

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
Western Division**

AMERICAN PREMIER UNDERWRITERS, INC.,)	
)	
Plaintiff,)	No. 1:05CV437
)	
v.)	JUDGE WATSON
)	MAGISTRATE JUDGE BLACK
GENERAL ELECTRIC COMPANY,)	
)	
Defendant.)	

**BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN PARTIAL SUPPORT OF
THE DEFENDANT'S RENEWED MOTION TO DISMISS**

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The United States respectfully submits this brief as amicus curiae in partial support of the renewed motion to dismiss filed by the defendant, General Electric Company (“GE”), on October 29, 2007. In its renewed motion to dismiss, GE asks this Court, inter alia, to dismiss Count I of the plaintiff’s complaint, a claim to recover response costs under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), as to the Paoli Yard and South Amboy Yard sites. See Def.’s Renewed Mot. to Dismiss at 5-9 (Doc. 37). GE explains that because the plaintiff can seek, or at one time could have sought, to recover all costs incurred at these sites under Section 113(f) of CERCLA, it cannot seek to recover the same costs under Section 107(a) of CERCLA. See id. As explained in this amicus brief, the United States agrees with the general proposition that to the extent a private party has, or at a one time had, a claim under Section 113(f) for certain response costs, it cannot seek to recover the same costs under Section 107(a). The United States further agrees that this Court should dismiss Count I of the plaintiff’s complaint as to the following: (1) costs incurred by the plaintiff in cleaning up the Paoli Yard site; (2) money paid by the plaintiff to reimburse the United States for response actions taken at this same site; and (3) money paid by the plaintiff to reimburse the N.J. Transit Corp. for response actions taken at the South Amboy Yard site.^{1/}

INTRODUCTION

The interests of the United States in this action are discussed in the United States’ Motion for Leave to File a Brief as Amicus Curiae, which accompanies this amicus brief. As the parties have already fully briefed GE’s renewed motion to dismiss, the United States dispenses with

^{1/} The United States takes no position regarding the other issues raised by GE’s renewed motion to dismiss.

extended discussion of background. A short summary of the relevant facts and allegations is provided below.²

In Count I of its complaint, the plaintiff in this action, American Premier Underwriters, Inc. (“APU”), asserts a claim against GE under Section 107(a) of CERCLA, seeking to recover, under a theory of joint and several liability, the costs of responding to releases or threatened releases of hazardous substances at or from several facilities, including the Paoli Yard, in Paoli, Pennsylvania, and the South Amboy Yard, in South Amboy, New Jersey. See Pl.’s Compl. ¶¶ 77, 79, 88.³ In addition, it seeks a declaratory judgment that GE is liable under Section 107(a) for any necessary costs of response incurred at these sites by APU in the future. Id. ¶ 92.

In connection with the Paoli Yard site, the United States brought an action against APU under Section 107 of CERCLA in the Eastern District of Pennsylvania in 1992, seeking to recover response costs incurred and to be incurred by the Environmental Protection Agency (“EPA”) at the site. See Pl.’s Compl. ¶ 63; United States v. Penn Cent. Corp., No. 2:92-6119 (E.D. Pa. filed Oct. 23, 1992); Notice of Lodging of Consent Decree Pursuant to CERCLA, 70 Fed. Reg. 36,408 (June 23, 2005). In addition, EPA issued a unilateral administrative order in 1996, requiring APU to take certain response actions at the site. See United States v. Se. Pa.

² GE’s renewed motion to dismiss provides a more detailed background section. See Def.’s Renewed Mot. to Dismiss at 2-4. Of course, in ruling on the instant motion to dismiss, this Court will consider only the factual allegations of the plaintiff’s complaint, as well as relevant public documents that are properly subject to judicial notice. See id. at 5. The United States notes that it has not conducted an independent review of the facts underlying the instant dispute, and has instead confined the factual discussion set forth in this brief to the allegations in APU’s complaint and the public documents referenced herein.

³ APU refers to Section 107(a) in its complaint, but to be more precise in describing this claim, any claim that APU, a private party, has for response costs would be under Section 107(a)(4)(B). See 42 U.S.C. § 9607(a)(4)(B).

Transp. Auth., 235 F.3d 817, 821 (3d Cir. 2000). APU ultimately spent money investigating and cleaning up PCB contamination at the Paoli Yard. Pl.’s Compl. ¶ 62. And the claims brought against APU by the United States in the 1992 action were resolved in 2005, when APU entered into a consent decree with the United States, resolving its liability for some or all of the response costs incurred by EPA. See Pl.’s Compl. ¶ 64; see also Notice of Lodging of Consent Decree Pursuant to CERCLA, 70 Fed. Reg. at 36,408.⁴

With respect to the South Amboy Yard, APU explains that it was sued in December 2004 by the New Jersey Transit Corporation (“NJT”), an instrumentality of the state, in the District of New Jersey. Pl.’s Compl. ¶ 67. In that action, NJT asserts against APU, among other things, a claim under Section 107(a) of CERCLA, and seeks to recover \$2.8 million that NJT spent cleaning up the South Amboy site. Id. ¶ 68.

ARGUMENT

APU HAS, OR AT ONE TIME HAD, A CLAIM UNDER SECTION 113(f) OF CERCLA FOR CERTAIN COSTS IT IS SEEKING TO RECOVER FROM GE; IT THUS CANNOT SEEK TO RECOVER THESE COSTS UNDER SECTION 107(a)(4)(B) OF CERCLA.

APU is seeking to recover from GE costs it incurred in performing cleanup at the Paoli Yard site, as well as costs paid to reimburse other parties for response actions at the Paoli Yard site and the South Amboy Yard site (collectively, “APU’s claims”). See supra note 4. It cannot,

⁴ In connection with the Paoli Yard site, APU also allegedly paid money to other liable parties under a private settlement agreement, and pursuant to this same agreement, these parties, as well as one other liable party, assigned to APU their rights to assert certain claims against GE. See Pl.’s Compl. ¶¶ 65-66. At this stage of the litigation, however, the details of, and the circumstances surrounding, the private settlement agreement are unclear. The United States thus takes no position regarding what, if any, claims APU may have for these third-party costs, and in this amicus brief, references to “APU’s claims” do not include the following: (1) the money paid to the other parties under the private settlement agreement; and (2) claims against GE that were assigned to APU pursuant to that agreement.

however, seek to recover these costs under Section 107(a)(4)(B) of CERCLA. This is so because the plain language of Section 113(f) of CERCLA provides a cause of action for APU's claims. In United States v. Atlantic Research Corp., 127 S. Ct. 2331 (2007) (ARC), the Supreme Court held that a party in Atlantic Research's position who expended response costs in the absence of suit under section 106 or 107 or the compulsion of settlement, and thus had no claim under section 113(f), may bring a claim under section 107(a)(4)(B). Id. at 2336-38. The Court explained, however, that a potentially liable party, like APU, that has reimbursed the response costs of another party after being sued under Section 107 of CERCLA may not seek to recover these costs under Section 107(a)(4)(B). See id. at 2338. And while the Supreme Court in ARC did not directly address the issue of whether a potentially liable party that, like APU, sustained expenses cleaning up a site after being sued under Section 106 or Section 107 of CERCLA may maintain a claim under Section 107(a)(4)(B), a ruling that such a party has a Section 113(f) claim for such expenses and must use it, rather than Section 107(a)(4)(B), is consistent with the Supreme Court's opinion, gives meaning to the separate procedural aspects of Sections 107(a) and 113(f), promotes and protects settlements with the government as intended by the statutory framework of Section 113(f), and helps ensure prompt and effective cleanup of sites.

A. The Plain Statutory Language of CERCLA Authorizes APU to Bring Its Claims Under Section 113(f).

The plain language of Section 113(f) authorizes, or at one time authorized,⁵⁷ APU to seek contribution in the circumstances presented here. Section 113 of CERCLA provides, in relevant

⁵⁷ It is not clear at this juncture whether the applicable statute of limitations has run on any of APU's claims. The analysis set forth in this brief, however, applies regardless of whether the Section 113(f) claims at issue are time barred.

part:

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

42 U.S.C. § 9613(f)(1). It further provides that “[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.” 42 U.S.C. § 9613(f)(3)(B).

In light of the plain language of these sections, the United States’ action against APU in connection with the Paoli Yard site provides APU with a contribution claim against GE for the costs APU incurred doing work at that site. See 42 U.S.C. § 9613(f)(1). As discussed further below, APU’s view that ARC allows it to bring an action for costs incurred performing work under Section 107(a)(4)(B), see Pl.’s Opp’n to Def.’s Mot. to Dismiss at 3-4, suggests that the Supreme Court sub silentio rendered an entire piece of Section 113(f) superfluous. Allowing a potentially liable party to choose to use Section 107(a)(4)(B) instead of Section 113(f) negates clear congressional intent.

Similarly, pursuant to the plain language of Section 113(f), this enforcement action, as well as the judicially approved settlement that APU entered into with the United States in connection with the Paoli Yard site, provides APU with a contribution claim against GE for money paid to resolve liability to the United States for response actions conducted by EPA. See 42 U.S.C. § 9613(f)(1), (f)(3)(B). Likewise, NJT’s action against APU under Section 107(a) of CERCLA provides APU with a contribution claim for any costs ultimately reimbursed to NJT

for the response actions NJT has taken, and may take in the future, at the South Amboy Yard site. See 42 U.S.C. § 9613(f)(1).

B. The Supreme Court Held in ARC that a Party Who Expended Response Costs in the Absence of a Suit under Sections 106 or 107 of CERCLA or the Compulsion of Settlement, and thus Lacked a Cause of Action under Section 113(f), May Bring a Claim under Section 107(a)(4)(B).

In ARC, the Supreme Court addressed the question of whether Section 107(a)(4)(B) of CERCLA authorizes suits by potentially responsible parties (“PRPs”). 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 (2004) (“Aviall”), see infra Part D.3, that the only CERCLA claim available to one PRP against another is a claim for contribution under Section 113(f). It had also held that because Atlantic Research, the plaintiff, had neither been sued under Section 106 or 107 as required by Section 113(f)(1), nor entered into a settlement in accordance with Section 113(f)(3)(B), Atlantic Research had no cause of action for contribution under Section 113(f). The Court of Appeals reversed. It reasoned that absent a finding that Atlantic Research had a Section 107(a)(4)(B) 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 CERCLA’s purpose . . . [and an] unjust outcome.” Atlantic Research Corp. v. United States, 459 F.3d 827, 837 (8th Cir. 2006) (ARC I). 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 the Section 107(a)(4)(B) remedy is not available in circumstances such as those in this case that would 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 Research], 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 (emphasis added) (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, 127 S. Ct. at 2339. The Court did not hold that all PRPs have a cause of action under Section 107(a)(4)(B) for costs they have spent in cleaning up a site. On the contrary, the Court held merely that Atlantic Research did.

Unlike APU, Atlantic Research 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.

C. APU May Not Seek to Recover Costs Reimbursed to the United States and NJT Under Section 107(a)(4)(B), in Lieu of Section 113(f).

It is clear from APU's complaint that many of the costs APU is seeking to recover from GE are actually money paid by APU to reimburse other parties for the costs of response actions. See Pl.'s Compl. ¶ 64 (alleging that APU resolved liability to the United States in a judicial settlement); Notice of Lodging of Consent Decree Pursuant to CERCLA, 70 Fed. Reg. at 36,408; Pl.'s Compl. ¶ 68 (explaining that NJT is seeking to recover from APU \$2.8 million that NJT spent to clean up the South Amboy Yard site); see also Pl.'s Opp'n to Def.'s Mot. to Dismiss at 4 (referring to both costs of reimbursement and costs of response). And it is settled that when a

potentially liable party is sued by a governmental or private party under Section 107 of CERCLA in connection with a site and ultimately reimburses the costs of response actions taken by the governmental or private party, the potentially liable party may not seek to recover these costs from other parties under Section 107(a)(4)(B) of CERCLA, rather than Section 113(f)(1). As the Supreme Court explained in ARC,

a [potentially responsible party (“PRP”)] that pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a). As a result, though eligible to seek contribution under § 113(f)(1), the PRP cannot simultaneously seek to recover the same expenses under § 107(a).

ARC, 127 S. Ct. at 2338 (emphasis added).⁴ Accordingly, APU may not seek to recover from GE money paid by APU to reimburse the United States for the costs of response actions taken by EPA at the Paoli Yard site or any money that ultimately may be paid to reimburse NJT for the costs of response actions taken by NJT at the South Amboy Yard site.

D. APU May Not Seek to Recover the Costs It Incurred in Cleaning Up the Paoli Yard site Under Section 107(a)(4)(B), in Lieu of Section 113(f)(1).

APU is seeking to recover from GE not only reimbursement costs, but also the expenses associated with performing cleanup at the Paoli Yard site. As explained, APU has, or at one time had, a claim under Section 113(f)(1) for these costs. See supra Part A. A ruling that APU

⁴ The Sixth Circuit has noted this reasoning, stating that “[t]o distinguish when a cost recovery action under § 107(a) is appropriate, as opposed to a contribution action under § 113(f), the Court noted that a § 107(a) action may lie where a party has itself ‘incurred’ cleanup costs as opposed to reimbursing costs paid by other parties.” ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 458 (6th Cir. 2007). Likewise, the Ninth Circuit has explained that “[a] PRP cannot choose remedies, but must proceed under § 113(f)(1) for contribution if the party has paid to satisfy a settlement agreement or a court judgment pursuant to an action instituted under § 106 or § 107.” Kotrous v. Goss-Jewett Co. of N. Cal., --- F.3d ---, 2008 WL 1745338, at *6 (9th Cir. 2008) (emphasis added).

may not seek to recover these costs under Section 107(a)(4)(B), in lieu of Section 113(f)(1), is in keeping with the decision in ARC, gives meaning to the separate procedural aspects of Sections 107(a) and 113(f), promotes and protects settlements with the government as intended by the statutory framework of Section 113(f), and is consistent with existing circuit precedent that was not affected by ARC.

1. Precluding APU from Seeking to Recover Response Costs Under Section 107(a)(4)(B) Is Consistent with the Guideposts Established in ARC.

The ARC Court expressly declined to decide whether a Section 107(a)(4)(B) cause of action would be available to PRPs in the situation that presents itself here—that is, where a PRP spends money to clean up a site after being sued under Section 106 or 107 of CERCLA. ARC, 127 S. Ct. at 2338 n.6. Limiting APU to a claim for contribution, however, is consistent with the Supreme Court’s opinion for several reasons.

First, as explained, the plain language of Section 113(f) authorizes APU to seek contribution in the circumstances presented here. And the ARC Court stressed that “§§ 107(a) and 113(f) provide two ‘clearly distinct’ remedies.” Id. at 2337 (quoting Aviall, 543 U.S. at 163, n.3). It further explained that “‘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. (quoting Aviall, 543 U.S. at 163) (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 stressed 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.

Aviall, 543 U.S. at 163 n.3. 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, 127 S. Ct. at 2338 (emphasis added; internal quotations and cites omitted). The Court contrasted contribution claims with the “cost recovery” claim under Section 107(a)(4)(B) that is available to a PRP that has “itself incurred cleanup costs” without the compulsion of an enforcement action or settlement. Id.

Second, the Supreme Court quoted the Eighth Circuit’s view that to harmonize Sections 107(a) and 113(f) and to prevent the latter from becoming “meaningless,” ARC I, 459 F.3d at 836, a person who has a contribution claim under Section 113(f) must use it, and cannot choose to use Section 107(a)(4)(B) 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 § 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, 127 S. Ct. 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 a potentially liable party that has 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(f). See id. at 2339. Taken together, these passages show that the Supreme Court would not allow PRPs, such as APU, that clearly have, or at one time had, a claim under Section 113(f) for certain costs, to seek to recover these same costs under Section 107(a)(4)(B) instead.

Indeed, the Sixth Circuit has noted the distinction the ARC Court made between PRPs that have a cause of action under Section 113(f) and those who do not, explaining that

[t]o maintain the vitality of § 113(f), however, PRPs who have been subject to a civil action pursuant to §§ 106 or 107 or who have entered into a judicially or administratively approved settlement must seek contribution under § 113(f).

ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 458 (6th Cir. 2007) (citing ARC, 127 S. Ct. at 2338) (emphasis added).⁷ The Ninth Circuit, in a more recent opinion, likewise read ARC as distinguishing between those PRPs that have been subject to a governmental enforcement action or resolved liability in a governmental settlement, and thus can sue under Section 113(f)(1), and those who cannot. See Kotrous v. Goss-Jewett Co. of N. Cal., --- F.3d ---, 2008 WL 1745338, at *6 (9th Cir. 2008). In Kotrous, the plaintiff in each of the consolidated cases voluntarily incurred response costs, without first being subject to an enforcement action or entering into a governmental settlement. Id. at *1-3, 7. Based on Aviall and ARC, the Ninth Circuit overturned its precedent that required a PRP “necessarily” to bring suit to recoup response costs under Section 113(f). Id. at *4-7. Instead, the Ninth Circuit held that after ARC, “a PRP . . . that incurs costs voluntarily, without having been subject to an action under § 106 or § 107, may

⁷ Notwithstanding this reasoning, the Sixth Circuit remanded the claims at issue to the district court for “further consideration” in light of ARC. ITT, 506 F.3d at 458.

bring a suit for recovery of its costs under § 107(a).” Id. at *7. However, “any of the defendants sued by such a PRP may seek contribution under § 113(f) because they now will have been subject to an action under § 107.” Id.⁸

Third, the Supreme Court in ARC 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, 127 S. Ct. at 2336, the Court did not hold that the only requirement for a Section 107(a)(4)(B) claim is that a party “incur costs” (consistent with the NCP). Rather, the Court held only that a party like Atlantic Research, which has “incurred costs” neither pursuant to an enforcement action nor pursuant to a settlement with the government, has a claim to recover response costs under Section 107(a)(4)(B).

While the Court did not decide the issue presented here, that is, whether a PRP that has been sued under Section 106 or 107 in connection with a site may nonetheless bring claims under Section 107(a)(4)(B), rather than Section 113(f)(1), see ARC, 127 S. Ct. at 2338 n.6, the Court’s analysis of the nature of contribution supports the view that a party in APU’s position is limited to a contribution claim under Section 113(f). Contrary to the assumptions of most circuit courts prior to ARC and Aviall, see infra Part D.3, the Court rejected the notion that “the word

⁸ In addition, a district court recently held that a PRP could not assert a Section 107(a)(4)(B) claim for “remediation costs that [the defendants] and others have incurred and may incur in the future as the result of the lawsuit instituted under § 107(a)” by a state for cost recovery. See New York v. Next Millennium Realty, LLC, No. 03-5985, 2008 WL 1958002, at *6-7 (E.D.N.Y. May 2, 2008). The state’s complaint against the defendants also asserted a claim under state law for injunctive relief to abate contamination. See New York v. Next Millennium Realty, LLC, No. 03-5985, 2007 WL 2362144, at *4 (E.D.N.Y. Aug. 14, 2007).

‘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). ARC, 127 S. Ct. at 2338. “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). In contrast, Section 107(a) authorizes a claim by a potentially liable party 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 Atlantic Research from the reimbursement party was not only that Atlantic Research had sustained the costs of doing the work, but also that it was acting “voluntarily,” i.e., not legally “compelled”; and that it was sustaining these costs on its own and not to satisfy a common liability established “during or following” a Section 106 or 107 suit or by settlement.

That is simply not the situation here. As discussed, the United States sued APU in 1992, issued APU a unilateral administrative order for site cleanup in 1996, and ultimately entered into a settlement with APU in 2005. Under these circumstances, it is clear that any necessary response actions APU has taken at the Site have been accomplished at the behest of the United States through the exercise of their various enforcement response authorities and are not “voluntary” action as addressed in ARC. But for the federal government’s actions, APU would not have taken the response actions and incurred the cleanup costs they have sustained to date.

Further, unlike Atlantic Research, APU is not “incurring its own costs,” ARC, 127 S. Ct. at 2338, when it performs response actions at the site. Rather, it has sustained these expenses to extinguish a common liability for the site cleanup. If EPA had cleaned up the entire site itself and sued APU under Section 107(a)(4)(A) to recover its costs, APU’s reimbursement of costs to EPA to extinguish this liability, as discussed, would have provided APU with the quintessential contribution claim described by the Supreme Court. APU’s performance of work in response to the government’s enforcement authorities reduces the amount that EPA would have to spend on cleanup and ultimately seek to recover from APU, and should provide APU the same remedy as APU’s reimbursement of costs that EPA would have incurred in performing that same work.

2. Requiring APU to Pursue a Section 113(f) Cause of Action Is Compelled by the Structure and Policies Underlying CERCLA.

As demonstrated above, APU’s claims are for contribution, and therefore APU is limited to claims under Section 113(f). 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 Superfund Amendments and Reauthorization Act (“SARA”), which amended CERCLA in 1986, Congress carefully crafted Section 113(f) to encourage PRPs promptly to settle their liability with the United States or a state. See generally United States v. Cannons Eng’g 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 SARA, which codified procedures for reaching settlements in CERCLA Section 122, 42 U.S.C. § 9622. See H.R. Rep. No. 99-253, pt. 1, at 101 (1985), 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., In re Reading Co., 115 F.3d 1111, 1119 (3d 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, pt. 1, at 80, reprinted in 1986 U.S.C.C.A.N. at 2862.⁹

If PRPs whose claims fall under Section 113(f) can attempt to do an end run around contribution protection by bringing a Section 107(a)(4)(B) claim, a strong incentive for

⁹ Section 113(f) 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 liable parties (including entering into settlements that provide contribution protection), thereby ensuring that the United States is made whole before contribution plaintiffs can recover. 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(f) would be undermined if parties could attempt to avoid these limitations by bringing their claims for response costs under Section 107(a)(4)(B).

settlement will be eroded.¹⁰ 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 settlers 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, pt. 1, at 80, reprinted in 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, reprinted in 1986 U.S.C.C.A.N. at 2861 (Section 113(f) "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, at 44 (1985). In United Technologies Corp. v. Browning-Ferris Industries, Inc., 33 F.3d 96 (1st Cir. 1994), after reviewing the legislative history, the First Circuit summarized: "These statements show beyond serious question that the drafters intended contribution, as that term is used in [Section 113(f)],

¹⁰ GE does not have contribution protection. However, in the wake of ARC, private parties have attempted to circumvent the contribution bar by asserting claims under Section 107(a)(4)(B). In such cases, the United States has made the same core argument set forth in this brief. See, e.g., United States' Supp. Amicus Curiae Mem. (July 27, 2007), Solutia, Inc. v. McWane, Inc., No. 03-1345 (N.D. Ala. 2003). That argument stems from the basic structure of the statute, and applies equally to the present context; the absence or presence of contribution protection in any particular case makes no difference to the analysis set forth herein.

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." Id. at 102; see also Akzo Coatings, Inc., v. Aigner Corp., 30 F.3d 761, 764-66 (7th Cir. 1994)

The notion that Section 107(a)(4)(B) provides an independent right to recover costs for a whole category of claims governed by Section 113(f) is untenable because it renders many of Section 113(f)'s substantive requirements, including contribution protection, largely superfluous. 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 Atlantic Research's position—could sue under Section 107(a)(4)(B). As to PRPs that have a Section 113(f) cause of action, nothing in ARC compels or even suggests that courts should ignore the structure and policies under Section 113(f) that compel parties seeking contribution to pursue that claim only through Section 113(f).

3. ARC Does Not Disturb 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(f) can only use Section 113(f). Prior to Aviall, the circuit courts, including the Sixth Circuit, uniformly concluded that a PRP cannot rely on Section 107(a)(4)(B) 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). See, e.g., Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 356 (6th Cir. 1998).

The Eighth Circuit in ARC I discussed the history and rationale behind these decisions. Because the language “any person” in Section 107(a)(4)(B) is broad enough to encompass PRPs seeking contribution, PRPs began to try to assert their claims for contribution under Section 107(a)(4)(B), in an effort to evade Section 113(f)’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.” ARC I, 459 F.3d at 832.

As discussed above, in ARC the Court clarified that not all claims between PRPs are for contribution, and specifically, that a PRP in Atlantic Research’s circumstance has a cause of action under Section 107(a)(4)(B), not a claim for contribution under Section 113(f). Thus, ARC overrules the various circuit decisions that held that there was no Section 107(a)(4)(B) 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.^{11/} However, nothing in ARC is inconsistent with the result of numerous circuit court decisions that the costs expended in performing a cleanup pursuant to a judicial or administrative settlement or after being sued under Section 106 or 107 are claims for contribution and are governed by Section 113(f).^{12/} Parties, like APU, that have

^{11/} See, e.g., Kotrous v. Goss-Jewett Co. of N. Cal., --- F.3d ---, 2008 WL 1745338, at *7 (9th Cir. 2008) (explaining that ARC undermined the Ninth Circuit’s holding in Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298 (9th Cir. 1997), “that an action between PRPs is necessarily for contribution”); E.I. DuPont de Nemours and Co. v. United States, 508 F.3d 126, 128 (3d Cir. 2007) (“It is apparent that [ARC] impels us to reconsider our precedents.”).

^{12/} See, e.g., Bedford Affiliates v. Sills, 156 F.3d 416, 423-25 (2d Cir. 1998). To be sure, the precise rationales in some of these cases are affected by ARC. For example, the First Circuit in United Technologies based its holding that parties to an administrative settlement are limited to a

claims for contribution and are merely trying to 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 sites.” ARC I, 459 F.3d at 836-37; see Consol. Edison Co. v. UGI Utils., Inc., 423 F.3d 90, 94, 100-03 (2d Cir. 2005).

CONCLUSION

As explained, APU must seek to recover the following under Section 113(f) of CERCLA, rather than Section 107(a)(4)(B): (1) the costs of response actions taken by APU at the Paoli Yard site; and (2) money paid by APU to reimburse the United States and NJT for the cost of response actions taken at the Paoli Yard site and South Amboy Yard site, respectively.^{13/} The United States takes no position as to whether APU may assert claims under Section 107(a)(4)(B) with respect to costs and assigned claims pertaining to the private settlement agreement that APU entered into with other liable parties in connection with the Paoli Yard site. See supra note 4.

contribution action under Section 113(f) in part on its view that only governments and “innocent parties” can use Section 107(a). United Techs., 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 101-02.

^{13/} If this Court does not dismiss these claims, the United States may seek leave to file an additional brief(s) concerning the nature of that claim. The Supreme Court did not decide whether a cause of action under Section 107(a)(4)(B) is for joint and several liability. ARC, 127 S. Ct. at 2339 & n.7. It is the United States’ view that a potentially responsible party suing under Section 107(a)(4)(B) cannot invoke the presumption of joint and several liability, but is limited to recovering its fair share of costs, as determined by the significant body of case law on equitable allocation that has developed under Section 113(f).

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