IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

SOLUTIA, INC. and PHARMACIA CORPORATION Plaintiffs, v. McWane, Inc., et al., Defendants.	CIVIL ACTION NO. CV-03- PWG-1345-E

UNITED STATES' SUPPLEMENTAL AMICUS CURIAE MEMORANDUM

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UNITED STATES' SUPPLEMENTAL AMICUS CURIAE MEMORANDUM

INTRODUCTION

The United States submits this supplemental amicus curiae memorandum in response to the Parties' recent filings concerning the Supreme Court's decision in United States v. Atlantic Research Corp. ("ARC"), 551 U.S. ___ , 127 S. Ct. 2331 (2007) ("ARC"), and specifically to respond to arguments made by Solutia Inc. and Pharmacia Corporation (collectively "S/P") in their Response to Defendants' Supplemental Briefs and in Opposition to Defendants' Motions for Summary Judgment ("S/P Response"), in which S/P address the impact of the ARC decision on their claims.[1/]

As the United States explained in its prior amicus curiae memorandum (see United

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[1/] See also S/P's Notice of Supplemental Authority in Support of Motion to Lift Stay of the Case, and in Opposition to Settling Defendants' Motion for Summary Judgment; and Settling Defendants' Supplemental Brief in Support of their Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Leave to Amend Count II of their First Amended Complaint.

States' Amicus Curiae Memorandum ("U.S. Memorandum" at 1-2), the United States, primarily through the U.S. Environmental Protection Agency ("EPA"), administers the program for the cleanup of hazardous waste sites around the country under CERCLA and has a substantial interest in assuring that CERCLA is interpreted in a manner that promotes the protection of public health and the environment through the efficient and effective cleanup of hazardous waste sites. S/P's argument that they may avail themselves of a Section 107 cause of action is of critical interest to the United States because it disrupts the carefully crafted scheme that Congress set up in CERCLA Section 113 in order to promote settlements. The United States has the additional interest of ensuring that settlement agreements, including those in this case, which are in the best interests of the general public, are upheld and fully implemented.

In its prior amicus curiae memorandum, the United States set forth the statutory background of CERCLA, including CERCLA's cost recovery framework under Section 107 and the contribution framework under Sections 113 and 122, U.S. Memorandum at 3-5, and argued, inter alia, that based on this framework and binding Circuit precedent (and consistent with well established law in other circuits), PRPs cannot proceed under Section 107(a) of CERCLA, but rather are limited to a claim for contribution under Section 113(f). Id. at 13-16.

Since the United States filed that brief, the Supreme Court ruled in ARC that a party in ARC's position, that had cleaned up a site not under the compulsion of a CERCLA settlement or judgment, can sue under Section 107. As explained below, however, that ruling does not mean, as S/P contend here, that S/P can use Section 107 to sue the Settling Defendants in the circumstances of this case. They cannot.

In Anniston, S/P have been subject to an enforcement action by the United States under

Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606, 9607. S/P and the United States entered into a Partial Consent Decree ("PCD") on August 4, 2004, partially settling the claims of the United States against S/P. By virtue of that settlement, S/P obtained protection from claims for contribution pursuant to Section 113(f)(2) for the matters addressed in their settlement and a right of contribution pursuant to Sections 113(f)(1) and (f)(3)(B). As explained in the United States' prior amicus brief, however, S/P's right to contribution is subordinate to the United States' right under the statute to pursue and settle with other liable parties, thereby triggering statutory contribution protection to those settlors against S/P's claims for any overlapping "matters addressed." See 42 U.S.C. § 9613(f)(2); U.S. Memorandum at 16-20. After entering into the PCD, the United States entered into a settlement with the Settling Defendants (effective on January 17, 2006), under which the Settling Defendants obtained statutory contribution protection for the matters addressed in their settlement, which include the very matters that are the subject of S/P's suit. S/P argue that ARC now allows them to maintain a cause of action under Section 107, rather than Section 113.

The United States disagrees with S/P's assertion that ARC stands for the proposition that they may maintain a Section 107 action against the Settling Defendants for the costs of performing the work under the PCD. S/P's claim is one for contribution, and the plain language of Section 113(f) provides and governs contribution actions. A ruling by this Court allowing S/P to bring a Section 107 action for costs they have incurred under their settlement would be contrary to the Supreme Court's guidance in ARC, and would be inconsistent with the structure and policies of CERCLA because it would substantially undermine the contribution protection and other settlement provisions of Section 113(f) and of the *de minimis* settlement provision of

CERCLA Section 122(g).

S/P also contend, in direct contradiction of their prior position in this litigation, that they are not compelled by their settlement with the United States to perform certain cleanup work. They also contend that their claims against the Settling Defendants are for costs expended outside their settlement with the United States. As discussed below, S/P's characterization of their obligations under their settlement with the United States is not correct.

ARGUMENT

I. SOLUTIA AND PHARMACIA HAVE A CONTRIBUTION CLAIM UNDER SECTION 113 OF CERCLA AND ARE NOT ENTITLED TO PURSUE COST RECOVERY UNDER SECTION 107 OF CERCLA[2/]

S/P assert that the ARC decision unequivocally stands for the proposition that "a PRP who steps forward and enters into a settlement agreement to clean up contamination has incurred costs of response and, thus, has a cause of action under § 107(a)(4)(B)." See S/P Response at 2. In fact, the Court specifically did not decide whether PRPs in S/P's situation that do work under a decree have a Section 107 cause of action, but in affirming the Eighth Circuit's opinion, the Supreme Court quoted the Eighth Circuit's reasoning that PRPs that were previously subject to enforcement action under Section 106 or 107 of CERCLA are limited to a Section 113 contribution remedy. ARC, p. 2335. As discussed below, a ruling that S/P have a Section 113 cause of action and must use it and not Section 107, is consistent with the Supreme Court's

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[2/] By asserting throughout this brief that S/P have a contribution claim or a right to seek contribution under Section 113(f), we mean that S/P's claims are for contribution, can only be brought pursuant to Section 113(f), and are governed by Section 113(f), including, as set forth in the United States' first amicus brief, the subordination provisions of Section 113(f)(3)(C) and the contribution protection provisions of Section 113(f)(2) and (f)(3)(A). See U.S. Memorandum at 16-20.

opinion, gives meaning to the separate procedural aspects of Sections 107 and 113, and promotes and protects settlements with the government as intended by the statutory framework of Section 113.

A. The Plain Statutory Language of Section 113(f) and the Supreme Court's Opinion in ARC Provide S/P with a Cause of Action and Compel its Use

In ARC, the Supreme Court addressed the question whether Section 107 of CERCLA authorizes suits by liable parties. The district court had held, following Eighth Circuit precedent and most courts of appeal prior to Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157 ("Aviall"),[3/] that the only available CERCLA claim by one PRP against another is a claim for contribution under Section 113. After Aviall, because ARC had neither been sued by the government under Section 106 or 107 as required by Section 113(f)(1), or entered into a settlement in accordance with Section 113(f)(3)(B), ARC had no cause of action for contribution under Section 113(f). The Court of Appeals reversed. It reasoned that absent a finding that ARC had a Section 107 cause of action for cost recovery, it would have no right to recover any of its cleanup costs from other liable parties, which the Eighth Circuit found would be "contrary to

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[3/] In the 2004 Aviall decision, the Supreme Court ruled that a person may not sue for contribution under Section 113(f)(1) except "during or following" a civil action under Section 106 or 107. 543 U.S. at 165-66. The Court noted that Section 113(f)(3)(B) provides the other "express avenue[ ]" for contribution under Section 113(f), but to take advantage of this provision a party must have entered into "an administrative or judicially approved settlement that resolves liability to the United States or a State." Id. Aviall had neither been sued by nor settled with the governments and thus did not meet the criteria for a Section 113(f) contribution action. Because the issue had not been sufficiently raised or considered below, the Aviall Court declined to address whether Aviall could recover costs under Section 107(a)(4)(B), despite the fact that it was itself a PRP under CERCLA. Id. at 169. The ARC decision addresses the question left open by the Supreme Court in Aviall, namely, whether a liable party may, under some circumstances, maintain a cause of action under Section 107 of CERCLA.

CERCLA's purpose . . . [and an] unjust outcome." Atlantic Research Corp. v. United States ("ARC I), 459 F.3d 827, 837 (8th Cir. 2006). Thus, the Eighth Circuit held that

> a liable party may, under appropriate procedural circumstances, bring a cost recovery action under § 107. This right is available to parties who have incurred necessary costs of response, but have neither been sued nor settled their liability under §§ 106 or 107.

Id. at 835. The court stressed, however, that allowing ARC a Section 107 claim would not render Section 113 "meaningless:"

> [L]iable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality. But parties such as Atlantic, which have not faced a CERCLA action, and are thereby barred from § 113, retain their access to § 107. This resolution gives life to each of CERCLA's sections, and is consistent with CERCLA's goal of encouraging prompt and voluntary cleanup of contaminated sites.

Id. at 836-37 (citations omitted).

The Supreme Court affirmed the Eighth Circuit but focused on the language of Section 107(a)(4)(B), holding that "[b]ecause the plain terms of § 107(a)(4)(B) allow a PRP to recover costs from other PRPs, the statute provides Atlantic Research with a cause of action." ARC at 2339. The Court did not hold that all PRPs have a cause of action under Section 107 for costs they have spent in cleaning up a site. On the contrary, the Court held merely that Atlantic Research did. Unlike S/P, ARC did not have a cause of action for contribution under Section 113(f) for its cleanup costs – it was not subject to an enforcement action under Section 106 or 107, and it had not entered into a judicial or administrative settlement for the work. The Court expressly declined to decide whether a Section 107 cause of action would be available to PRPs in other situations, including the very situation that presents itself here – that is, where a PRP spends money to clean up a site pursuant to a consent decree following suit under Section 106 or

107. ARC at 2338, n.6. All indications in the opinion are, however, are that the Supreme Court would limit S/P to a claim for contribution pursuant to Section 113(f).

First, as the Court recognized, the plain language of Sections 113(f)(1) and (f)(3)(B) authorize S/P to seek contribution in the circumstances presented here. Section 113 of CERCLA provides, in relevant part:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) [107(a)] of this title, during or following any civil action under section 9606 [106] of this title or under section 9607(a) of this title.

Section 113(f)(1) (emphasis added); see ARC at 2338.

> A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement referred to in paragraph (2).

Section 113(f)(3)(B) (emphasis added); see ARC at 2338, n.5. The Court stressed that "§§ 107(a) and 113(f) provide two 'clearly distinct' remedies. Cooper Industries, 543 U.S., at 163, n.3. 'CERCLA provide[s] for a *right to cost recovery* in certain circumstances, §107(a), and *separate rights to contribution* in other circumstances, §§113(f)(1), 113(f)(3)(B).' Id. at 163" ARC at 2338. (emphases in original). While in a prior decision the Court said that the two causes of action were "similar and somewhat overlapping," in Aviall, the Court stessed that the remedies are "clearly distinct:"

> In Key Tronic Corp. v. United States, 511 U.S. 809, 114 S. Ct. 1960, 128 L. Ed.2d 797 (1994), we observed that §§ 107 and 113 created "similar and somewhat overlapping" remedies. Id., at 816, 114 S. Ct. 1960. The cost recovery remedy of § 107(a)(4)(B) and the contribution remedy of § 113(f)(1) are similar at a general level in that they both allow private parties to recoup costs from other private parties. But the two remedies are clearly distinct.

543 U.S. at 163 n.3.[4] Thus, the ARC Court continued,

> the remedies available in §§ 107(a) and 113(f) complement each other by providing causes of action to persons in different procedural circumstances. Section 113(f)(1) authorizes a *contribution action* to PRPs with common liability stemming from an *action instituted under §106 or §107(a)*.

ARC at 2338. (emphasis added; internal quotations and cites omitted). Similarly, Section 113(f)(3)(B) authorizes a contribution action to PRPs who have resolved a common liability in a judicial or administrative settlement.[5] Id.. The Court contrasted these contribution claims with the "cost recovery" claim that is available to a PRP that has "itself incurred cleanup costs" without the compulsion of an enforcement action or settlement. ARC at 2338. Because S/P's cleanup actions resulted from the United States' suit to compel response action under Section 106 and settlement to partially resolve S/P's common liability for this response action, S/P's claims are precisely those described in Sections 113(f)(1) and (f)(3)(B).

Moreover, the Supreme Court quoted the Eighth Circuit's view that to harmonize Sections 107 and 113 and to prevent the latter from becoming "meaningless," 459 F.3d at 836, a person who has a contribution claim under Section 113 must use it, and cannot choose to use Section 107 instead. The Supreme Court explained the Eighth Circuit's reasoning as follows:

> The court reasoned that § 107(a)(4)(B) authorized suit by any person other than the persons permitted to sue under § 107(a)(4)(A). Accordingly, it held that §

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[4] See also ARC I, 459 F.3d at 834-35 (discussing note 3; "The Supreme Court emphasized that §§ 107 and 113 are 'distinct.'"; Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc., 423 F.3d 90 (2nd Cir. 2005) (discussing note 3; "[S]ection 107(a) is distinct and independent from section 113(f)(1) . . . ."; remedies are available to "persons in different procedural circumstances.")

[5] Although the Court focused much of its discussion on the example of the contribution remedy provided by Section 113(f)(1), the Court also recognized that Section 113(f)(3)(B) similarly provides a "separate right to contribution." ARC at 2338, n.5.

> 107(a)(4)(B) provides a cause of action to Atlantic Research. To prevent a perceived conflict between § 107(a)(4)(B) and § 113(f)(1), the Court of Appeals reasoned that *PRPs that 'have been subject to §§ 106 or 107 enforcement actions are still required to use § 113*, thereby ensuring its continued vitality.' We granted certiorari, *and now affirm.*"

ARC at 2335. (emphasis added, citations omitted). The Supreme Court's selection of this passage to quote immediately before its statement of affirmance strongly indicates that the Court would require PRPs that have a cause of action for contribution under Section 113(f) to use it. Elsewhere, the Court's opinion further indicates that it would not endorse a scheme that would allow a PRP to choose between a contribution and a cost recovery action to evade the statutory limitations of Section 113. See ARC at 2339. Taken together, these passages show that the Court would not allow PRPs, such as S/P, that clearly have a cause of action under Section 113(f), to sue other PRPs under Section 107(a) instead.

B. S/P Have a Claim for Contribution under Section 113(f) for the Costs of Performing the Cleanup under the PCD. The Fact that S/P "Incurred" Costs Does Not Provide Them a Cause of Action under Section 107

S/P argue that after ARC they have a Section 107 action and not a Section 113 action for the costs of cleanup under the PCD. S/P argue that the Supreme Court's distinction between contribution and cost recovery is "straightforward – 'contribution' arises when a party reimburses another party's costs, and 'cost recovery' arises when a private party itself incurs cleanup costs." S/P Response at 6. We agree with S/P's statement that under the Supreme Court's analysis they have only a contribution claim (and not a Section 107 claim) for the past costs and oversight costs they reimbursed to EPA under the PCD. We disagree, however, with S/P's statement that after ARC, they have a Section 107 cause of action (and not a Section 113(f) claim) for the cost of implementing the cleanup required by the PCD. S/P Reply at 7, 8 n.5. S/P's latter

interpretation ignores the language of Section 113(f), places too much emphasis on the concept of "incur costs" to the exclusion of the rest of the Supreme Court's analysis, and is inconsistent with the structure and policies underlying CERCLA and years of circuit court precedent holding that work performed pursuant to a CERCLA consent decree gives rise to a contribution action governed by Section 113(f).

1. Under The Statutory Language of Section 113(f), S/P have a Cause of Action for Contribution. S/P's argument that they do not have a Section 113 claim after ARC is baseless. The plain language of both Sections 113(f)(1) and 113(f)(3)(B) provides contribution rights in the specific circumstance where, as here, a party is compelled to conduct response work as a result of a government enforcement action. By allowing a party to seek contribution during or following a Section 106 action, Section 113(f)(1) specifically references the section of CERCLA under which the government can judicially (or administratively) seek to compel a liable party to conduct response actions. Section 113(f)(3)(B) also explicitly provides that a party "who has resolved its liability for some or all of a response action or some or all of the costs of such action . . . may seek contribution. . . . ." (emphasis added). Thus, Section 113(f)(3)(B) provides a right to contribution not only for a settlement for reimbursement of response costs, but also specifically for settlements that require PRPs to undertake a response action. As the First Circuit Court of Appeals noted, given the language of the statute, the argument that response costs expended by a PRP for cleanup under a consent decree do not fall within the ambit of Section 113(f)(3)(B) "fails this commonsense test." United Technologies Corp. v. Browning-Ferris Industries, Inc., 33 F.3d 96, 102 (1st Cir. 1994) ("The simple reading of this subsection is that the initial phrase refers to expenses incurred in the course of a liable party's direction of a

site's cleanup while the second phrase refers to reimbursement of cleanup costs incurred under the government's hegemony.").

2. The Supreme Court Distinguished Section 107 and 113 Actions Based on the Nature of Contribution and Not Based Merely on Whether Costs are "Incurred" by a PRP or "Reimbursed" to Another Party. The ARC Court's analysis does not limit Section 113(f)'s reach to judgments or settlements for cost reimbursement, as S/P contend. In ARC, the Supreme Court focused on which parties may sue under Section 107(a)(4)(B), and specifically whether the "any person" language of subparagraph (B) authorizes suits by liable parties. In determining that "the plain language of subparagraph (B) authorizes cost recovery actions by any private party, including PRPs," ARC at 2339, the Court did not hold that the only requirement for a Section 107 claim is that a person "incur costs" (consistent with the NCP). S/P Response at 3 ("It is that simple."). Rather, the Court held only that a person like ARC, which has "incurred costs" not pursuant to an enforcement action or settlement with the government, has a cause of action for "cost recovery" under Section 107. S/P place far too much emphasis on this one criteria and ignore the Court's further statements on the differences between "contribution" and "cost recovery" actions under Sections 113(f) and 107(a), respectively. While the Court did not decide the issue presented here, that is, whether a PRP has a Section 107 or 113 claim for the costs of cleanup pursuant to a CERCLA consent decree, ARC at 2338, n. 6, a careful reading of its analysis leads to the conclusion the Supreme Court, if faced with this situation, would find that a party in S/P's position is limited to a claim under Section 113.

As noted above, the Court stressed that Sections 107(a) and 113(f) provide two distinct remedies, which complement each other by providing different remedies to people in different

procedural circumstances. ARC at 2338. Contrary to the assumptions of most circuit courts prior to ARC and Aviall, see infra ¶ I.B.4, the Court rejected the notion that "the word 'contribution' [is] . . . synonymous with any apportionment of expenses among PRPs[,]" and that, thus, any action in which a PRP seeks to allocate costs among other PRPs must be brought pursuant to Section 113(f). Id. "Contribution," the Court continued, is defined as "the tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share . . . ." Id. (citation omitted). "Section 113(f)(1) authorizes a contribution action to PRPs with *common liability* stemming from an *action instituted under §106 or §107(a)*." Id. (emphasis added).[6] In contrast, Section 107(a) permits a "cost recovery" claim to a PRP that has "*itself* incurred cleanup costs" (as opposed to cleanup costs stemming from an action under Section 106 or 107), or put another way, that has "incurred its *own* costs," not stemming from a common liability to a third party. Id. Thus, the Court made clear that what distinguished the ARC party from the reimbursement party was not only that the ARC party was sustaining the costs of doing the work, but also that it was acting "voluntarily,"[7]

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[6] See also id. at 8-9 (Section 113(f)(1) "authorizes a PRP to seek contribution 'during or following' a suit under § 106 or 107(a). 42 U.S.C. § 9613(f)(1). Thus, § 113 permits suit before or after the establishment of common liability.")

[7] The Court used the term "voluntarily" in footnote 6 to compare and contrast a party who is "compelled" to sustain expenses pursuant to a consent decree following a Section 106 or 107 action from a person who "incurs costs" without the compulsion of a Section 106 or 107 action or settlement. The Court expressly did not decide whether a Section 107 cause of action is available only to "volunteers" and the United States does not address that issue here. S/P entered into administrative settlements with, were sued under Sections 106 and 107 by, and entered into a judicial decree with, the United States and thus have only a Section 113 action. In any event, whatever the precise parameters of the terms terms "voluntary" and "compelled" are and whatever their significance to the availability of a Section 107 cause of action, the actions S/P took in response to enforcement by the United States were not "voluntary" in the sense of the word as used by the Supreme Court in ARC.

i.e., not legally "compelled;" and that it was sustaining these costs on its own and not as part of a common liability established "during or following" a Section 106 or 107 suit or by settlement.[8]

The statute expressly provides a cause of action for contribution to any person who has resolved its liability for "some or all of a *response action or* response costs" or in an action "during or following" a Section 106 action for cleanup. S/P's reading of ARC suggests that the Supreme Court *sub silencio* read an entire piece of Section 113 out of the statute. In fact, requiring that parties in S/P's position only use Section 113 comports with the Court's common law notions of contribution as they relate to Section 113(f). An action under Section 106 for cleanup or a judicial or administrative settlement for cleanup would establish the common liability for this work just as a Section 107 action would establish the common liability for response costs. A party that performs the response actions to satisfy a consent decree with EPA is not incurring its "own" costs or establishing its "own" liability – rather, it is sustaining these expenses to extinguish the common liability owed to EPA. Just as the Court explained that reimbursing costs incurred by others satisfies a common liability and gives rise to a contribution action, so too does performing work pursuant to a decree or court order. This is demonstrated by

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[8] The Second Circuit in Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc., 423 F.3d 90 (2nd Cir. 2005) explained the distinction this way:

> It may be that when a party expends funds for cleanup solely due to the imposition of liability through a final administrative order, it has not, in fact, incurred "necessary costs of response" within the meaning of section 107(a). . . . [W]hen a party does not conduct its own cleanup, it has not incurred recovery costs. If a party expends funds out of obligation under an administrative or court order or final judgment, its liability may be "similar to that of a tortfeasor's liability for the doctor's bills of the injured party. Payment by the tortfeasor does not mean it has incurred doctor's bills itself.

Id. at 101 (internal quotations and citations omitted).

the fact that EPA could itself have performed the entire cleanup and entered into a Section 107 settlement to recover its response costs. Under the Court's logic, this settlement would "reimburse" EPA's costs and clearly provide the settlor with a cause of action under Section 113(f)(3)(B) (and (f)(1) for a judicial settlement.) A PRP's performance of work "owed" to EPA under a settlement should provide the same remedy to the settlor as the PRP's reimbursement of costs that EPA incurred in performing that same work. Accordingly, Section 113(f) provides the same contribution remedy for actions and settlements involving response action (under Section 106) as it does for actions and settlements involving costs (under Section 107).

In sum, Section 113 authorizes S/P to seek contribution from other PRPs under Section 113(f)(1) because the United States has brought a civil action against S/P and under Section 113(f)(3)(B) because S/P has resolved its liability to the United States for some of a response action and some response costs in the PCD, and nothing in ARC alters that result. To interpret S/P's claim against the Settling Defendants as anything but a contribution action under Section 113 would directly contradict the plain language of Section 113 and be contrary to the Supreme Court's common law analysis.

3. Requiring S/P to Pursue a Section 113 Cause of Action Is Compelled by the Structure and Policies Underlying CERCLA. As demonstrated above, S/P's claim for costs they spent in performing the work in the PCD is one for contribution, and therefore S/P are limited to a claim under Section 113. This result is compelled by the structure and policies underlying CERCLA and, prevents the contribution framework Congress set up in Section 113(f) from being rendered superfluous.

Courts have widely recognized that in enacting the SARA Amendments, Congress

carefully crafted Section 113 to encourage PRPs promptly to settle their liability with the United States or a state. See generally, United States v. Cannons Engineering Corp., 899 F.2d 79 (1st Cir. 1990). Settlement helps ensure prompt and effective cleanups of sites contaminated by hazardous substances and provides a means of replenishing the Superfund, which funds EPA cleanups. EPA has long demonstrated its preference for avoiding CERCLA litigation by entry into settlements. See Interim CERCLA Settlement Policy, 50 Fed. Reg. 5034 (Feb. 5, 1985). That preference was specifically endorsed by Congress in the 1986 amendments to CERCLA, which codified procedures for reaching settlements in CERCLA Section 122, 42 U.S.C. § 9622. See H.R. Rep. 99-253(I) at 101, reprinted in 1986 U.S.C.C.A.N. 2883 ("Negotiated private party actions are essential to an effective program for cleanup of the nation's hazardous waste sites and it is the intent of this Committee to encourage private party cleanup at all sites.").

CERCLA Section 113(f)(3)(B) promotes settlement by providing PRPs with the right to bring contribution claims against other PRPs if they resolve their liability to the United States or a state in an administrative or judicially approved settlement. See, e.g., Matter of Reading Co., 115 F.3d 1111, 1119 (3rd Cir. 1977). At the same time, Section 113(f)(2) immunizes settling parties from liability for contribution for the matters addressed in the settlement. Congress specifically intended that the contribution bar would encourage settlements by providing PRPs with a measure of finality in return for their willingness to settle. See H.R. Rep. No. 99-253, Part I, 90th Cong., 1st Sess. 80 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 2862.[9]

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[9] Section 113 contains other important limitations applicable to claims for contribution. For example, Congress made sure that any contribution action brought by a party that had resolved its liability to the United States was subordinate to the right of the United States to pursue other

If PRPs whose claims fall under Section 113 can do an end run around contribution protection by bringing a Section 107 action, a strong incentive for settlement will be eroded. From the settling party's perspective, the importance of contribution protection is no different whether the contribution plaintiff has incurred costs performing work or has reimbursed the United States' costs, and the contribution bar protects settlors from both kinds of contribution claims. The legislative history of SARA shows that Congress intended Section 113(f) to govern all CERCLA claims for contribution, including claims by parties that perform work. See H.R. Rep. No. 99-253 (I), at 80, 1986 U.S.C.C.A.N. 2835, 2862 ("Parties who settle for *all or part of a cleanup* or its costs, or who pay judgments as a result of litigation, can attempt to recover some portion of their expenses and obligations in contribution litigation from parties who were not sued in the enforcement action or who were not parties to the settlement.")(emphasis added). See also id. at 79, 1986 U.S.C.C.A.N. at 2861 (Section 113 "clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances."); Senate Comm. on Environment and Public Works, Superfund Amendments and Reauthorization Act of 1986, S. Rep. No. 99-11, 99 Cong. (1985) at 44. In United Techs., 33 F.3d at 101, after reviewing the legislative history, the First Circuit summarized: "These statements show beyond serious

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liable parties (including entering into settlements that provide contribution protection), thereby ensuring that the United States is made whole before contribution plaintiffs seek their recovery. 42 U.S.C. § 9613(f)(3)(C). Congress also adopted a separate statute of limitations applicable to claims for contribution. 42 U.S.C. § 9613(g)(3). Obviously, the entire structure Congress set up in Section 113 would be undermined if parties could avoid these limitations by bringing their contribution claims under Section 107.

question that the drafters intended contribution, as that term is used in [Section 113], to cover parties' disproportionate payments of first-instance costs [i.e., costs for performing the work] as well as parties' disproportionate payments of reimbursed costs." United Techs., 33 F.3d at 102. See also Akzo, Akzo Coatings, Inc., v. Aigner Corp., 30 F.3d 761, 764-6 (7th Cir. 1994)

S/P's contention that Section 107(a)(4)(B) provides an independent right to cost recovery for a whole category of claims governed by Section 113 is untenable because it renders many of Section 113(f)'s substantive requirements, including contribution protection, largely superfluous.[10/] Congress would not have adopted a statutory scheme that directly applies to claims for contribution for work performed, only to allow claims for such costs to be brought under Section 107(a)(4)(B). ARC implies no such intent. ARC held only that one class of responsible party – a party in ARC's position -- could sue under Section 107. As to other PRPs – that have a Section 113 cause of action, nothing in ARC compels or even suggests that courts should ignore the structure and policies under Section 113 that compel parties seeking contribution to pursue that claim only through Section 113.

4. ARC Does Not Disturb the Binding Precedent and Many Other Circuit Precedents that Claims for Contribution Must Be Brought Under Section 113(f). ARC also does not stand for the proposition that courts should put aside their longstanding view that PRPs that have (or had) claims for contribution under Section 113 can only use Section 113. Prior to

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[10/] S/P argue that the Court rejected arguments that allowing a PRP like ARC to sue under Section 107 would eviscerate contribution protection provided to settlors because a settling defendant could counterclaim for contribution against the ARC plaintiff and thus "blunt any inequitable distribution." ARC at 2339; S/P Brief at 15. Whatever may be the case as to parties that have a true Section 107 action, S/P are limited to a claim for contribution and their claim is subject to the contribution protection Congress provided. Thus, it is not an answer to say that the Settling Defendants can counterclaim.

Aviall, the circuit courts, including the Eleventh Circuit Court of Appeals, uniformly concluded that a PRP cannot rely on Section 107(a) to seek cost recovery from another PRP; rather, a party that is subject to CERCLA liability is limited to seeking contribution from other jointly liable parties in accordance with Section 113(f). Redwing Carriers v. Saraland Apartments, 94 F.3d 1489, 1496 (11th Cir. 1996) (settlor under a CERCLA administrative settlement has a cause of action under Section 113(f)(3)(B)).[11/]

The Eighth Circuit in ARC I discussed the history and rationale behind these decisions. Because the language "any person" in Section 107 is broad enough to encompass PRPs seeking contribution, PRPs began to try to assert their claims for contribution under Section 107, in an effort to evade Section 113's congressionally-mandated constraints such as contribution protection and a shorter statute of limitations. "[T]o prevent § 107 from swallowing § 113, courts began directing traffic, . . . steer[ing] liable parties away from § 107 and requir[ing] them to use § 113." Id. at 832. See, e.g., Colorado & E. R.R., 50 F.3d 1534, 1536 (10th Cir. 1995); Akzo Coatings, Inc., v. Aigner Corp., 30 F.3d 761, 764-6 (7th Cir. 1994); New Castle County v. Halliburton NUS Corp., 111 F.3d 116, 1119-24 (3rd Cir. 1997); United Techs. Corp. v. Browning-Ferris Ind., 33 F.3d 96, 101 (1st Cir. 1994).

[11/] See also, e.g., Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 935 (8th Cir. 1995); Bedford Affiliates v. Sills, 156 F.3d 416, 423-425 (2d Cir. 1998); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 356 (6th Cir. 1998); Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R., 142 F.3d 769, 776 (4th Cir. 1998), cert. denied, 525 U.S. 963 (1998); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1121-1123 (3d Cir. 1997); United States v. Colorado & E. R.R., 50 F.3d 1530, 1534-1536 (10th Cir. 1995); United Techs. Corp., 33 F.3d at 103; Akzo Coatings, 30 F.3d at 764; Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th 1989); Dico, Inc. v. Amoco Oil Co., 340 F.3d 525 (8th Cir. 2003).

As discussed above, in ARC the Court clarified that not all claims between PRPs are for contribution, and specifically, that a PRP in ARC's circumstance has a cause of action for cost recovery under Section 107, not a claim for contribution under Section 113. Thus, ARC overrules the various circuit decisions that held that there was no Section 107 cause of action in circumstances where the plaintiff, while potentially liable, had not yet been compelled to act by a government enforcement action or settlement under Section 106 or 107 and thus had not yet extinguished a common liability.[12] However, ARC does not overrule the Eleventh Circuit and others circuit court decisions that claims for costs expended in performing a cleanup pursuant to a judicial or administrative settlement are claims for contribution and are limited to a contribution action under Section 113(f).[13] Parties, like S/P, that have a cause of action for

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[12] See, e.g., Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989).

[13] See, e.g., Bedford Affiliates v. Sills, 156 F.3d 416, 423-425 (2d Cir. 1998); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1121-1123 (3d Cir. 1997); Redwing Carriers v. Saraland Apartments, 94 F.3d 1489, 1496 (11th Cir. 1996); Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 935 (8th Cir. 1995); United States v. Colo. & E. R.R. Co., 50 F.3d 1530, 1534-1536 (10th Cir. 1995); United Techs. Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 103 (1st Cir. 1994); Akzo Coatings, Inc. v. Aignor Corp., 30 F.3d 761, 764 (7th Cir. 1994). To be sure, the precise rationale in some of these cases are affected by ARC. For example, the Eleventh Circuit in Redwing and the First Circuit in United Technologies based their holdings that parties to an administrative settlement are limited to a contribution action under Section 113 in part on their view that only the governments and "innocent parties" can use Section 107(a). Redwing, 94 F.3d at 1496; United Technologies, 33 F.3d at 99. However, ARC does nothing to call into question the reasoning of these courts that claims that are for contribution must be brought under Section 113. Echoing the Eighth Circuit's concerns, the First Circuit explained, to find otherwise would "produce[] judicial nullification" of Section 113(g)'s statute of limitations provisions and "emasculate[] the contribution protection component of CERCLA's settlement framework." Id. at 101, 102.

The Eleventh Circuit recently confirmed that a PRP that enters into a qualifying settlement for site cleanup has a cause of action for contribution toward the cleanup costs under

contribution and are merely trying to forum shop for a better deal than Congress gave them, are "still required to use § 113, thereby ensuring its continued vitality. . . . This resolution gives life to each of CERCLA's sections, and is consistent with CERCLA's goal of encouraging prompt and voluntary cleanup of contaminated site." ARC I, 459 F.3d at 836-37.[14]

C. Permitting S/P to Bring a Section 107 Action Against the Settling Defendants Renders Section 122(g) Superfluous

Similarly, a ruling by this Court limiting S/P's claim against the Settling Defendants to Section 113 is necessary to give meaning to all parts of CERCLA and to not render Section 122(g) meaningless. Congress passed Section 122(g), 42 U.S.C. § 9622(g) to relieve *de minimis* parties from "prolonged and costly litigation." (131 Cong. Rec., H11086) (Dec. 5, 1985)

Section 113(f)(3)(B). Atlanta Gas Light Co. v. UGI Utilities, Inc., 463 F.3d 1201 (11th Cir. 2006) (rejecting the assertion that it lacked jurisdiction because Aviall only held that parties did not have a right to contribution under Section 113(f)(1) unless they had been sued, but discussed Section 113(f)(3)(B) only in dicta).

[14] In footnote 6, despite its unequivocal statements in Aviall and again earlier in the opinion that the remedies provided by Sections 107 and 113 are clearly distinct," see supra, the Court said that "We do not suggest that §§ 107(a)(4)(B) and 113(f) have no overlap." For all the reasons discussed in this brief, however, we do not believe that this is a situation in which a party has overlapping remedies. If this Court nevertheless finds that S/P have overlapping remedies under Sections 107 and 113, consistent with the statutory scheme and policies of Section 113 and the rationale of circuit court precedent, this Court should find that S/P "are still required to use § 113, thereby ensuring its continued vitality." 127 S. Ct. at 2335. However, if this Court finds that S/P may pursue a cost recovery action under Section 107, there are numerous additional issues that must be addressed. The United States would request the right to file an additional amicus brief on other legal issues, which would include, at a minimum, whether the liability would be joint and several (which the United States does not think is the case), whether statutory contribution protection would apply, and if not, whether common law contribution protection would apply.

(statement of Rep. Glickman).[15] With the *de minimis* provisions, Congress was attempting to encourage expedited settlements and to eliminate the practice that had evolved whereby *de minimis* parties were being sued by major PRPs and were sustaining enormous transaction costs, well above their fair share of liability for a Superfund site. To prevent this injustice, Congress passed Section 122(g), which requires EPA to enter into "final settlements" with *de minimis* parties "as promptly as possible." 42 U.S.C. § 9622(g)(1). Section 122(g)(5) further ensures Congressional intent is met by providing *de minimis* parties who settle with the United States with protection from contribution regarding matters addressed in the final settlement. This protection is to ensure that *de minimis* parties do not expend litigation costs and avoid lawsuits altogether against such parties.

In this case, after carefully considering all of the evidence, EPA determined that the Settling Defendants met the statutory requirements to be considered *de minimis* parties, resulting in a *de minimis* settlement. If S/P are allowed to sue Settling Defendants under Section 107, and S/P's claim is not barred, then Settling Defendants are subject to the very lawsuit the *de minimis* provisions of CERCLA were intended to prevent. Such a ruling renders Section 122(g) superfluous.

II. S/P's Factual Arguments Regarding the Scope of the PCD and the Relationship of Their Claims Against the Settling Defendants to the Claims They Resolved are Incorrect.

A. S/P Are Required to Conduct the Work Specified by the Partial Consent Decree in Settlement of a 106 and 107 Enforcement Action Brought Against Them. S/P argue

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[15] A party qualifies for *de minimis* status where the amount of hazardous substances contributed by that party and the toxic or other hazardous effects of the substances contributed by that party are minimal in comparison to other hazardous substances at the facility. 42 U.S.C. § 9622(g)(1)(A)(i)(ii).

that even if parties compelled to perform work pursuant to a settlement with the United States must use Section 113, they still have a Section 107 action because S/P are not seeking the recovery of costs "compelled" by the PCD. S/P make the untenable argument that work required by the PCD is somehow not compelled. In essence, S/P argue that only a portion of the investigation and cleanup work they are doing under the PCD is actually "compelled" by the PCD, and that other portions of the work they are doing under the PCD are not "compelled" by the PCD, but rather constitute "volunteer" work. See generally, Part IV of S/P Response.

In fact, all of the cleanup "Work" being conducted by S/P under the terms of the PCD, as clarified by the Stipulation and Agreement of the Parties Clarifying Partial Consent Decree ("Stipulation"), is "compelled" by the PCD. Subsequent to entry of the PCD, S/P contended that they were not required to cleanup properties which they alleged were contaminated by other parties. The United States disagreed with S/P about the source of contamination and the scope of S/P's obligations under the PCD. That disagreement was resolved through the Stipulation. The Stipulation clarifies S/P's cleanup and investigative obligations under the PCD (collectively described as the "Work").[16/]

The PCD and the Stipulation undermine S/P's argument. They require S/P to perform numerous tasks, including the sampling and clean up of all of the contamination in specific residential properties in certain geographic areas of Anniston irrespective of S/P's beliefs

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[16/] The Stipulation was negotiated with the considerable assistance of the Court appointed Legal and Technical Special Masters (Messrs. Thomas Dahl and Douglas Jones). To ensure that clean up would be performed without further dispute and delay, the Stipulation made certain that S/P are obligated under the PCD to clean up PCBs and hazardous substances in geographical locations in Anniston regardless of whether S/P believed the contaminants were generated by other parties.

regarding the source of such contamination. Paragraph 28 of the Stipulation is directly on point.[17] It states in pertinent part:

> Defendants [S/P] maintain that the PCBs and lead that have come to be located in certain areas of Anniston and its environs originated in whole or part from persons other than Defendants [S/P]. **Defendants [S/P] herein agree, however, not to raise any such claims or defenses against the EPA or the United States in any administrative or judicial forum solely with respect to Defendants [S/P's] obligations under this Agreement or the PCD**. . . .

Thus, Paragraph 28 of the Stipulation makes it clear that the Work required of S/P under the PCD is compulsory and not subject to any argument or dispute by S/P regarding the origin of the contamination. The Stipulation specifically prohibits S/P from disputing that they are obligated to do the Work under the PCD because they "maintain" that certain waste may have come from other persons. Thus, it is clear that all of the obligations of the PCD are required by the PCD and are not voluntary.

B. Under the PCD, S/P are Required to Clean Up PCBs, Regardless of Their Source. In support of their position that S/P are only compelled under the PCD and Stipulation to address their own contamination and that their claim against the Settling Defendants is for costs S/P are expending outside the scope of their obligations under the PCD, S/P assert that the Anniston PCB Site consists solely of S/P's contamination. As already shown above, Par. 28 of the Stipulation establishes that S/P are compelled to perform work under the PCD regardless of

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[17] In footnote 7 of their Response, S/P quote the first sentence from Paragraph 28, but neglect to direct the Court to the next crucial sentence.

the source of the contaminants. In addition, S/P's factual premise - that the PCB Site consists solely of S/P's contamination - is wrong.

The Anniston PCB Site has always included PCBs from sources other than S/P.[18] Until recently, S/P agreed. In S/P's complaint against the Settling Defendants in this case, S/P repeatedly assert claims that the Settling Defendants, among others, contributed PCBs to the Anniston PCB Site.[19] See S/P Complaint, Heading, pg. 16. ("The Foundries arranged for the disposal of PCB-contaminated foundry sand at the Anniston PCB and Lead Sites.") See S/P Complaint, Paragraph 89. ("The Foundries arranged for the disposal of PCB-contaminated foundry sand at the Anniston PCB and Lead Sites.") See S/P Complaint, Paragraph 114. ("Huron Valley disposed of PCBs and other hazardous waste at the Anniston PCB and Lead Sites.")

Moreover, nearly three years ago, S/P began a campaign to halt EPA's entry into the AOC with the Settling Defendants. They did so for one reason; S/P argued that the Settling Defendants were significant contributors of PCBs to the Anniston PCB Site.[20] In a December

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[18] The United States has provided lengthy discussions of the Anniston PCB and Lead "Site" issues in its previous *Amicus* brief and in EPA's Response to Comments on the AOC which were provided to the Court by the Settling Defendants. Interestingly, at that point in time, S/P were claiming that the Anniston PCB Site was comprised of three CERCLA "facilities" some of which also had other parties' PCBs. See S/P, Comments on Proposed AOC, Exhibit C (Legal Position), pg. 21.

[19] While EPA agreed that the Settling Defendants contributed to some of the PCB contamination at the Anniston PCB Site, EPA concluded that they were, at most, *de minimis* contributors in accordance with the statutory requirements for *de minimis* status.

[20] See Docket # 125, 02-CV-0749, December 3, 2004, *Defendants Pharmacia Corporation's and Solutia Inc.'s Response to the United States' Motion to Reconsider the Court's Order of November 18, 2004, and Motion to Strike Letter to the Court*, pg. 5; Docket # 137, May 9, 2005, *Defendants Pharmacia Corporation's and Solutia Inc's Motion for an Order to Show Cause for*

2004 brief to Judge Clemon of this Court, S/P stated, "[t]he key is that [S/P's] right to hold other parties responsible for their contribution to the Anniston PCB Site is clearly related to [S/P's] performance of the [PCD]."[21/] Emphasis added.

After having sued the Settling Defendants for their contribution to the PCB contamination at the Anniston PCB Site and attempting to block the United States' settlement with the Settling Defendants on the grounds that the Settling Defendants were significant contributors to the PCB contamination at the Anniston PCB Site, and after several briefings and hearings in which they presented facts which they maintained showed that the Settling Defendants were significant contributors to the PCB contamination at the Anniston PCB Site, S/P now question whether any of that "makes sense," because they now take the position, based on a change in the law, that all of the contamination at the Anniston PCB Site is from S/P's Anniston Plant. See S/P Response, fn. 10. The truth, however, is evident. While the law changes, the facts do not. S/P attempt to make this startling shift in position not because of any recent change in the law, but rather, to end run around the contribution protection afforded the Settling Defendants in the AOC.

S/P now aver that the Anniston PCB Site is defined as containing only S/P's wastes, and therefore, that the United States' pending complaint under CERCLA § 106 and § 107, as well as

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Contempt of the Court's November 17, 2004, and March 8, 2005 Orders and the Anniston PCB Site Partial Consent Decree, pg. 3. (Citing Nov. 17, 2004 Order ". . . Defendants may pursue contribution claims against other PRPs for polychlorinated biphenyl ("PCB") releases to the Anniston PCB site.").

[21/] Judge Clemon also understood that the Anniston PCB Site included other parties' wastes. In his June 2, 2005, Order, Judge Clemon ruled that "[t]he Defendants [S/P] would not have agreed to the RPCD in the absence of a clause preserving their right to contribution from other Potentially Responsible Parties ("PRPs") for contamination of the Anniston PCB Site." Emphasis added. See Docket # 144, 02-CV-0749.

the PCD and orders thereunder do not cover PCB waste from other sources.[22] S/P's argument follows that if no other parties' wastes are at the Anniston PCB Site then those parties' wastes must be at the Anniston Lead Site where S/P will argue that they are not subject to a CERCLA § 106 or § 107 enforcement action and that they are likewise not compelled or obligated to perform associated Work required by the PCD.[23] S/P's argument is directly at odds with the geographical Work zones described in detail in the Stipulation. (See pp. 4-10 of the Stipulation describing "The Work" in Zones A, B, C and D.) Under the PCD, as clarified by the Stipulation, S/P are required to conduct sampling and clean up in the Work zones and those obligations are wholly unrelated to the source of the contamination in the zones. Undoubtedly, S/P will be cleaning up, pursuant to its obligations under the PCD, contaminants which originated from their operations, and possibly the operations of others in the Anniston area.

No shift in case law can alter the facts. S/P's previous actions belie their current argument. S/P sued the Settling Defendants for the Anniston PCB Site and opposed the *de minimis* Anniston PCB Site settlement in the AOC because they maintained that the Settling Defendants were significant contributors to the PCB contamination at the Anniston PCB Site. Obviously, S/P could not have sued the Settling Defendants to recover costs for cleaning up only their own contamination. If S/P truly believed that the Anniston PCB Site was solely comprised of S/P's waste, they would never have taken those actions. Everyone involved in this matter,

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[22] S/P also misread the definitions of the Sites by contending that the term "including" in the definitions is limiting. The words "includes" or "including" are commonly recognized as terms of enlargement, not of limitations. See In Re N.P. Min. Co., Inc., 963 F. 2d 1449 (11th Cir. 1992); United States v. Gertz, 249 F. 2d 662 (9th Cir. 1957).

[23] Also see discussion regarding the Sites at pp. 7-13 of the United States' Amicus Curiae Memorandum filed on May 25, 2006.

including S/P, the United States, and the Court, knew that the Anniston PCB Site includes other parties' PCBs. The legal impact of these facts under ARC is that S/P are limited to seeking contribution pursuant to CERCLA § 113 for other parties' contribution of PCBs to the Anniston PCB Site.

S/P further contend that the definitions of the Sites "control" their "obligations" under the Consent Decree. (P. 9) They are wrong. One paragraph in the definition section of the PCD does not control S/P's work obligations. The entire PCD, voluminous attachments thereto, the Stipulation and work plans submitted by S/P as required by the PCD collectively define S/P's work obligations.[24] Moreover, as already shown above, the Stipulation requires S/P to clean up properties in described geographic zones even though S/P maintain that some of the PCBs they are required to remediate originated in whole or in part from persons other than themselves. The source of the contamination on the properties in the zones set out in the Stipulation is of no consequence with respect to S/P's obligations to conduct sampling and remediation of those properties. All the terms of the PCD, its attachments, the Stipulation and work plans "control" S/P's obligations under the PCD, not just one paragraph.

CONCLUSION

S/P are not in the procedural circumstances that the Supreme Court found ARC. Unlike ARC, S/P were subject to an EPA enforcement action under §§ 106 and 107 of CERCLA, and

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[24] For example, Paragraph 6 of the PCD states that S/P shall finance and perform the RI/FS Work, Removal Work, Removal Order Work, and Non-time Critical (NTC) Removal Agreement and the Removal Order and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by S/P and approved by EPA. The work to be performed in those PCD and attachments covers over thirty pages and is not limited by the definitions of Sites.

unlike ARC, S/P entered into a settlement agreement with EPA. S/P, therefore, do not have a § 107 claim, but are required to use §113(f) of CERCLA. In addition, all of the work that S/P are performing in Anniston is required by the PCD, and the source of the contamination they are investigating and cleaning up is irrelevant to their obligations under the PCD.

Respectfully submitted,

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I hereby certify that on July 27, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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