect of the BHF Site." *Id.*

Because the current estimate of future costs for the Boarhead Site remediation ranges from $9,742,273.49 to $13,111,798.03 (*see* A570), the QSF—which contains the remaining $13,000,000.00 from the Carpenter Settlement—is enough to pay the Future Costs at the Boarhead Site. In short, as was shown at trial, **none of Plaintiffs will actually "incur" any such Future Costs until and unless the Future Costs exceed this amount placed in the QSF**. The Trial Court erred when it did not take this into account.[11]

[11] The Trial Court indicated at trial that it would be reviewing this argument related to double-recovery, but does not appear to have done so its Opinion. *See* A301 [191:14-192:2].

III. The Trial Court Erred When It Relied on the Circumstance That the Definition of "Future Costs" Does Not Specify Which Entity Actually Incurs Future Costs, As A Basis To Apparently Find That Worthington Must Pay 13% Of Funds Recovered From Carpenter Technology.

Question Presented

Whether the Trial Court erred as a matter of law and fact when it went beyond the plain language of the Settlement Agreement and determined based on testimony that the definition of "Future Costs" does not specify which entity actually had to "incur" future costs for remediation; and even if the evidence were somehow pertinent to this issue, whether the Trial Court erred where the testimony directly contradicted the Court's findings (A337).

Standard and Scope of Review

If the Court determines that this question presents a mixed question of law and fact, "the Court has stated it will review mixed question of fact and law *de novo*, 'to the extent that we examine the trial judge's legal conclusions,' and for clear error, '[t]o the extent the trial judge's decision is based on factual findings.'" D.L. Wolfe and M.A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 14.10[c] (Matthew Bender 2013) (quoting *Hunter v. State*, 783 A.2d 558, 561 (Del. 2001) and *Miller v. State*, 4 A.3d 371, 373 (Del. 2010)).

Merits of the Argument

A. A Plain Language Reading of the Settlement Agreement Supports Worthington's Argument.

In interpreting the Settlement Agreement, the Trial Court found that, because no entity is specified in connection with the obligation to "incur" future costs at the Boarhead Site, then it could mean costs incurred by any entity, not just Plaintiffs. The Trial Court emphasized that "Section 1.4 clearly and unambiguously describes a cost set without specifying the payor." Opinion at 19. The Trial Court concluded that if the parties intended for Plaintiffs to actually pay the 87% of the costs, the agreement would have provided that. *See id.* at 20. The Trial Court then made the leap in logic that it is not a condition to Worthington's obligation that the other participants in the Settlement Agreement actually "incur" costs of response or actually pay them. See *id.* at 20-21.

This position ignores the undisputed facts as agreed by the parties to the effect that there were only three parties, Plaintiffs Cytec, Ford, and SPS, which, in fact, were ever legally obligated to fund the remediation work at the Boarhead Site under the Administrative Order on Consent for OU-1 (the Operable Unit addressing continued issues of groundwater cleanup). *See* Opinion at 4, n.7. One of Appellee's witnesses, Mr. Dennis Shea, SPS's in-house counsel, testified at trial that only the three parties obligated to perform and fund OU-1 could "incur costs."

> Q. … Mr. Shea, did you have an understanding of who had to incur the costs, if anybody, to require Worthington to pay 13 percent of the incurred costs?
>
> A. The group. The costs have to be incurred at the site.
>
> Q. Okay, and what group are you referring to:
>
> A. Worthington, SPS, Cytec, Ford, and TI.

(A 245 [130:20-131:4]).

In other words, by Plaintiffs' own admission, it was always Plaintiffs or Worthington which "incurred," *i.e.*, paid, costs of response. Further, the testimony of Messrs. Shea and Bergere, established, without dispute, that, after the Settlement Agreement, "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%." Opinion at 16, n.73. There was never any implication or understanding that any party other than the parties to the Settlement Agreement would be responsible or liable for "Future Costs." There is no significance to the failure to state by name that it was the other entities who were members of the PRP Group which would pay the other 87%.

At page 22, n.94 of the Opinion, the Trial Court then finds:

> 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 in Ballard's IOLTA account.").

The Trial Court's interpretation apparently turns on its view that it does not matter that Plaintiffs, even though they are the only entities legally obligated to pay the costs and "incur" costs, used third-party funds to pay for remediation. The Trial Court, then, never really explains whether in its view, Carpenter has actually "incurred" the costs because its CERCLA case settlement funds were used to pay them; or whether Plaintiffs' incurred the costs when they used the recovery to fund them. Either interpretation is at odds with the language and context of the Settlement Agreement whereby Worthington settled its liability to share costs—13% / 87%—which Plaintiffs were legally obligated and actually did pay.

B. The Underlying Fact Support Worthington's Interpretation of the Word "Incur."

Even apart from this plain language reading, the facts shown at trial support Worthington's interpretation of the word "incur." Specifically, in connection with the CERCLA Litigation, Plaintiffs were required to provide amended and supplemental information with respect to the costs being claimed in the case. There are several references in a July 12, 2007, letter from Ballard Spahr (A891), counsel for Plaintiffs, which support Worthington's interpretation of "incur" as

used in the Settlement Agreement. Specifically, when Plaintiffs were asked, in the context of the CERCLA Litigation, to identify the payments which they had allegedly made in excess of their "equitable share," they responded in the letter using the term "incurred" and defining it:

> Plaintiffs have **incurred** through 2006 $13,778,164.55 (the amounts contributed by each individual Plaintiff to the response costs for work required by OU-1 Consent Decree and EPA Oversight Costs pursuant to that decree, the response costs for work required by the OU-2 Consent Decree and EPA's Oversight costs related to that decree, and the payment of EPA's past and interim costs as required by the OU-2 Consent Decree).

(A894) (emphasis added).

At trial, however, despite the fact that Plaintiffs had again and again used the term "incurred" to mean "paid," Mr. Mesevage attempted to dodge the question arguing that you can incur a cost "without having paid it." Worthington's counsel then pointed out, that Mr. Mesevage had answered differently in his deposition, admitting that the term "incurred" meant "paid." There Mr. Mesevage said that: "They [Plaintiffs] seek recovery of costs they have incurred. I assume – yeah, it does imply that, having said they have incurred costs, meaning costs were paid." (A267 [55:23 -56:21]).[12]

[12] Then Mr. Mesevage answered in respect of another reference in the Ballard Spahr letter (A895) where it was noted: "It is self-evident from these facts and this analysis that each individual Plaintiff has also incurred more than its equitable share of costs to date" (A267 [57:20-58:16]).

Additionally, in the Fifth Amended Complaint in the CERCLA Litigation, Plaintiffs used language seeking recovery and contribution for those "response costs incurred by Plaintiffs" (A550 at ¶ 1). Mr. Mesevage admitted that the term "incur" was purposefully used in the CERCLA Complaint "to satisfy the [CERCLA] statutory requirement" (A266-7 [53:3-55:17]).

Notably, there has not been any context in the CERCLA Litigation or a discussion of the Boarhead Site costs where "incur" does not mean "paid by the party seeking reimbursement." It is not plausible that Plaintiffs intended a different meaning in settling the CERCLA contribution claim against Worthington arising from the same CERCLA Litigation.

The Settlement Agreement, by its terms, obligated Worthington to pay 13% of those Future Costs as defined in § 1.4 of the agreement. The terms defining the costs to be shared among the settling parties must be read consistently with the manner in which the parties had used the same terms in the CERCLA Litigation.

CONCLUSION

At the trial of this case, the Trial Court never addressed the circumstance that its interpretation of the Settlement Agreement resulted in Plaintiffs' double recovery of the costs and expenses which they had sought in the underlying CERCLA Litigation. Rather, the Trial Court has ruled that Worthington must pay 13% of costs which are not, in fact, paid by the other parties to the Settlement Agreement. In order to reach this result, the Trial Court had to ignore the following:

1. Paragraph 1.6 of the Settlement Agreement which specifically references the fact that "the terms used in this Agreement shall be defined as in CERCLA 42 U.S.C. §§9601 *et seq.*";

2. The fact that Plaintiffs, who drafted the Settlement Agreement, used terms in the definition of Future Costs which have meaning only under CERCLA;

3. The words "incurred" and "costs of response" had meaning as used in other documents drafted by the same Plaintiffs in the CERCLA Litigation;

4. Federal case law directly on point which indicates that, to the extent, a party recovers its costs in settlement under CERCLA from one responsible party, it has not incurred costs such that it can recover them from another party;

5. Multiple court decisions holding that, in the context of CERCLA, in order to "incur costs of response" a party must have paid those costs itself;

6. Under CERCLA, a party cannot double recover its costs of response from two different defendants—here Worthington and Carpenter;

7. Worthington became a member of the OU-1 Group, as a full and participating member, which should have entitled it to share both the reductions and increases in Future Costs as the Boarhead Site; and

8. The Plaintiffs' representatives, Mr. Mesevage and Mr. Shea, never addressed the subject of the effect of any later recovery from any third party under any circumstance related to the obligation of Worthington to pay 13% of the Future Costs, much less conditioned settlement on Worthington's exclusion from funds from third-parties to reduce Future Costs.

The explanation for the Trial Court's view is found in the way it phrases the question before it: "In other words, Worthington claims that it should reap the benefits from plaintiffs Carpenter Settlement Agreement, three years after Worthington's own settlement." Opinion at 18. In fact, Worthington seeks nothing more than an interpretation that it has an obligation to pay 13% of future costs only as incurred by the parties who are obligated to perform the OU-1 remediation activities. To the extent that those parties obligated to make those payments do not do so, Worthington believes that it does not have an obligation to pay a 13% share of funds not expended. Any contrary ruling provides Plaintiffs with the windfall to obtain double recovery from the interpretation of an Agreement which does not speak, in either direction, to the manner in which funds recovered from a third-party are to be applied to pay Future Costs. The necessity that Plaintiffs found in placing a provision in the proposed Site Participation Agreement (*see* discussion, *supra*, at pp. 10-11) provides the best evidence for the

fact that they thought Worthington's participation as a full member in the PRP Group entitled it to share in the proceeds of any funds collected to pay the same future costs of response. The Trial Court never addressed these circumstances.

Respectfully submitted,

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