



Administrator's Motion to Determine that the Agreement Between NorthStar f/k/a NCM ("NCM") and the Perrine DuPont Settlement Has Not Expired and Requesting Reimbursement of Settlement Damages Caused by NCM's Failure to Timely Remediate Settlement Properties," (hereinafter, the "NCM Response,") filed on April 14, 2015.

On April 30, 2015, the Court held a hearing on this matter. The hearing was attended by Edgar C. Gentle, III, Esq., and Michael Jacks, Esq., for the Settlement; Cy Hill, Esq., for NCM; Meredith McCarthy, Esq., as guardian *ad litem* for children and incompetent adults; and James Arnold, Esq., for DuPont, telephonically.

The Court heard the positions of the parties. In summary, NCM argues that the period of performance of the remediation contract has expired, and requests increased payment rates for future remediation work. The Settlement argues that the period of performance has not expired, and that NCM is in breach of contract for failing to complete the remediation work to date and for supplying poor soil during 2012, which delayed the implementation of the soil remediation program, and requests leave of the Court to develop evidence as to the Settlement's claimed damages suffered due to the alleged NCM breach.

#### **Findings of Fact**

1. The Agreement for Soil and Property Remediation Services for the Lenora Perrine, et al., v. E.I. DuPont Nemours and Company, et al., Settlement a.k.a. the Perrine DuPont Settlement, (hereinafter, the "Agreement") dated April 25, 2012, was approved by the Court on May 1, 2012.
2. The remediation of contaminated properties in the Class Area began on June 11, 2012, and continues to the present time.

3. As of the end of March, 2015, NCM has completed the remediation of approximately 389 house properties and 190 soil properties, and the remediation of additional properties is in progress. Of the four Class Area Zones to be remediated, Zones 1B and 2 are complete, soil remediation remains to be done in Zone 1A, and house remediation in Zones 1A and 3 is incomplete. Of the \$14.8 million contractual amount, approximately \$12.8 million has been billed and paid, with \$2 million left for unfinished work.
4. NCM and the Settlement agree that additional contaminated properties remain to be remediated in Zone 1A and Zone 3. The Settlement estimates that approximately 11 soil properties which were started in 2014 need to be finished, and that there are 23 additional new soil properties to remediate during 2015, which will complete the soil remediation program in Zone 1A. The Settlement estimates that approximately 200 houses remain to be remediated, primarily in Zones 1A and 3 of the Class Area.
5. The Agreement was negotiated by the Settlement and NCM, and was finalized and signed after drafts were prepared and modified based upon input from both Parties to the Agreement.

#### Conclusions of Law

1. "Contracts containing unambiguous language must be construed according to their plain and natural meaning." Payne v. Weston, 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1985); cited by Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 468 S.E.2d 712, 196 W.Va. 97 (1996).

2. "It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." McDaniel v. Kleiss, 202 W.Va. 272, 503 S.E.2d 840 (1998); citing Cotiga Development Co. v. United Fuel Gas Co., 147 W.Va. 484, 128 S.E.2d 626 (1962).
3. "We also have held that "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Wellington Power Corp. v. Cna Sur. Corp., 614 S.E.2d 680, 217 W.Va. 33 (2005); citing Syl. Pt. 1, Cotiga Development Co. v. United Fuel Gas Co., 147 W.Va. 484, 128 S.E.2d 626 (1962).
4. The Agreement was jointly prepared and drafted by the Settlement and NCM, working together, and should not be construed against either party. Bischoff v. Francesca, 133 W. Va. 474, 56 S.E.2d 865 (1949).
5. The "Period of Performance" section of the Agreement, on page 8, Section II., A., states that "[t]his Agreement shall become effective following Court approval, and shall continue in full force through December 31, 2014, or until such time as all conditions and obligations are met and satisfied herein, which the Claims Administrator estimates is sufficient time to complete all remediation services in accordance with the terms of this Agreement."
6. The Court finds that the language of the Period of Performance clause is not ambiguous.

7. The Court finds that the plain language of the Period of Performance clause means that the Agreement does not expire until NCM "complete[s] all remediation services in accordance with the terms of this Agreement," with the word "estimates" showing that the December 31, 2014, date was an estimate and not a deadline. NCM has argued that the language of the Period of Performance clause should be construed as "whichever occurs first, not last," but this suggested language is not in the Agreement. The Court cannot insert such new language into a contract which is plain and unambiguous. If the parties had wanted such language in the Agreement, it could have been included therein. The Period of Performance clause allows flexibility in the completion of a complex multi-million dollar remediation contract, and allows the Claims Administrator the discretion to ensure that the work is properly completed.
8. The Court finds that all of the remediation services defined in the Agreement have not been completed. The Agreement provided an estimated 600 house properties to be remediated, and an estimated 160 soil properties to be remediated. Agreement on Page 9. While NCM has remediated more than 160 soil properties, 190, it has remediated significantly fewer house properties, 389. Also, NCM has not earned the entire Agreement contractual amount of \$14.8 million, with approximately \$2 million being unearned to date.
9. Page 48 of the Agreement, Section IX., E., Continuation of Services, states that, "[e]xcept for termination due to the Claims Administrator's breach, NCM agrees that upon completion of the Work, at Claims Administrator's request for continuation of services, it shall continue to provide services hereunder, provided

Claims Administrator complies with all the terms and provisions of this Agreement in effect prior to the termination. The fees for such continuation period shall be equitably adjusted.” In open Court, during the April 30, 2015, hearing, the Claims Administrator stated that no such request has been made to NCM.

10. The Court finds that the Continuation of Services clause is inapplicable by its plain language, because the clause only takes effect, “upon completion of the work,” and only applies upon the “Claims Administrator’s request,” which did not occur.  
Id.

11. “To state a claim for breach of contract .... [one] must allege facts sufficient to support the following elements: the existence of a valid, enforceable contract; that the plaintiff has performed under the contract; that the defendant has breached or violated its duties or obligations under the contract; and that the plaintiff has been injured as a result.” Executive Risk Indem. Inc. v. Charleston Area Medical Ctr. Inc., 681 F. Supp.2d 694, 714 (S.D. W. Va., 2009).

12. A ruling on the Settlement’s claim of breach of contract, and alleged damages, is premature at this time, because the Settlement and NCM need time to develop evidence related to the alleged breach and Settlement damages.

13. The Court holds any finding of breach of contract or Settlement damages in abeyance, pending development of evidence by NCM and the Settlement, as the Agreement has not expired.

### Order

The Court hereby **ORDERS** that the Agreement, by its plain terms, has not expired. The Court therefore **ORDERS** that the Agreement has not expired and **DENIES** NCM's request for a ruling that the Agreement has expired. The Court **ORDERS** that the Continuation of Services clause of the Agreement is inapplicable based upon the facts before the Court. The Court **ORDERS** that, upon a request of either Party, the Court will establish a discovery schedule for the development of evidence related to the alleged NCM breach of contract and Settlement damages.

As the Agreement is in full force and effect, the Court **ORDERS** that NCM shall complete the remediation program and shall be paid by the Settlement at the rates set forth in the Agreement, with work to continue "until such time as all conditions and obligations are met and satisfied" and the "remediation services" are completed under the Period of Performance clause in the Agreement.

**IT IS SO ORDERED.**

The Clerk of this Court shall provide certified copies of this Order to the following:

David B. Thomas, Esq.  
James S. Arnold, Esq.  
Thomas Combs & Spann, PLLC  
P. O. Box 3824  
Charleston, WV 25338  
*DuPont's Finance Committee  
Representative*

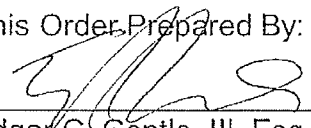
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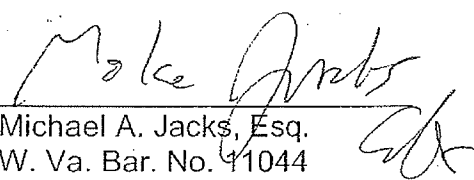
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This Order Prepared By:

  
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Date:

5-11-15

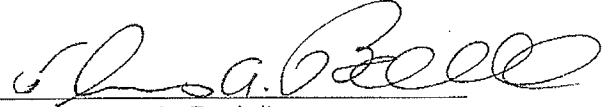
  
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Date:

5-11-15



ENTER this 26<sup>TH</sup> day of MAY, 2015.

A handwritten signature in cursive script, appearing to read "T. A. Bedell", written over a horizontal line.

Hon. Thomas A. Bedell  
Circuit Judge of Harrison County, West Virginia

STATE OF WEST VIRGINIA  
COUNTY OF HARRISON, TO-WIT

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18<sup>th</sup>  
Family Court Circuit of Harrison County, West Virginia, hereby certify the  
foregoing to be a true copy of the ORDER entered in the above styled action  
on the 26<sup>th</sup> day of May, 2015.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix  
the Seal of the Court this 26<sup>th</sup> day of May, 2015.

Donald L. Kopp II  
Fifteenth Judicial Circuit & 18<sup>th</sup> Family Court  
Circuit Clerk  
Harrison County, West Virginia