Nos. 06-56727 & 07-55027

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF COLTON,
Plaintiff-Appellee,

-v.-

AMERICAN PROMOTIONAL EVENTS, INC. - WEST, et al.,
Defendants-Appellees,

and

PYRO SPECTACULARS, INC. & GOODRICH CORPORATION,
Defendants-Appellees/Cross-Appellants,

-v.-

UNITED STATES DEPARTMENT OF DEFENSE,
Third-party-defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

RESPONSE BRIEF FOR THIRD-PARTY DEFENDANT-APPELLEE THE UNITED STATES DEPARTMENT OF DEFENSE

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STATEMENT OF JURISDICTION

Plaintiff-Appellant the City of Colton filed suit against numerous defendants (but not the United States Department of Defense ("United States")) asserting claims under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2002, and various provisions of state law. Excerpts of Record ("ER") 1-37. Colton invoked the subject-matter jurisdiction of the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1331. ER 3.

Defendant Goodrich Corporation asserted cross-claims against other defendants, but did not assert claims against any third-party defendant. See Goodrich Supplemental Excerpts of Record ("SER") 105-22. Goodrich also asserted counterclaims against Colton. Goodrich SER 26, 33-41. Defendant Pyro Spectaculars, Inc. ("PSI") asserted counterclaims against Goodrich and cross-claims against five third-party defendants, including the United States. PSI SER 14-22; US SER 1-12. Both Goodrich and PSI also had deemed cross-claims against other defendants, but no deemed cross-claims under CERCLA Section 107(a)(4)(B) against any third-party defendants, including the United States. PSI SER 38.

On October 31, 2006, the district court entered judgment against Colton. ER 110-25. Pursuant to Fed. R. App. P. 4(a)(1)(B), Colton filed a timely notice of appeal on November 28, 2006. ER 126-28. On October 31, 2006, the court also

dismissed all of the defendants' counterclaims and cross-claims. ER 122. Goodrich filed a timely Rule 59(e) motion to alter or amend the judgment with respect to its claims against Colton and certain defendants other than the United States, which the district court denied on December 13, 2006. Goodrich SER 1-5. Defendants Goodrich and Pyro Spectaculars filed timely cross-appeals of the dismissal of their counterclaims and certain cross-claims on December 15, 2006, and November 30, 2006, respectively. Goodrich SER 22-24; PSI SER 199. This Court has jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the judgment with respect to the United States should be affirmed because no party has appealed the dismissal of any claim against the United States.
2. If a party has appealed the dismissal of any claim against the United States, whether this Court should remand to the district court for further consideration in light of United States v. Atlantic Research Corp., 127 S. Ct. 2331 (2007).

STATEMENT OF THE CASE

A. Introduction

These appeals relate to alleged perchlorate and trichloroethylene contamination near the City of Colton and arise from one of several federal and

state lawsuits pertaining to the Rialto-Colton groundwater basin.[1] In these particular appeals, the United States' interests are implicated mainly by the cross-appeals filed by Goodrich and PSI regarding the dismissal of some of their cross-claims for recovery of costs in responding to the contamination. Goodrich and PSI assert that the district court erred by dismissing allegedly properly pleaded claims for recovery of Goodrich's and PSI's response costs under CERCLA Section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B). Neither party has appealed the dismissal of any claim against the United States, however.

B. Statutory and Regulatory Background: Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

Congress enacted CERCLA (also commonly known as "Superfund"), Pub. L. No. 96-510, codified as amended, 42 U.S.C. §§ 9601–9675, in 1980 in response to the serious environmental and health dangers posed by contamination by hazardous substances. United States v. Bestfoods, 524 U.S. 51, 55 (1998). CERCLA establishes a comprehensive scheme for the cleanup of contaminated sites and the payment of costs by those liable for the contamination. CERCLA, as amended in 1986 by the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613, "grants the President broad power to command government agencies and private parties to clean up hazardous waste

[1] For example, this Court heard argument on unrelated issues arising out of another CERCLA lawsuit involving the Rialto-Colton Basin in October 2007. Goodrich Corp. v. U.S. Dep't of Def., 9th Cir. Nos. 05-56694, 05-56749, 06-15162, 06-16019.

sites." Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994).

CERCLA Section 107(a)(4)(A) authorizes the United States, as well as States and Indian Tribes, to seek recovery of response costs through a suit against four categories of "covered persons," commonly referred to as "potentially responsible parties" or "PRPs." These four categories of PRPs are:

(1) owners and operators of facilities at which hazardous substances are located;

(2) past owners and operators of such facilities at the time hazardous substances were disposed of;

(3) persons who arranged for disposal or treatment of hazardous substances; and

(4) certain transporters of hazardous substances to the site.

42 U.S.C. § 9607(a)(1)-(4). A PRP can escape liability for response costs only if it can establish that it qualifies for one of the enumerated defenses in Section 107(b), or some other narrowly defined exclusion from liability.[2] 42 U.S.C. § 9607(b).

Assuming that a PRP cannot avail itself of one of the enumerated defenses or exclusions to liability, Section 107(a)(4)(A) provides that the United States, individual States, and Indian tribes are entitled to recover from PRPs "all costs of removal or remedial action incurred" that are "not inconsistent with the national contingency plan." [3] 42 U.S.C. 9607(a)(4)(A).

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[2] See, e.g., 42 U.S.C. §§ 9607(n) (liabilities of fiduciaries and certain exclusions), 9607(q) (contiguous properties), 9607(r) (bona fide prospective purchasers).

[3] "The national contingency plan specifies procedures for preparing and (continued...)

In addition, Section 107(a)(4)(B) provides that PRPs "shall be liable for [] any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). The Supreme Court held in Atlantic Research that the PRP before it, which had incurred cleanup costs but did not conduct its cleanup under the compulsion of a CERCLA settlement or judgment, could sue under Section 107(a)(4)(B). Atlantic Research, 127 S. Ct. at 2339. The Court expressly declined to decide whether a Section 107(a)(4)(B) cause of action would be available to PRPs in other situations, for example where the PRP seeks recovery of money it spent in cleaning up a site pursuant to a consent decree following a suit under § 106 or § 107(a) and therefore did "not incur costs voluntarily but d[id] not reimburse the costs of another party." Atlantic Research, 127 S. Ct. at 2338 n.6.

Before CERCLA was amended by SARA in 1986, "it was not clear whether a potentially responsible person under section 107 could recover from other potentially responsible persons that portion of its clean-up costs that exceeded its fair share." New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1122 (3rd Cir. 1997). Congress enacted Section 113(f) in 1986 as part of the SARA amendments to address specifically the circumstances in which a PRP may seek

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[3](...continued)
responding to contaminations and was promulgated by the [EPA] pursuant to CERCLA section 105, 42 U.S.C. § 9605 (2000 ed. and Supp. I). The plan is codified at 40 C.F.R. pt. 300 (2004)." Cooper Indus. v. Aviall Servs., 543 U.S. 157, 161 n.2 (2004).

contribution from other PRPs. See Cooper Indus. v. Aviall Servs., 543 U.S. 157, 162-63 (2004). Congress authorized contribution actions by PRPs in two carefully defined circumstances. First, Section 113(f)(1) provides in pertinent part that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or under [Section 107(a)]." 42 U.S.C. § 9613(f)(1). Second, Section 113(f)(3)(B) provides:

> [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 party to a settlement referred to in [Section 113(f)(2), 42 U.S.C. 9613(f)(2)].

42 U.S.C. 9613(f)(3)(B).

C. Statement of the Facts

The City of Colton brought suit to recover costs it incurred responding to the alleged contamination of its groundwater wells with perchlorate and trichloroethylene.[4] ER 13-15. The district court granted summary judgment in favor of the defendants on Colton's CERCLA claims because Colton did not properly initiate a removal action and failed to follow the National Contingency Plan ("NCP") when it incurred the costs that were the subject of the suit.[5]

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[4] The district court did not decide whether perchlorate is a hazardous substance under CERCLA and that issue is not presented here on appeal. See ER 114 n.4.

[5] Colton does not appeal the dismissal of its CERCLA cost recovery claims. Colton Br. 1-2, 54 n.18. Colton appeals only the dismissal of it declaratory

(continued...)

ER 113-18. Upon dismissing all of the federal claims, the court declined to exercise supplemental jurisdiction over Colton's remaining state law claims. ER 121.

Some of the defendants sued by Colton asserted counterclaims and cross-claims against the other existing defendants and additional third-party defendants. The claims of two defendants are relevant to the cross-appeals. On September 28, 2005, PSI filed "cross-claims" for contribution and declaratory relief pursuant to CERCLA Section 113 against the United States and several other third-party defendants. US SER 1-12. PSI is the only appellant that affirmatively brought claims against the United States in this case. PSI also brought counterclaims against Goodrich. PSI SER 14-22.

On December 23, 2005, Goodrich asserted cross-claims against several defendants. Goodrich SER 105-22. Goodrich also filed counterclaims against Colton. Goodrich SER 26, 33-41. Goodrich, however, did not bring any affirmative claims against the United States then or at any other time in this particular case.

On September 29, 2005 – before the United States had entered an appearance in this case – the parties that had been sued by Colton at that time submitted a "Stipulation for Entry of Case Management Order re Deemed Cross-Claims" with the district court. See US SER 16. The United States and several

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[5](...continued)
judgment claim. Colton Br. 2.

other third-party defendants were not parties to that stipulation. See id. The court entered the stipulation as a case management order on October 4, 2005. PSI SER 1-3. The order provided for mutual "deemed" cross-claims for contribution under CERCLA Section 113 and declaratory relief, if applicable, by and between each separately represented defendant, cross-defendant, and third-party defendant. PSI SER 2. The order further provided for the automatic "dismissal of all deemed cross-claims for contribution or declaratory relief" upon the dismissal of any of the principal claims against any defendant. PSI SER 2.

In February 2006, counsel representing several different parties contacted counsel for the United States to discuss a proposed amendment to the deemed cross-claims provision in the October 4, 2005 case management order. US SER 16. The proposed amendment provided that each defendant also would be asserting a deemed cross-claim under CERCLA Section 107(a) for response costs. Id. On several occasions, the United States advised counsel that the United States would not consent to this portion of the stipulation. US SER 16-17. Thus, the proposed stipulation was submitted to the court with the confirmed understanding that the deemed Section 107 claims would not apply to the United States. US SER 17. Consistent with the mutual understanding of the parties, the court entered a second case management order providing that the additional deemed cross-claims applied only to defendants, not cross-defendants, a term which includes the United States. PSI SER 38.

When the district court granted summary judgment in favor of the

defendants on Colton's claims, it also dismissed all of the defendants' counterclaims and cross-claims on the ground that they were derivative of Colton's original cost-recovery action. SER 122. None of the defendants, except Goodrich and PSI, disputed that the court correctly terminated those claims. On December 13, 2006, the court denied Goodrich's Rule 59(e) motion to alter the judgment with respect to certain claims to recover response costs under Section 107(a)(4)(B) that Goodrich argued it had alleged against Colton and several defendants. Goodrich SER 1-5. The court held that Goodrich had not pleaded or received any deemed Section 107(a)(4)(B) claims independent of its Section 113 claims for contribution, which Goodrich acknowledged were properly dismissed. Goodrich SER 3-5. The court also denied PSI's improper and untimely attempt to "join" in Goodrich's Rule 59(e) motion, which nevertheless failed for the same reasons that the court denied Goodrich's motion. Goodrich SER 1 n.1, 4 n.6.

SUMMARY OF ARGUMENT

Neither of the cross-appellants have appealed the dismissal of any claims against the United States, accordingly the judgment with respect to the United States should be affirmed.[6] Goodrich argues on appeal that the district court erred by dismissing its Section 107(a)(4)(B) claims. However, Goodrich did not have a Section 107(a)(4)(B) claim against the United States. Moreover, Goodrich

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[6] The United States is not addressing any of the parties' arguments in the main appeal involving Colton's claims because the United States is not a party to any of Colton's claims.

explicitly conceded in district court that it did not have a Section 107(a)(4)(B) claim against the United States and that the dismissal of its deemed Section 113(f) contribution claims was proper.

PSI argues on appeal only that the district court erred by dismissing its deemed Section 107(a)(4)(B) claims. However, the United States was not subject to any such deemed cross-claims. Although PSI pleaded a claim for contribution under CERCLA 113(f) against the United States, PSI does not appeal the dismissal of this claim and that dismissal was proper in all events. Because PSI never lodged a proper objection to the dismissal of its derivative claims and if it did lodge a proper objection, sought different relief than it seeks now in this Court, its cross-appeal should be rejected.

If this Court concludes that either Goodrich or PSI has appealed the dismissal of any claims against the United States and properly preserved those arguments, the United States respectfully requests that this Court remand to the district court for further consideration of whether either Goodrich or PSI has properly asserted claims for recovery of costs under CERCLA Section 107(a) in light of United States v. Atlantic Research Corp., 127 S. Ct. 2331 (2007).

STANDARD OF REVIEW

This Court reviews dismissals of cross-claims and counterclaims de novo. See Rodriguez v. Panayiotou, 314 F.3d 979, 983 (9th Cir. 2002). The district court's denial of Goodrich's Rule 59(e) motion to alter the judgment is reviewed for abuse of discretion. Carter v. United States, 973 F.2d 1479, 1488 (9th Cir.

1992).

ARGUMENT

I. Goodrich's Appeal Does Not Involve Any Claims Against the United States.

Goodrich asserts that it pleaded independent cross-claims and counterclaims for recovery of response costs under CERCLA 107(a) against Colton and certain defendants, that it likewise had independent claims for recovery of response costs under the district court's second deemed cross-claim order, and that the district court erred by failing to recognize that those claims were independent of Colton's claims and should have survived summary judgment on Colton's claims. Goodrich Br. 11-24. None of those arguments applies to the United States because Goodrich asserted no such claims against the United States, as Goodrich conceded in district court. US SER 33. Thus Goodrich's cross-appeal – even if successful – presents no ground for altering the judgment with respect to the United States.

Goodrich did not assert any claims against the United States in its pleadings. Goodrich pleaded cross-claims against several defendants, including Emhart Industries, Inc., Black & Decker, Inc., Kwikset Locks, Inc., and American Promotional Events, Inc. – West. Goodrich SER 105-22. Goodrich also asserted counterclaims against Colton. Goodrich SER 25-41. None of Goodrich's pleadings in this suit included any claims against the United States.

Nor did Goodrich have any deemed cross-claims against the United States

to recover response costs under Section 107(a)(4)(B) because the only deemed cross-claim order that allegedly asserts a claim under Section 107(a)(4)(B) did not apply to the United States. The first case management order, entered on October 4, 2005, did not contain a claim to recover response costs under Section 107(a)(4)(B). Instead, it provided only for mutual "deemed" cross-claims for contribution under CERCLA Section 113 and declaratory relief, if applicable, by and between each separately represented defendant, cross-defendant, and third-party defendant. PSI SER 1-3. The United States and several other third-party defendants were not parties to the stipulation that led to the first case management order. US SER 16. The order further provided for the automatic "dismissal of all deemed cross-claims for contribution or declaratory relief" upon the dismissal of any of the principal claims against any defendant. PSI SER 2. Goodrich does not assert that this order contains a deemed Section 107(a)(4)(B) claim. See Goodrich Br. 17 (asserting only that the second case management order contained a Section 107 cross-claim).

The second case management order does not apply to the United States. As explained supra at 8, the United States repeatedly advised counsel that the United States would not consent to the portion of a proposed new stipulation to amend the October 4, 2005 case management order that would provide that each defendant also would be asserting a deemed cross-claim under CERCLA Section 107(a) for response costs. US SER 16-17. Consistent with the mutual understanding of the parties, the court entered a second case management order providing that the

deemed cross-claims applied only to defendants, not cross-defendants, PSI SER 38, and thus no party received any deemed Section 107(a)(4)(B) cross-claim against the United States at any time in this case.

Consistent with this history, Goodrich acknowledged in district court that there was "no Section 107(a) claim for response costs against the United States." US SER 33. This admission is binding here. See Cold Mt. v. Garber, 375 F.3d 884, 891 (9th Cir. 2004) (arguments not raised before the district court are waived on appeal). Nor does Goodrich argue otherwise in its opening brief on appeal, and thus any argument that Goodrich may raise in its reply brief that it has a Section 107 claim for response costs against the United States is waived. E.g., Bazuaye v. Immigration & Naturalization Serv., 79 F.3d 118, 120 (9th Cir. 1996).

In sum, Goodrich's cross-appeal should not be interpreted as seeking – and should not result in – the reinstatement of any claims against the United States because Goodrich only asserted the claims that are the subject of its cross-appeal against other parties, not the United States. To avoid any confusion regarding the live claims (if any) in this procedurally complex, multi-party matter, this Court should confirm that Goodrich has no claim against the United States whatever the outcome of its cross-appeal with respect to other parties might be and affirm the judgment with respect to the United States.

II. PSI Has Not Appealed the Dismissal of Any Claims Against the United States.

Unlike Goodrich, PSI did assert a claim against the United States in its

pleadings, however its claim was only for contribution under CERCLA Section 113 and thus was derivative of the Colton suit. US SER 7-8. PSI does not appeal the dismissal of any of the cross-claims or counterclaims that PSI explicitly pleaded, including the contribution claim against the United States under CERCLA Section 113(f). Instead, PSI asserts that it had a Section 107(a)(4)(B) claim only by way of the deemed claims in the second case management order and that it appeals only "the dismissal of its deemed cross-claims for cost recovery under Section 107(a)." PSI Br. 10, 12, 14. Thus, there is no basis to reinstate any claim explicitly pleaded by PSI against the United States because PSI did not raise that issue in its opening brief. Greenwood v. F.A.A., 28 F.3d 971, 977 (9th Cir. 1994).

PSI's brief on appeal argues only that it had Section 107(a)(4)(B) claims pursuant to the district court's second case management order and that those claims should be reinstated. PSI Br. 10, 14. As noted above, supra at 12-13, that order may apply to other parties but it does not apply to the United States. The United States never consented to that order or those deemed claims, as all of the parties fully understood. See US SER 16-17. Moreover, the United States was not a defendant in the Colton lawsuit, only a third-party defendant, and thus explicitly was excluded from the deemed cross-claim order that PSI argues contains a 107(a) claim for recovery of response costs. PSI SER 38 (deemed cross-claim order). Again, the sole argument that PSI advances based on the second case management order applies only to other parties, not the United States. Because PSI asserts no

argument in its opening brief that the deemed cross-claims in the second case management order apply to the United States, any argument to the contrary that PSI might make in its reply brief has been waived. Bazuaye, 79 F.3d at 120. Accordingly, the judgment as to the United States should be affirmed.[7]

III. Alternatively, PSI Has Waived its Request to Restore its Cross-claims.

To the extent that PSI's brief may be read as an attempt to reinstate any claim it may have had against the United States, PSI has not properly preserved its arguments for reinstatement. Arguments not made before the district court are generally considered waived on appeal. See Cold Mt., 375 F.3d at 891. In district court, PSI requested only that the dismissal of its cross-claims be changed from a dismissal with prejudice to a dismissal without prejudice. PSI SER 122, 127. PSI did not ask that any of its cross-claims be reinstated. Accordingly, this Court should not reinstate any of PSI's cross-claims because that is a request that PSI makes for the first time on appeal.

IV. Alternatively, this Court Should Remand to the District Court for Reconsideration in Light of Atlantic Research.

If this Court concludes that either Goodrich or PSI has properly appealed the dismissal of a claim against the United States and that there is some reason that the district court's judgment should not be affirmed, we respectfully request that

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[7] In addition, when PSI moved for summary judgment against Colton, PSI sought to terminate litigation of all CERCLA claims in the district court, accordingly, the judgment also may be affirmed on the ground that PSI received the relief that it requested from the district court. PSI SER 96 (requesting that the court dismiss all of Colton's claims and "terminate this case").

this Court remand so that the district court may consider in the first instance whether Goodrich or PSI may maintain a Section 107(a)(4)(B) claim. The United States has not had an opportunity to litigate whether Goodrich's pleadings or the deemed cross-claim order contain the elements of a Section 107(a)(4)(B) claim. But even if Goodrich and PSI are correct that they facially asserted or had deemed cross-claims or counterclaims against the United States under Section 107(a)(4)(B), the proper course is to remand to the district court for further consideration. It is possible that there is some other impediment to Goodrich or PSI asserting a valid Section 107(a)(4)(B) claim. The briefing and factual development on all the parties' cross-claims and counterclaims in district court were scant, and many details are unknown, such as what costs Goodrich and PSI might attempt to recover.[8] Thus, this Court should not declare that either

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[8] As noted supra at 5, the holding in Atlantic Research that a PRP may bring a cause of action under Section 107(a)(4)(B) is limited to a PRP in Atlantic Research's situation. The Supreme Court expressly declined to decide whether PRPs in other circumstances, including those who seek recovery of the costs of performing cleanup pursuant to a decree, would have a cause of action under Section 107(a)(4)(B). Atlantic Research, 127 S. Ct. at 2338 n.6. Since the decision in Atlantic Research, however, the United States has argued that parties who incur costs in carrying out obligations under a CERCLA consent decree have a claim under Section 113(f) for those costs, and cannot choose to sue under Section 107(a)(4)(B) instead. Another of the many questions left open by Atlantic Research, and one on which the United States has not yet taken a position, is whether parties, like Goodrich, that incur response costs pursuant to a Unilateral Administrative Order ("UAO") issued by the Environmental Protection Agency, rather than "voluntarily," may seek to recover response costs under Section 107(a)(4)(B). See Atlantic Research, 127 S. Ct. at 2338 n.6. In view of the (continued...)

Goodrich or PSI has valid Section 107(a)(4)(B) claims per se, but should remand to the district court for further consideration in light of Atlantic Research, 127 S. Ct. 2331 (2007).

Moreover, a remand for reconsideration is consistent with what Goodrich itself requested in the related Rialto appeals, 9th Cir. Nos. 05-56694, 05-56749, 06-15162, 06-16019. See Addendum at 2 (Goodrich's letter brief to this Court in Rialto, citing cases from other circuits and the Supreme Court and requesting that this Court dismiss the appeals and remand to the district court for further consideration in light of Atlantic Research and in the appropriate factual setting).[9]

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[8](...continued)
number of questions left open by the Supreme Court, and the scant information in the record regarding the circumstances under which Goodrich and PSI may have incurred costs, it would be inappropriate for an appellate court to address these questions in the first instance.

[9] For the reasons explained in the previous sections, the judgment with respect to the United States should be affirmed. Given the limited briefing and factual development before the district court, a remand for further consideration in light of Atlantic Research may be appropriate with respect to any cross-claims or counterclaims against parties other than the United States if this Court concludes that any portion of the judgment with respect such other parties should not be affirmed.

CONCLUSION

The district court's judgment on the cross-claims should be affirmed with respect to the United States.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Form 8. Certificate of Compliance Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 05-35486

(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant ***And Attached to the Back of Each Copy of the Brief***

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__ (b) Monospaced, has 10.5 or fewer characters per inch and contains _______ words or ________ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

__2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

__ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

__ This brief complies with a page or size-volume limitation established by separate court order dated ____________ and is

__ Proportionately spaced, has a typeface of 14 points or more and contains _______ words,

or is

__ Monospaced, has 10.5 or fewer characters per inch and contains ______ pages or_______ words or ________ lines of text.

__3. *Briefs in Capital Cases*

__ This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 **and is**

__ Proportionately spaced, has a typeface of 14 points or more and contains ________ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words)

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__ Monospaced, has 10.5 or fewer characters per inch and contains _______ words or ________ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

__4. *Amicus Briefs*

__ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,

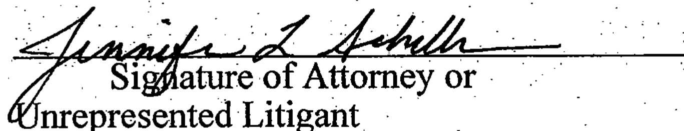
or is

__ Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7000 words or 650 lines of text,

or is

__ **Not** subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

11-14-07
Date



Signature of Attorney or
Unrepresented Litigant

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2007, I caused two copies of the foregoing Response Brief for the Federal Third-party Defendant-appellee to be served on counsel of record via First Class U.S. Mail and addressed to the following:

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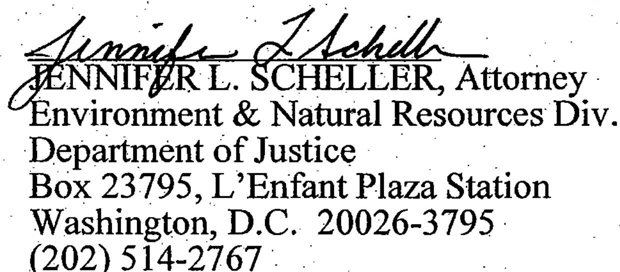

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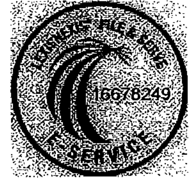

October 15, 2007

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VIA FACSIMILE AND OVERNIGHT MAIL

Ms. Cathy A. Catterson
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
95 7th Street
San Francisco, CA 94013

Attention: Pablo Garcia

Re: *City of Rialto, et al. v. United States Department of Defense, et al.*, Appeal No. 05-56694; *City of Rialto, et al. v. Goodrich Corporation, et al.*, Appeal No. 05-56749; *Kotrous v. Goss-Jewett Co., et al.*, Appeal No. 06-15162; *Adobe Lumber, Inc. v. F. Warren Hellman, et al.*, Appeal No. 06-16019

Dear Ms. Catterson:

Pursuant to this Court's Order of October 3, 2007, counsel for plaintiffs in the four appeals referenced above, which have been consolidated for oral argument, have met and conferred. We respond to the Court's requests as follows:

1. Which Side Of The § 107 Contribution Claim Issue Will Each Party Argue?

Our group's primary position is that this Court should not reach the question of whether CERCLA Section 107(a), 42 U.S.C. § 9607(a), contains an implied right of contribution. Rather, the Court should dismiss the appeals and remand for further proceedings consistent with the Supreme Court's recent opinion, *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007). Although the Court expressly left open the question of contribution claims, 127 S. Ct. 2331 at 2339 n.8, the Court's interpretation of that provision and its holding significantly altered

the legal background applicable to that question. Rather than engage this issue theoretically, in the complete absence of a current case and controversy, this Court should dismiss the appeals and permit the district courts to address any actual issue before them pertinent to this question.

This is the course of action taken by the Supreme Court and United States Courts of Appeals when faced with similar appeals based on pre-*Atlantic Research* case law and complaints. *See E. I. du Pont de Nemours & Co. v. United States*, 127 S. Ct. 2971 (2007); *Aviall Servs. v. Cooper Indus.*, No. 06-10996, 235 Fed.Appx. 222, 2007 WL 1959147 (5th Cir. July 2, 2007); *Montville Twp. v. Woodmont Builders, LLC*, No. 05-4888, 2007 WL 2261567 (3d Cir. August 8, 2007). Both of these unpublished decisions are attached hereto.

The Third Circuit's approach in *Montville Township* is particularly instructive. There, the court considered a complaint that cited to both Section 107 and Section 113, and "framed its CERCLA Section 107(a) claim in its brief as an 'implied right of contribution.'" *Montville* at *3. Reversing the district court, the Third Circuit held that, "the Township's complaint properly sought to recover clean-up costs under CERCLA Section 107(a) in accordance with the Supreme Court's subsequent *Atlantic Research Corp.* decision, and semantic distinctions in briefing that also pre-dated *Atlantic Research Corp.* should not bar us from considering and remanding those Section 107(a) claims." *Id.*

"Semantic distinctions" aside, each of the complaints in the underlying actions on appeal expressly contain the basic elements of a Section 107(a) claim as defined by the Supreme Court in *Atlantic Research* and this Court in *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870-871 (9th Cir. 2001). Under the liberal notice pleading standard created by the Federal Rules of Civil of Procedure, Rules 8(a) and 8(f), the subject pleadings are sufficient to give "the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1036 (9th Cir. 2006 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Moreover, a complaint is "sufficient if it shows that the plaintiff is entitled to any relief which the court can grant [*i.e.*, cost recovery under *Atlantic Research*], regardless of whether it asks for the proper relief." *United States v. Howell*, 318 F.2d 162, 166 (9th Cir. 1963). A complaint should not be dismissed if it states a claim under any legal theory, even if the pleading erroneously states a different legal theory. *See Haddock v. Board of Dental Examiners of Calif.*, 777 F2d 462, 464 (9th Cir. 1985); *Massey v. Banning Unified School Dist.*, 256 F.Supp.2d 1090, 1092 (C.D. Cal. 2003) (holding that a 12(b)(6) motion cannot be granted merely because a plaintiff requests a remedy to which he or she is not entitled, so long as the Court can ascertain from the face of the complaint that some relief can be granted).

2. **Response To Defendants' Argument That This Court Should Decide The Issue Of Whether 107(a) Permits A PRP Who Incurs Response Costs To Assert A Claim For Joint And Several Liability.**

It is the plaintiffs' position that defendants have disregarded the holding in *Atlantic Research* that "[t]he choice of remedies simply does not exist. In any event, a defendant PRP in such a section 107(a) suit could blunt any inequitable distribution of costs by filing a section 113(f) counterclaim." 126 S.Ct. at 2339. Moreover, the cases are before the court on pleadings motions from the District Courts and it is the plaintiffs' position that this issue does not require resolution at this time. Plaintiffs will be prepared to address the defendants' arguments asserting a "race to the courthouse" and other points, *see* Letter of James Meeder dated October 11, 2007, at page 3, paragraphs 1-4, relative to the issue of joint and several liability at oral argument.

3. **Defendants Division Of Their 30 Minutes Of Time.**

In light of the effect of *Atlantic Research* and the somewhat complex issues now raised by the defendants, the plaintiffs propose to follow the defendants' 30 minutes of argument. Plaintiffs propose to argue in the following order:

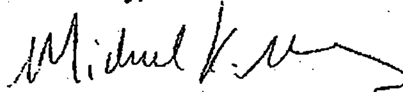
A. That this Court should not reach the issues presented by defendants after *Atlantic Research*. Michael K. Murphy, counsel for Goodrich Corporation, 10 minutes.

B. Implied contribution under 107(a) and issues unique to *Kotrous*. Jacqueline McDonald, counsel for Kotrous, 5 minutes.

C. Joint and several liability. Scott A. Sommer, counsel for City of Rialto and Rialto Utility Authority, 10 minutes.

D. Standard of review on pleadings and issues unique to *Adobe*. Robert Wainess, counsel for Adobe Lumber, 5 minutes.

Sincerely,



Michael K. Murphy

MKM/mkm

cc: Attached Service List