APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARCONIC, INC., FKA Alcoa, Inc.; APPLIED MICRO CIRCUITS CORP.; BASF CORPORATION; BAXTER HEALTHCARE CORPORATION; CAL-TAPE & LABEL CO.; CALIFORNIA HYDROFORMING COMPANY, INC.; CINTAS CORPORATION; COLUMBIA SHOWCASE & CABINET COMPANY, INC.; COUNTY OF LOS ANGELES; CROSBY & OVERTON, INC.; DISNEY ENTERPRISES, INC.; FHL GROUP; FORENCO, INC.; GENERAL DYNAMICS CORPORATION; HEXCEL CORPORATION; HERCULES, INC.; HONEYWELL INTERNATIONAL, INC.; INTERNATIONAL PAPER COMPANY; LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY; MATTEL, INC.; MASCO CORPORATION OF INDIANA; MERCK SHARP & DOHME CORPORATION; PILKINGTON GROUP LIMITED; QUEST DIAGNOSTICS CLINICAL LABORATORIES, INC.; RAYTHEON COMPANY; SOCO WEST, INC.; SPARTON TECHNOLOGY, INC.; THE BOEING COMPANY; THE DOW CHEMICAL COMPANY; REGENTS OF THE UNIVERSITY OF CALIFORNIA;	No. 19-55181 D.C. No. 2:14-cv-06456-GW-E OPINION

TRIMAS CORPORATION; UNIVAR USA, INC.; SAFETY-KLEEN SYSTEMS, INC.,
Plaintiffs-Appellants,

v.

APC INVESTMENT CO.; ASSOCIATED PLATING COMPANY; ASSOCIATED PLATING COMPANY, INC.; GORDON E. MCCANN; LYNNEA R. MCCANN; DARRELL K. GOLNICK; CLARE S. GOLNICK; BODYCOTE THERMAL PROCESSING, INC.; POWERINE OIL COMPANY; CLAUDETTE EARL; EARL MFG. CO., INC.; FERRO CORP.; FIREMAN'S FUND INSURANCE COMPANY; FEDERAL INSURANCE COMPANY; PALLEY SUPPLY COMPANY; FOSS PLATING COMPANY, INC.; KEKROPIA, INC.; PALMTREE ACQUISITION CORPORATION; PHIBRO-TECH, INC.; FIRST DICE ROAD COMPANY, INC.; UNION PACIFIC RAILROAD COMPANY; HALLIBURTON AFFILIATES, LLC; CHERYL A. GOLNICK,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted March 3, 2020
Pasadena, California

Filed August 10, 2020

Before: Consuelo M. Callahan and
Jacqueline H. Nguyen, Circuit Judges,
and Dana L. Christensen,* District Judge.

Opinion by Judge Callahan

COUNSEL

E. Joshua Rosenkranz (argued) and Elizabeth R. Cruikshank, Orrick Herrington & Sutcliffe LLP, New York, New York; Brian P. Goldman, Easha Anand, and Karim J. Kentfield, Orrick Herrington & Sutcliffe LLP, San Francisco, California; Nancy Sher Cohen and Ronald A. Valenzuela, Lathrop Gage LLP, Los Angeles, California; for Plaintiffs-Appellants.

Thomas R. McCarthy (argued), Consovoy McCarthy PLLC, Arlington, Virginia; David E. Cranston, Greenberg Glusker, Los Angeles, California; for Defendant-Appellee Union Pacific Railroad Company.

James B. Harris, Thompson & Knight LLP, Dallas, Texas; for Defendant-Appellee Bodycote Thermal Processing, Inc.

Robert P. Doty (argued) and Cathy T. Moses, Cox Castle & Nicholson LLP, San Francisco, California, for Defendant-Appellee Palmtree Acquisition Corporation.

No appearances by remaining Defendants-Appellees.

Matthew R. Oakes (argued) and Jennifer Scheller Neumann, Attorneys; Eric Grant, Deputy Assistant

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* The Honorable Dana L. Christensen, United States District Judge for the District of Montana, sitting by designation.

Attorney General; Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; Michael Massey, Attorney, United States Environmental Protection Agency; for Amicus Curiae United States.

Xavier Becerra, Attorney General; Sally Magnani, Senior Assistant Attorney General; Edward H. Ochoa, Supervising Deputy Attorney General; Olivia W. Karlin and James Potter, Deputy Attorneys General; Office of the Attorney General, Los Angeles, California; for Amicus Curiae California Department of Toxic Substances Control.

Timothy T. Coates and Marc J. Poster, Greines Martin Stein & Richland LLP, Los Angeles, California, for Amicus Curiae Former United States Department of Justice Official Stephen D. Ramsey.

OPINION

CALLAHAN, Circuit Judge:

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires parties to pursue contribution for their cleanup costs within three years of the "entry of a judicially approved settlement with respect to such costs." 42 U.S.C. § 9613(g)(3)(B). This appeal asks whether, to trigger this limitations period, a settlement must impose costs on the party seeking contribution—a question we answer in the affirmative. Because the district court relied on a contrary reading of the statute in holding the

plaintiffs' claims time-barred, we reverse its grant of summary judgment in the defendants' favor.

I.

A.

The Omega Chemical Corporation recycled solvents and refrigerants at its facility in Whittier, California, from 1976 to 1991. The company's mishandling of these substances caused them to spill and leak from drums, tanks, and pipes, severely contaminating nearby soil and groundwater. In 1999, the U.S. Environmental Protection Agency (EPA) placed the Omega facility on the National Priorities List, a list of the most contaminated sites in the nation. 64 Fed. Reg. 2942, 2945 (Jan. 19, 1999). The agency then set about developing a long-term remedial plan for cleaning up the site, splitting the process into manageable phases, or "operable units." *See* 40 C.F.R. § 307.14 (defining "operable unit" as "a discrete action that comprises an incremental step toward comprehensively addressing site problems"). EPA first turned toward cleaning up the soil and groundwater contamination in the immediate vicinity of the Omega plant. It dubbed this Operable Unit 1 (OU-1).

EPA negotiated the cleanup of OU-1 with a group of Omega's customers, who formed the Omega Chemical Potentially Responsible Parties Organized Group (OPOG). The discussions proved fruitful, with OPOG agreeing to lead the remedial efforts with EPA oversight. To give a district court authority over that

agreement and to trigger OPOG's right to seek contribution, the United States simultaneously lodged a complaint against OPOG with a proposed consent decree resolving that complaint. The consent decree required OPOG to contain and remediate the groundwater contamination around the Omega plant. It also required OPOG to reimburse the United States for its cleanup costs. The court entered the consent decree a few months later, in early 2001, thereby resolving OPOG's liability as to OU-1.

Under the applicable statute of limitations, 42 U.S.C. § 9613(g)(3)(B), the entry of the consent decree gave OPOG three years to seek contribution for its OU-1 costs. So in 2004 OPOG sued various other entities that had sent hazardous waste to the Omega plant. By and large, these defendants had contributed relatively small amounts of waste. They were, in EPA parlance, "*de minimis*" parties. *See* 42 U.S.C. § 9622(g) (characterizing *de minimis* parties by the quantity and toxicity of their waste). OPOG's complaint alleged that it had incurred $6.5 million in cleaning up the site, and it asserted that the *de minimis* parties were liable for their share of OPOG's past and future cleanup costs.

The *de minimis* parties agreed to settle OPOG's claims for $1.7 million. In exchange, OPOG assumed their "responsibilities" for the site, including their cleanup costs. This assumption was not limited to costs associated with OU-1; it included any Omega-site claims that the United States or another party might, in the future, assert against the *de minimis* parties. In essence, the settlement allowed these parties to walk

away from the site effectively immune from further pursuit. The court approved that settlement in 2007.

EPA was meanwhile investigating Operable Unit 2 (OU-2). The agency had learned that chemicals from the Omega plant had migrated through groundwater and comingled with hazardous waste released from other facilities, forming a toxic plume extending over four miles downgradient of OU-1. In 2011, once EPA better understood the extent of the OU-2 plume, it selected a remedy: an extensive "pump-and-treat" system that would draw contaminated water from the ground and strip it of chemicals.

As it had with OU-1, OPOG agreed to spearhead the cleanup efforts for OU-2. The parties formalized their arrangement in 2016, with the United States again lodging a complaint and corresponding consent decree the same day.[1] This time, though, the litigation concerned the downgradient plume. The consent decree committed OPOG to finance and implement the OU-2 pump-and-treat system. It further obligated OPOG to post a $70 million performance guarantee and reimburse the United States for its past and future OU-2 costs. The court approved the consent decree in 2017, thereby resolving OPOG' s liability as to that portion of the site.

[1] In 2010, the United States also sued and settled with OPOG for work concerning OU-1 soil contamination.

B.

Several years earlier, in 2014, having already undertaken some OU-2 work, OPOG brought this suit seeking to recover the costs of that work from APC Investment Company and other entities (collectively, the APC defendants) who purportedly had contributed to the plume but not its cleanup. Once OPOG entered into the OU-2 consent decree, it amended its complaint to drop the cost-recovery claim and assert one for contribution in its stead. OPOG also sought a declaration as to the APC defendants' liability "for their respective equitable shares" of the obligations OPOG had incurred under the OU-2 consent decree.

Some of the APC defendants moved for summary judgment, arguing that OPOG's 2007 settlement with the *de minimis* parties triggered CERCLA's three-year statute of limitations for contribution claims. The district court agreed, holding that the 2007 settlement was "with respect to" the same costs sought in this litigation and that, as a result, OPOG's claims were time-barred. Observing that the settlement resolved OPOG's and the *de minimis* parties' site-wide claims against each other, the court reasoned that OU-2 necessarily fell within the scope of their agreement. The court also noted that OPOG was likely estopped from arguing that it could not previously seek contribution for OU-2 costs, since it asserted just such a claim in its 2004 complaint against the *de minimis* parties. The court entered judgment, and OPOG timely appealed. We have jurisdiction under 28 U.S.C. § 1291 and reverse.

II.

We review de novo the grant of summary judgment and interpretation of CERCLA. *Asarco LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1208 (9th Cir. 2015). We also interpret CERCLA settlements de novo but defer to the district court's factual findings unless they are clearly erroneous. *Id.* And finally, we review a district court's application of the doctrine of judicial estoppel for an abuse of discretion. *MK Hillside Partners v. Comm'r of Internal Rev.*, 826 F.3d 1200, 1203 (9th Cir. 2016).

III.

A.

Congress enacted CERCLA to "promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (internal quotation marks and citation omitted); *accord* S. Rep. No. 96-848, at 13 (1980). To that end, the statute provides two mechanisms for private parties to recoup their cleanup costs: cost-recovery actions under § 107(a), 42 U.S.C. § 9607(a), and contribution actions under § 113(f), *id.* § 9613(f). These related but distinct provisions "complement each other by providing causes of action to persons in different procedural circumstances." *United States v. Ad. Research Corp.,* 551 U.S. 128, 139 (2007) (internal quotation marks and citation omitted).

Section 107(a) enables parties to recover their directly incurred "response"—i. e., cleanup—costs from those liable for the contamination. 42 U.S.C. § 9607(a); *see Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994) (explaining that CERCLA "encourage[s] private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others" (internal quotation marks and citation omitted)). The provision imposes strict liability, and a successful § 107(a) claim generally results in the defendant being held jointly and severally liable for all cleanup costs sought in the suit, even those attributable, at least in part, to others. *Arizona v. City of Tucson*, 761 F.3d 1005, 1011 (9th Cir. 2014). Consequently, a cost-recovery defendant often faces a disproportionate share of liability for a site's contamination.

That is where § 113(f) comes in. It provides parties with a right of contribution "to recover expenses paid under a settlement agreement or judgment." *Whittaker Corp. v. United States*, 825 F.3d 1002, 1009 (9th Cir. 2016). Parties subjected to suit under § 107(a) or § 106—which empowers the United States to order certain cleanups—can file for contribution, 42 U.S.C. § 9613(f)(1), as can parties that settle their liability with the United States or a state, *id.* § 9613(f)(3)(B). Hence, a claim for contribution, unlike one for cost recovery, turns on a party first facing or incurring liability to a third party. *Atl. Research*, 551 U.S. at 139-40. If that liability exceeds the particular polluter's portion of responsibility for a cleanup, § 113(f) serves to force others to shoulder their share of the burden. *Id.* at 139.

CERCLA imposes a three-year statute of limitations on § 113(f)(1) contribution claims. 42 U.S.C. § 9613(g)(3). The clock starts to run not when the claims accrue, but upon the occurrence of certain statutory triggering events. As relevant here, the statute bars parties from filing for contribution "for any response costs . . . more than three years after . . . [the] entry of a judicially approved settlement with respect to such costs." *Id.* § 9613(g)(3)(B). We must decide whether the 2007 settlement, which imposed no liability on OPOG but transferred to it the *de minimis* parties' responsibilities for the Omega site, triggered this provision.

B.

Starting, as we must, with the statute's text, *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004), we find the limitations provision's applicability to claims for "contribution" largely dispositive. Because "[n]othing in § 113(f) suggests that Congress used . . . 'contribution' in anything other than [its] traditional sense," the term refers to 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." *Atl. Richfield*, 551 U.S. at 138 (quoting Black's Law Dictionary (8th ed. 2004)); *accord Whittaker*, 825 F.3d at 1008. A CERCLA contribution claim, in other words, is by definition predicated upon "an inequitable distribution

of common liability among liable parties."[2] *Atl. Richfield*, 551 U.S. at 139.

Bearing that in mind, interpreting the limitations provision is fairly straightforward. It provides that a party must pursue contribution following the entry of a "settlement with respect to such costs." The term "such costs" plainly refers to the response costs sought in the contribution action. And since a party can obtain contribution only for costs incurred in excess of its own liability, an action under § 113(f)(1) is necessarily for another's share of the costs faced or imposed under § 106 or § 107(a). *See Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 13 (1st Cir. 2004) ("'[S]uch costs' . . . refers to the judgment mentioned earlier in the sentence and identifies a particular claim or payment."). A settlement, then, starts the limitations period on a § 113(f)(1)

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[2] The Restatement elaborates:

> A person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment. As permitted by procedural rules, a person seeking contribution may assert a *claim* for contribution and obtain a contingent judgment in an action in which the person seeking contribution is sued by the plaintiff, even though the liability of the person against whom contribution is sought has not yet been extinguished.

Restatement (Third) of Torts § 33 cmt. b (citations omitted); *see also Friedland v. TIC-The Indus. Co.*, 566 F.3d 1203, 1206 (10th Cir. 2009) (defining a CERCLA contribution claim as "a claim by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make" (internal quotation marks and citation omitted)).

claim for response costs only if it imposed those costs and serves as the basis for seeking contribution.

It is therefore inaccurate to characterize the 2007 settlement as covering the costs at issue here merely because it foresaw the remediation of the OU-2 groundwater plume. OPOG's claims do not concern OU-2 in the abstract. Rather, OPOG seeks the APC defendants' share of the liability it assumed in the 2017 OU-2 consent decree. The 2007 settlement did not address those costs. It resolved neither who would pay for OU-2's remediation nor what that effort would entail. Nor did it impose on OPOG any response costs or remedial obligations. That OPOG agreed to forego further contribution from the *de minimis* parties and, in effect, to indemnify them for future cleanup work bears no relation to the APC defendants' responsibility for the site. The 2007 settlement, after all, did not extinguish OPOG's and the APC defendants' common liability to the United States for OU-2. Accordingly, that agreement did not start the limitations period.

C.

The APC defendants disagree, of course. They point out that "with respect to" is broad qualifying language, and that the limitations provision mentions costs alone—not obligations, liabilities, or responsibilities. They advise against reading into the statute any such requirement, especially since Congress expressly required a resolution of liability in § 113(f)(3)(B), which authorizes contribution claims upon settling

with the government. Thus, in the APC defendants' view, any settlement starts the clock so long as it relates in some way to the general category of costs at issue in the contribution action.

But we construe statutory language in context, *Celanese*, 792 F.3d at 1210, and we limit otherwise capacious terms when that context "tug[s] . . . in favor of a narrower reading," *Mellouli v. Lynch*, 135 S. Ct. 1980, 1990 (2015) (some alterations omitted) (quoting *Yates v. United States*, 574 U.S. 528, 539 (2015)). Here, we see no reason why a settlement cashing out minor polluters from future involvement with a site would trip the limitations period for contribution claims against different polluters. Section 113(f) instead confirms that the clock starts ticking only upon the entry of a judgment or settlement resolving an underlying § 106 or § 107(a) claim and imposing liability on a polluter, who then has three years to seek contribution for those imposed costs.

To begin with, the APC defendants' position contravenes not only the central tenet of common-law contribution, but also the "standard rule" that a limitations period does not run—let alone expire—before a party can assert the associated claim. *Green v. Brennan*, 136 S. Ct. 1769, 1776 (2016); *see also Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108, 1124 n.8 (9th Cir. 2017) (construing CERCLA to avoid this very inconsistency). A party's right to seek contribution extends only to the costs for which it is potentially or actually liable, as bounded by the operative complaint, settlement, or judgment. *See Whittaker*, 825 F.3d at 1012. So

if a party is never sued and never deemed liable for a particular subset of a site's cleanup costs, then those costs are not recoverable under § 113(f)(1). Under the APC defendants' broad construction of "settlement" and "costs," however, the limitations period could expire prior to the filing of a § 106 or § 107(a) claim.

This case illustrates the point. The United States' 2000 complaint sought from OPOG the "reimbursement of *certain* costs" and the "performance of *certain* response actions" needed to clean up a "*portion*" of the Omega site. It did not address site-wide liabilities. And even if it had, the consent decree filed alongside the 2000 complaint dispels any doubt as to the scope of OPOG's then-existing contribution rights. *See id.* (basing a party's § 113(f)(1) rights on the liability imposed in the resolved § 107(a) action rather than faced in the complaint underlying that action). That agreement dealt only with OU-1. It resolved the pending suit but left open the prospect of the United States later pursuing OPOG for liability arising from other parts of the site. Once the court entered the OU-1 consent decree, OPOG had three years to seek reimbursement under § 113(f) for the costs therein incurred. But it had no right to contribution outside of that.[3] *See id.*

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[3] The APC defendants argue that the 2001 consent decree did not limit OPOG's contribution rights because § 113(f)(1) allows a party to seek contribution "during or following" the underlying § 106 or § 107(a) action. We rejected a nearly identical argument in *Whittaker*, explaining that although "the statute permits a party to initiate a contribution action while a § 107 . . . suit is pending, actual recovery under § 113(f)(1) is limited to the expenses for which the party is found liable." 825 F.3d at 1012. This

at 1008-09; *Celanese*, 792 F.3d at 1209 ("[Section 113(f)(1)] remains open while the [§ 106 or § 107(a)] lawsuit is unresolved."). Not until 2016, when the United States sued OPOG for the downgradient plume, could it pursue contribution for its OU-2 costs. Yet the APC defendants' reading of the statute would mean that the limitations period on that claim expired six years earlier, in 2010, which strikes us as nonsensical.[4]

The APC defendants' focus on the 2007 settlement also ignores CERCLA's symmetrical scheme for pursuing contribution claims. With § 113(f)(1), Congress paired the events opening the door to contribution with the events closing it. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) (noting § 113(g)(3)'s "corresponding" limitations periods). A contribution claim accrues when a party is sued under § 106 or § 107(a), and then "the statute of limitations begins to run once *that litigation* settles or ends by judgment."

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comports with "how contribution claims traditionally work." *Id.* (citing Restatement (Third) of Torts § 23(b) & cmt. b). So here, following resolution of the United States' 2000 suit, OPOG could have sought contribution only for "the costs for which [it] was held liable" in that suit. *Id.* Other costs were recoverable by way of § 107(a). *See id.* at 1009; *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 225-26 (3d Cir. 2010) (holding that the parties could pursue incurred costs under § 107(a) but not § 113(f) "because those parties were never themselves sued for those amounts").

[4] For similar reasons, the 2010 litigation concerning soil contamination, *see supra* n.1, likewise failed to give rise to a contribution claim for OU-2 costs. That is especially true given that the United States filed that suit after the limitations period on OPOG's pending claims purportedly expired.

Celanese, 792 F.3d at 1209 (emphasis added); *see also id.* at 1210 (reiterating the same idea). This framework clearly contemplates that the underlying § 106 or § 107(a) suit will lead to the defendant's liability: being sued anticipates that liability, and the resulting settlement or judgment establishes it. The statute of limitations sensibly starts then, once the defendant knows the scope of its obligations. But the 2007 settlement arose well before that point. It resolved no suit against OPOG and stemmed instead from OPOG's own claims against the *de minimis* parties. Having the limitations period run from such agreements would make a mess of both § 113(f) and the traditional workings of contribution. The better reading is that the provision's reference to settlements means the agreement imposing the costs in question.[5]

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[5] We note in this respect that, in addition to judgments and settlements, two other events trigger CERCLA's statute of limitations for contribution claims: administrative—i.e., EPA—settlements with *de minimis* parties, and administrative settlements for cost recovery. 42 U.S.C. § 9613(g)(3). Each imposes liability on the party pursuing contribution, so we construe "judicially approved settlements" similarly—as referring to agreements requiring a party to clean up a site under § 106 or pay response costs under § 107(a). *See Beecham v. United States*, 511 U.S. 368, 371 (1994) ("[S]everal items in a list shar[ing] an attribute counsels in favor of interpreting the other items as possessing that attribute as well.").

The legislative history is in accord. The House report explains that Congress added § 113(f) to confirm "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." H.R. Rep. No. 99-253(I), at 79

Indeed, our case law supports, if not compels, this conclusion. *Celanese*, for example, also involved two settlements concerning the cleanup of a contaminated site. There we looked to which settlement underlay the plaintiff's § 113(f) contribution claim. 792 F.3d at 1210. We held the claim time-barred because it was for "exactly the same liability" assumed in the much earlier agreement. *Id.* at 1214. Critically, that initial agreement comprehensively "define[d] who [would] pay for the work and the nature of the work to remediate" the site. *Id.* at 1213 (likening the earlier agreement to "a proportionate liability declaratory judgment"). The later settlement may have fixed those costs, we explained, but it imposed no new ones. *Id.* at 1214. We further noted that nothing prevented "a party in an early settlement from seeking contribution related to a later settlement, as long as those settlements cover separate *obligations*." *Id.* at 1215 (emphasis added).

In contrast to the underlying settlement in *Celanese*, the 2007 settlement neither imposed any costs on OPOG nor obligated it to clean up OU-2. True, the 2007 settlement transferred to OPOG the *de minimis* parties' "responsibilities" for the site, including any of their prospective future costs for the groundwater plume.[6] But that is of no moment, as the settlement did

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(1985) (emphasis added). The report adds, in this vein, that "[p]arties 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." *Id.* at 80; *accord* S. Rep. No. 99-11, at 43 (1985).

[6] In 2007, EPA was years away from selecting a remedy for the plume, and no party was yet liable for its remediation. To

not create any liability on OPOG's part. What is more, OPOG's release of the *de minimis* parties had no impact on the APC defendants' share of responsibility for the plume, which remained outstanding.

While the 2007 settlement fell short of triggering the limitations period, the 2017 consent decree fits the bill. It resolved the United States' § 106 and § 107(a) claims against OPOG for OU-2. In doing so, it established OPOG's response obligations for that portion of the site and burdened OPOG with the APC defendants' share of liability to the United States. It, therefore, is the settlement that is "with respect to" the costs OPOG now seeks. And because OPOG filed this suit within three years of the entry of that consent decree, its claims are timely.

D.

Mooring the limitations provision to the settlement giving rise to the contribution costs also serves CERCLA's remedial objectives. As this case amply demonstrates, the cleanup of contaminated sites can span many years and involve scores of litigants. Settling with *de minimis* parties plays an important role in streamlining this process. Cashing out minor contributors can supply a needed influx of funds for cleanup work, and releasing them from future liability

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date, OPOG is the only entity to have pursued any CERCLA claim against the *de minimis* parties with respect to the Omega site.

can reduce the number of parties involved, simplifying litigation and reducing transaction costs.

The APC defendants' reading of the limitations provision as including settlements untethered to resolved or pending § 106 or § 107(a) claims would throw a wrench into this process. It would dissuade major polluters from providing a complete release to any party, however minor that party's role in contributing to a site's contamination. That is because any such release would require major polluters to then file all possible contribution claims concerning the site, even when the bounds of site-wide liability remain undefined. The parties to such a suit would, in turn, have to fight over their respective equitable shares of response costs that the United States or another party may never pursue. Here, OPOG would have had to sue for contribution for OU-2 despite EPA having yet to select a remedy for the plume. While § 113(f)(1) was intended to "bring[] all . . . responsible parties to the bargaining table at an early date," *Whittaker*, 825 F.3d at 1013 (Owens, J., concurring) (quoting H.R. Rep. No. 99-253(I), at 80 (1985)), it does not operate to prohibit the phased and orderly resolution of response obligations for complex sites.

The APC defendants protest that, to avoid tripping the limitations provision, major polluters can always cabin their releases to particular parts of a site, similar to how the United States proceeded in iterative stages with OPOG. Yet this approach would undo much of the benefit derived from *de minimis* settlements in the first place. As EPA guidance explains, the legal fees

and other transaction costs of negotiating with *de minimis* parties often dwarf their ultimate share of site-wide liability. 52 Fed. Reg. 24,333, 24,334 (June 30, 1987). The early dismissal of these parties thus serves the interests of all involved. Repeatedly dragging them to the table, on the other hand, would bog down negotiations, increase costs, and discourage settlement, given the lack of finality and certainty otherwise afforded by a complete release. *See United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 89 (1st Cir. 1990) (discussing some of the benefits associated with *de minimis* settlements). Such an outcome neither hastens cleanups nor ensures that responsible parties bear the costs.

IV.

Finally, we conclude that OPOG is not judicially estopped from seeking contribution for its OU-2 costs. "Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (first citing *Rissetto v. Plumbers & Steamfitters Local* 343, 94 F.3d 597, 600-01 (9th Cir. 1996); then citing *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)). According to the APC defendants, OPOG successfully pursued contribution for OU-2 costs in its 2004 suit against the *de minimis* parties, so it cannot now contend that such a claim arose only recently, upon entry of the OU-2 consent decree.

This argument is largely beside the point. Even if OPOG had obtained from the *de minimis* parties contribution for OU-2, the 2007 settlement did not start the limitations period because it did not impose on OPOG the APC defendants' share of liability for the downgradient plume. Furthermore, we discern no clear inconsistency in OPOG's position. The 2004 litigation necessarily involved a § 113(f) claim for the costs OPOG had assumed under the 2001 OU-1 consent decree, and a § 107(a) claim for the other costs OPOG had incurred but for which it had not, at that point, been sued. Although OPOG's complaint labeled the claims as for "contribution," it cited to § 107(a) in addition to § 113(f). Moreover, OPOG's 2006 motion for judicial approval of the resulting settlement was clearer in this regard. It explained that the claims were for contribution *and* cost recovery.[7] *See Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1064 n.2 (9th Cir. 2002) (looking to a claim's substance rather than its caption). OPOG's current position is thus consistent with its earlier one, and the district court erred in concluding otherwise.[8]

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[7] Prior to the Supreme Court holding in 2007 that potentially responsible parties could proceed under § 107(a), *Atl. Research*, 551 U.S. at 141, this circuit took the view that any action between such parties was "necessarily for contribution." *See Kotrous v. Goss-Jewett of N. Cal.*, 523 F.3d 924, 932 (9th Cir. 2008) (overruling this position). It therefore makes sense that OPOG would have so styled its claims.

[8] Contrary to the APC defendants' contention, OPOG did not forfeit its right to rebut this argument at two hearings and in its supplemental summary judgment briefs. We may review any matter passed upon by the district court, *Ahanchian v. Xenon*

V.

In sum, we hold that Congress incorporated into CERCLA basic precepts of common-law contribution. Chief among those precepts is that contribution turns on a party having incurred an inequitable share of another's liability. CERCLA's limitations period, 42 U.S.C. § 9613(g)(3)(B), runs upon the entry of the settlement imposing that liability, but not before. The statutory text supports this reading, as does its purpose. We therefore reverse the district court's holding that OPOG's claims are untimely and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Pictures, Inc., 624 F.3d 1253, 1260 n.8 (9th Cir. 2010) (citing *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 707 (D.C. Cir. 2009)), and, in any event, OPOG did discuss the issue. At the first hearing OPOG argued that estoppel was inextricably tied to the characterization of the 2007 settlement. At the second hearing the APC defendants broached estoppel only in asking for a clear ruling on the matter. And as for the supplemental briefs, estoppel was not among the matters the district court had ordered addressed.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 14-6456-GW(Ex) Date January 15, 2019

Title *Arconic, Inc., et al. v. APC Investment Co., et al.*

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

PROCEEDINGS: IN CHAMBERS – RULING ON MOTION FOR SUMMARY JUDGMENT RE: STATUTE OF LIMITATIONS [740]

Attached hereto is the ruling on Defendants' pending Motion for Summary Judgment based upon the Statute of Limitations as to the First and Third Causes of Action in the Fifth Amended Complaint. The Court sets a status/scheduling conference for January 28,

2019 at 8:30 a.m. The parties are to file a Joint status report by noon on January 24.

_____ : _____

Initials of Preparer JG

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Arconic, Inc., et al. v. APC Inv. Co.,
Case No. CV-14-6456-GW
Ruling[1] on Motion for Summary Judgment Re:
Statute of Limitations

[1] At the outset, the Court notes that this ruling is substantially similar in part and substantially different in part to the tentative rulings issued in the July 12, 2018 Civil Minutes ("MSJ Tentative I"), Docket No. 788 and in the August 3, 2018 Civil Minutes ("MSJ Tentative II), Docket No. 792. The Court has made the most significant modifications to the procedural history portion in Section I.B, the analysis in Section IV, and the conclusion in the now labeled Section V. The Court's prior rulings were merely *tentative* rulings, and this ruling replaces them and supersedes them in every way following reexamination of the original and supplemental briefing.

I. Background

A. Factual Background

In the operative pleading, Plaintiffs[2] assert claims against various Defendants,[3] arising under the

[2] "Plaintiffs" are: Alcoa, Inc.; Alpha Therapeutic Corp.; Applied Micro Circuits Corp.; Arlon, LLC; Astro Aluminum Treating Co., Inc.; BASF Corp.; Baxter Healthcare Corp.; Cal-Tape & Label Co.; California Hydroforming Company, Inc.; Cintas Corp.; Columbia Showcase & Cabinet Company, Inc.; County of Los Angeles; Crosby & Overton, Inc.; Disney Enterprises, Inc.; FHL Group; Forenco, Inc.; General Dynamics Corp.; Gulfstream Aerospace Corp.; Hercules, Inc.; Hexcel Corp.; Honeywell International, Inc.; Ingersoll-Rand Co.; International Paper Co.; Johns Manville; Kimberly-Clark Worldwide, Inc.; Kinder Morgan Liquids Terminals, LLC; Los Angeles County Metropolitan Transportation Authority; Masco Corp. of Indiana; Mattel, Inc.; Merck Sharp & Dohme Corp.; NBC Universal Media, LLC; Pacific Bell Telephone Co.; Pilkington Group Ltd; Quest Diagnostics Clinical Laboratories, Inc.; Raytheon Co.; Rio Tinto AUM Co.; Safety-Kleen Systems, Inc.; Scripto-Tokai Corp.; Sempra Global; Shiley, LLC; Signet Armorlite, Inc.; Soco West, Inc.; Sonoco Products Co.; Sparton Technology, Inc.; Texaco Inc.; Texas Instruments, Inc.; The Boeing Co.; The Dow Chemical Co.; The Regents of the University of California; The Sherwin-Williams Co.; Trane U.S., Inc.; TriMas Corp.; Union Oil Co. of California; Univar USA, Inc.; Universal City Studios, LLC; and Yort, Inc.

[3] "Defendants" are: APC Investment Co.; Associated Plating Co.; Associated Plating Co., Inc. (fka Associated Plating Acquisition Corp.); Bodycote Thermal Processing, Inc.; Burke Street, LLC; Powerine Oil Co.; Continental Heat Treating, Inc.; Continental Development Company, LP; Claudette Earl, an individual; Earl Mfg. Co., Inc.; ExxonMobil Oil Corp.; Ferro Corp.; Firmenich, Inc.; Foss Plating Co., Inc.; Gordon E. McCann, an individual; Lynnea R. McCann, an individual; Darrell K. Golnick, an individual; Clare S. Golnick, an individual; Cheryl A. Golnick, an individual; Kekropia, Inc.; Mission Linen Supply; Momentive Specialty Chemicals, Inc.; William K. Palley, an individual; Palley Supply Co.; Palmtree Acquisition Corp.; Phibro-Tech, Inc.; Pilot Chemical Corp.; PMC

Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq*. *See* Fifth Amended Complaint ("5AC") ¶ 2, Docket No. 526.

The 5AC alleges[4] the following: This action is one of several arising from environmental contamination at the Omega Chemical Superfund Site located in Whittier and Santa Fe Springs, California, which the Environmental Protection Agency (the "EPA") has designated as "Operable Unit No. 2" ("OU2" or the "OU2 Site" or the "OU2 Facility"). *See* 5AC ¶ 2. The groundwater contamination in OU2 is approximately 4.5 miles long. *See id.* Defendants owned properties, operated businesses, or arranged for treatment of waste at businesses sitting near or atop the OU2 Facility at which hazardous substances and waste (including hexavalent chromium and other solvents) spilled or discharged onto the ground and made their way into the soil and groundwater. *See id.* ¶ 3. As a result, the soil and groundwater have been contaminated; and there are multiple plumes of contamination blending together into regional groundwater contamination. *See id.*

The EPA evaluated many Defendants in connection with the OU2 Facility and declared some of them

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Specialties Group, Inc.; Union Pacific Railroad Co.; First Dice Road Co.; and Halliburton Affiliates, LLC.

[4] The Court provides a brief synopsis of the allegations in the 5AC to provide a contextual foundation for this motion.

"potentially responsible parties" ("PRPs"), warranting the receipt of a Special Notice Letter ("SNL") from the EPA. *See id.* ¶ 4. The EPA identified in the SNLs certain defendants ("SNL Defendants") who were potentially liable under CERCLA Section 107 for the OU2 groundwater contamination and for past and future costs to clean up that contamination. *See id.* The SNLs also provided information supporting those conclusions and solicited offers from the SNL Defendants to take remedial action and design remedial action as to OU2. *See id.* The EPA issued General Notice Letters ("GNLs") to other PRP Defendants ("GNL Defendants") that were potentially liable for cleanup costs at the Omega Superfund Site, inviting the GNL Defendants to explain why they should *not* receive an SNL. *See id.* ¶ 5.

Plaintiffs in this action are companies that allegedly sent chemicals to Omega Chemical Corporation ("Omega Chemical") in Whittier for appropriate processing and recycling. *See id.* ¶ 7. The EPA asserts that Omega Chemical's failure to properly process, recycle, and dispose of those chemicals resulted in the groundwater contamination and that Plaintiffs are responsible for remediation of the groundwater contamination underneath the Omega Chemical property. *See id.* In addition, the EPA has extended its view of Plaintiffs' responsibility to include the groundwater contamination in OU2. *See id.* ¶ 8. The EPA contends that Plaintiffs are responsible for remediating OU2. *See id.* It has determined that the contaminated groundwater should be contained, extracted, and treated in order to

be used in a beneficial manner, which will cost tens of millions of dollars in capital and operating expenditures. *See id.* ¶ 9.

Each Plaintiff has voluntarily incurred significant costs to investigate the sources of OU2 contamination and the remediation of OU2. *See id.* In doing so, Plaintiffs have collectively spent millions of dollars to address these issues and may incur further future expenses regarding response costs. *See id.* Defendants are responsible for releases of hazardous substances into the OU2 groundwater and therefore should bear the costs to clean up that contamination. *See id.* Defendants have failed to implement source control measures to prevent groundwater exceeding healthy levels from leaving source properties as a result of contaminated on-site soils or groundwater. *See id.* ¶ 10. This has led to unsafe groundwater continuing to migrate into OU2, swelling costs and the duration of cleanup efforts. *See id.*

In this action, Plaintiffs seek recovery from Defendants of necessary response costs that Plaintiffs have already incurred and will continue to incur due to the release or threatened release of hazardous substances contaminating OU2 groundwater. *See id.* ¶ 11. Plaintiffs also seek declaratory judgment that Defendants are liable for *future* response costs or damages binding on any subsequent actions for recovery of response costs or damages. *See id.* Plaintiffs further endeavor to enjoin certain Defendants from continuing to release hazardous substances emanating from source properties that those Defendants own or operate and

to force those Defendants to remediate soil and groundwater contamination to control the spread of hazardous substances in OU2. *See id.*

B. Procedural Background

At the outset, the Court notes that the statutory grounds for the claims in this lawsuit have shifted over time. In the original Complaint, Plaintiffs sought the recovery of costs under CERCLA § 107. *See* Complaint ¶¶ 308-331, Docket No. 1. Though the Complaint mentioned CERCLA § 113 in the declaratory judgment claim, the Complaint did not allege a contribution action under Section 113(f). *See id.* ¶¶ 332-336. The first appearance of a contribution claim under CERCLA § 113(f) seemed to arise in the June 13, 2016 filing of the Fourth Amended Complaint ("4AC"), Docket No. 489, wherein Plaintiffs pursued claims for both cost recovery under CERCLA § 107 and contribution under CERCLA § 113(f), among others. *See* 4AC ¶¶ 396-429. By the 5AC's filing on November 1, 2016, the CERCLA § 107 cost recovery claims for relief were no longer included in the pleading; instead, the CERCLA § 113(f) contribution claim was included along with an RCRA § 7002 cause of action and a claim for declaratory relief as to liability under CERCLA § 113(f) for contribution. *See* 5AC ¶¶ 396-426.

On April 30, 2018, Moving Defendants[5] filed a motion for summary judgment to dismiss the first and

[5] "Moving Defendants" are: Associated Plating Company, Associated Plating Company, Inc., Gordon E. McCann, Lynnea R.

third causes of action on statute of limitations grounds; they provided a notice of errata on May 1, 2018, attaching the motion for summary judgment and a Tab A attached to it with certain illustrative maps located therein. *See* Moving Defendants' Notice of Motion and Motion for Summary Judgment Re: Statute of Limitations ("MSJ" or "Motion"), Docket No. 754-1; *see id.* Tab A ("Maps"), Docket No. 754-2.[6] Plaintiffs filed an opposition to the MSJ.[7] *See* Plaintiffs' Opposition to

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McCann, Darrell K. Golnick, Clare S. Golnick, Cheryl A. Golnick, Bodycote Thermal Processing, Claudette Earl, Earl Manufacturing Company, Inc., Halliburton Affiliates, Fireman's Fund Insurance Company and Federal Insurance Company Interveners for Palley Supply Company, Ferro Corporation, PMC Specialties Group, Inc., Palmtree Acquisition Corporation, Phibro-Tech and First Dice Road Company, Foss Plating Company, and Union Pacific Railroad Company.

[6] Moving Defendants move for summary judgment as to Plaintiffs' first and third claims for relief, arguing that the three-year statute of limitations in 42 U.S.C. § 9613(g)(3)(B) bars them. *See* MSJ at 18-25. In the 5AC, Plaintiffs style the first claim for relief as "Contribution Under CERCLA," alleged against all Defendants except for Burke Street LLC. *See* 5AC ¶¶ 396-407. The third claim for relief is labeled as "Declaratory Judgment Under Federal Law," alleged against all Defendants except Burke Street LLC. *See id.* ¶¶ 424-426.

[7] As part of Plaintiffs' Opposition, they filed a request for judicial notice. *See* Plaintiffs' Request for Judicial Notice in Support of Opposition to MSJ ("Pls.' RJN"), Docket No. 770-1. Moving Defendants do not appear to have objected to Plaintiffs' RJN. *See* Docket. The Court finds the exhibits attached to Plaintiffs' RJN to be appropriate for judicial notice as per Fed. R. Evid. 201. Moving Defendants also filed a request for judicial notice of a complaint in a prior related action. *See* Moving Defendants' Request for Judicial Notice in Support of MSJ ("Defs.' RJN"), Docket No. 785. Moving Defendants' RJN is fit for judicial notice as per Fed. R. Evid. 201.

Defendants' Motion for Summary Judgment Re: Statute of Limitations ("Opp'n"), Docket No. 770. Moving Defendants filed a reply in support of the MSJ ("Reply," Docket No. 779) and a "Response to Statement of Uncontroverted Material Facts" ("DRSUF," Docket No. 780.[8]

On July 12, 2018 the Court issued its tentative ruling as to the MSJ, indicating its inclination to deny the motion. *See* July 12, 2018 Civil Minutes ("MSJ Tentative I"), Docket No. 788. During the hearing on that motion, the Court asked for an itemization of "what the [OU2 response costs] generally are and the source of those amounts. . . . the expenditures that [Plaintiffs] have and to the extent that [Plaintiffs] know what they are now. . . ." *See* July 12, 2018 Hr. Tr. at 19:5-17. The Court also granted the request for the submission of supplemental briefing from each side. *See id.* 21:22-24. Plaintiffs filed their supplemental briefing. *See* Plaintiffs' Supplemental Brief in Opposition to MSJ ("Pls.' Supp. I"), Docket No. 789. They attach what they label a Timeline of OU2 Activities and OPOG Costs ("Costs Timeline"), Docket No. 789-1. Moving Defendants filed a supplemental reply brief. *See* Moving Defendants' Reply to Plaintiffs' Offer of Proof Re: Costs Barred by the Statute of Limitations ("Defs.' Supp. I"), Docket No. 790. The Court heard oral argument on the MSJ again

[8] In support of the Reply, Moving Defendants filed a request for judicial notice. *See* Moving Defendants' Request for Judicial Notice in Support of Their Reply ("Defs.' RJN"), Docket No. 785. The Court finds the single exhibit, a complaint filed in a different proceeding, fit for judicial notice.

on August 6, 2018 and issued another tentative ruling three days prior. *See* Aug. 3, 2018 Civil Minutes ("MSJ Tentative II), Docket No. 792. On September 21, 2018 and September 28, 2018, the parties submitted additional briefing. *See generally* Moving Defendants' Post-Argument Brief, Docket No. 802 ("Defs.' Supp. II"); Plaintiffs' Response to Defendants' Post-Argument Brief Re: Statute of Limitations ("Pls.' Supp. II"), Docket No. 804.

C. Statutory Context

The Ninth Circuit provided a helpful statutory overview of CERCLA in *Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108 (9th Cir. 2017), stating as follows:

> Congress enacted CERCLA in 1980 with two goals in mind: (i) to encourage the " 'expeditious and efficient cleanup of hazardous waste sites,' " and (ii) to ensure that those responsible for hazardous waste contamination pay for the cleanup. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001) (en banc) (quoting *Pritikin v. Dep't of Energy*, 254 F.3d 791, 795 (9th Cir. 2001)); *see* S. Rep. No. 96-848, at 13 (1980). Hazardous waste sites – also known as Superfund sites – contain toxic substances often deposited by multiple entities. *See* 42 U.S.C. § 9607(a)(1)-(4). In order to spread responsibility among those entities, Congress included a provision in CERCLA providing for reimbursement of costs incurred by the government or a liable PRP. Section 107(a) provides a cause of action

for a "cost recovery" claim against PRPs for a wide range of expenses, including " 'any . . . necessary costs of response incurred' " that result from a release of a hazardous substance. *Whittaker Corp. v. United States*, 825 F.3d 1002, 1006 (9th Cir. 2016) (quoting 42 U.S.C. § 9607(a)).

"Response" is a term of art under CERCLA and means "remove, removal, remedy, and remedial action." 42 U.S.C. § 9601(25). Congress even gave those defining terms their own definitions. A "removal" means, *inter alia*, "the cleanup or removal of released hazardous substances from the environment" and any actions that may be necessary "in the event of the threat of release of hazardous substances into the environment." *Id.* § 9601(23). A "remedial action" means, *inter alia*, "actions consistent with permanent remedy taken instead of or in addition to removal actions . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." *Id.* § 9601(24). Put simply, a "response action" covers a broad array of cleanup activities.

Section 107(a) is limited to recovery of response costs the suing PRP itself directly incurred. *See Atl. Research*, 551 U.S. at 139, 127 S.Ct. 2331 ("[Section] 107(a) permits recovery of cleanup costs but does not create a right to contribution."). At the time of enactment, CERCLA included no express right to contribution for a PRP that did not itself incur

response costs, but that reimbursed another party that did incur response costs. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 162, 125 S.Ct. 577, 160 L.Ed.2d 548 (2004). Such a situation arises under two circumstances: (i) where the PRP is the defendant in a CERCLA § 106 or § 107(a) action and a money judgment issues against it; or, as with the CERCLA Decree in the matter before us, (ii) where the PRP pays the United States' or a State's response costs pursuant to a settlement agreement. *See id.* at 160-61, 125 S.Ct. 577; *Atl. Research*, 551 U.S. at 138-39, 127 S.Ct. 2331; *Whittaker*, 825 F.3d at 1006-07.

Congress added an express right to contribution with the Superfund Amendments and Reauthorization Act of 1986 ("1986 CERCLA Amendments"), Pub. L. No. 99-499, to address these two circumstances. *See Atl. Research*, 551 U.S. at 132, 127 S.Ct. 2331. Section 113(f)(1) captures the first, and provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)] of this title, during or following any civil action . . . under [§ 106 or § 107(a)] of this title." 42 U.S.C. § 9613(f)(1). . . . Section 113(f)(3)(B), which is directly at issue [in *Atl. Richfield*], captures the second scenario, and 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 from any person who is not party to a settlement [that immunizes such person from a contribution action].

Id. § 9613(f)(3)(B). In other words, "a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution." *Atl. Research*, 551 U.S. at 139, 127 S.Ct. 2331; *see Cooper*, 543 U.S. at 163, 167, 125 S.Ct. 577 (recognizing that § 113(f)(1) and § 113(f)(3)(B) set forth separate rights of contribution).

While § 107(a) cost recovery actions and § 113(f) contribution actions offer "complementary yet distinct" remedies, there is overlap between them. *Atl. Research*, 551 U.S. at 138, 139 n.6, 127 S.Ct. 2331. For example, a PRP may undertake its own response actions pursuant to a settlement agreement with the government. *See id.* That PRP will have incurred its own response costs, meaning it is eligible for cost recovery under § 107(a), but it has also settled with the government, giving rise to a contribution action under § 113(f)(3)(B). The question is whether both or only one of these avenues of relief is available. Our circuit, and "every federal court of appeals to have considered the question since *Atlantic Research*," has concluded that "a party who *may* bring a contribution action for certain expenses *must* use the contribution action [under § 113(f)(3)(B)], even if a cost

recovery action [under § 107(a)] would otherwise be available." *Whittaker*, 825 F.3d at 1007 (emphasis in original); *see*, *e.g.*, *Bernstein v. Bankert*, 733 F.3d 190, 206 (7th Cir. 2013) (party may not pursue cost recovery claim where a contribution claim is available); *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1236-37 (11th Cir. 2012) (same); *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 603-04 (8th Cir. 2011) (same); *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 229 (3d Cir. 2010) (same); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 128 (2d Cir. 2010) (same); *ITT Indus., Inc. v. BorgWarner, Inc.*, 506 F.3d 452, 458 (6th Cir. 2007) (same). Thus, a PRP that incurs its own response costs pursuant to a settlement agreement may only bring a claim for contribution.

Sections 107(a) and 113(f) have different statutes of limitations periods. An action for "recovery of . . . costs" under § 107(a) "must be commenced . . . within 6 years after initiation of physical on-site construction of the remedial action" or "within 3 years after the completion of the removal action." 42 U.S.C. § 9613(g)(2)(A), (B). An action for contribution of "response costs or damages" under § 113(f), by contrast, "may be commenced" no more than "3 years after . . . the date of . . . entry of a judicially approved settlement with respect to such costs or damages." *Id.* § 9613(g)(3)(B). The shorter three-year limitations period for contribution actions is intended "to ensure that the responsible parties get to the bargaining – and clean-up – table sooner rather

> than later." *RSR Corp. v. Commercial Metals Co.*, 496 F.3d 552, 559 (6th Cir. 2007); *see Whittaker*, 825 F.3d at 1013 (Owens, J., concurring in part) (observing that § 113(f) was intended to "'bring[] all such responsible parties to the bargaining table at an early date'" (quoting H.R. Rep. (Energy and Commerce Committee) No. 99-253, pt. 1, at 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862)).

See Atl. Richfield, 866 F.3d at 1115-1117 (internal footnotes omitted).

CERCLA § 113(g)(3) provides:

> No action for contribution for any response costs or damages may be commenced more than 3 years after –
>
> > **(A)** the date of judgment in any action under this chapter for recovery of such costs or damages, or
> >
> > **(B)** the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

See 42 U.S.C. § 9613(g)(3).

II. Undisputed Facts[9]

A. The Site

This lawsuit pertains to a 4.5 mile plume of contaminated groundwater situated south/southwest of the former Omega Chemical Corporation processing plant in Whittier, referred to as OU2 of the Omega Superfund Site.[10] DRSUF ¶ 1; 5AC ¶ 2. In 1995, the EPA issued a Unilateral Administrative Order ("UAO") requiring the UAO Respondents[11] to "undertake and

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[9] Some of the underlying "undisputed" facts cited herein have been disputed by Plaintiffs or Moving Defendants. The Court has reviewed such disputes and has included in this summary only facts that are supported by the cited evidence, altering the proffered facts if necessary to accurately reflect the uncontroverted evidence. To the extent that the cited underlying "undisputed" facts have been disputed, the Court finds that the stated disputes: (1) fail to controvert the proffered "undisputed" facts, (2) dispute the facts on grounds not germane to the below statements, and/or (3) fail to cite evidence in support of the disputing party's position. As such, the Court treats such facts as undisputed. Any proffered facts not included in this Tentative Ruling were found to be: (1) improper opinions or conclusions rather than facts, (2) were unsupported by admissible evidence, (3) were deemed irrelevant to the Court's present analysis, or (4) some combination thereof.

[10] Many of Moving Defendants' uncontroverted facts and supporting evidence are mere allegations in the 5AC. *See generally* Moving Defendants' Statement of Uncontroverted Material Facts and Conclusions of Law in Support of MSJ, Docket No. 742. Generally, to the extent the statements merely regurgitate what Plaintiffs allege, they will not be repeated here but are instead located in the background section above.

[11] The UAO Respondents were listed in Appendices A and B of the UAO. *See* Doty Decl. Ex. 7 at 1, 21-32. Not all of the Plaintiffs in this case are listed as UAO Respondents (and vice versa) in the UAO.

complete removal activities to abate an imminent and substantial endangerment to the public health, welfare, or the environment." *See* Declaration of Robert P. Doty in Support of Moving Defendants' Motion for Summary Judgment ("Doty Decl.") Ex. 7 at 2, Docket No. 744.[12] The EPA addressed the UAO to Omega Chemical, its owner, and over 100 Omega Property Generators ("Generators"), which comprised of entities that sent chemicals to the Omega Facility for recycling or reclamation. *See id.* at 3-4; Declaration of Gene A. Lucero in Support of Plaintiffs' Opposition to MSJ ("Lucero Decl.") ¶ 6, Docket No. 770-18. A portion of those public and private Generators formed the Omega Chemical Potentially Responsible Parties Organized Group ("OPOG") to work together with government regulators and Omega Chemical to evaluate the need for and perform necessary response actions at the Omega Facility. *See* Lucero Decl. ¶ 4. Plaintiffs in this lawsuit are included among the members of OPOG. *See id.* ¶ 5. The EPA identified Plaintiffs and certain Defendants in this action as jointly and severally liable for the regional groundwater contamination at the

[12] This page number refers to the pagination at the bottom right of the exhibit. All other page numbers for exhibits refer to that pagination unless noted otherwise. Rather than listing the docket numbers for each exhibit, the Court will list the exhibits and corresponding dockets here. As to the exhibits attached to the Doty Declaration, Exhibits 1 through 5 are at Docket No. 745; Exhibits 6 through 6A are at Docket No. 746; Exhibits 7 through 13A are at Docket No. 747; Exhibits 14-16 are at Docket No. 748; Exhibits 18-20 are at Docket No. 749; Exhibits 21-28 are at Docket No. 750; Exhibits 29-32 are at Docket No. 751.

Omega Superfund Site designated as OU2.[13] *See* DRSUF ¶ 2.

B. Response Costs

Plaintiffs have incurred significant costs to investigate the sources and the remediation of the OU2 Facility. *See* DRSUF ¶ 8; 5AC ¶ 9. This has amounted to millions of dollars. *See id.* Remedying the situation will require tens of millions of dollars in capital and operating expenditures for years to come. *See id.* Possible groundwater treatment technologies for the remediation, as described in a 2016 EPA fact sheet, include extraction wells, conveyance piping, and treatment equipment.[14] *See* Doty Decl. Ex. 5 at pg. 6 Fig. 3.

C. Relevant Settlements

1. The 2000 Action and the Related 2001 Consent Decree

In 2000, in *United States v. Abex Aerospace Division*, Case No. 00-cv-12471-TJH-(JWJx) ("2000 Action"),

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[13] Exhibit 4 to the Doty Declaration does not state the quoted language in DRSUF ¶ 2, but based on Plaintiffs' response and Moving Defendants' reply, this statement seems to constitute the overlapping undisputed statement of both parties.

[14] Jack Keener, who has "knowledge and experience as Project Manager and Project Coordinator" provided information about the amounts and descriptions of costs incurred by OPOG relating to OU2 in each of the years between 2001 and 2018, which has been incorporated into the Costs Timeline. *See* Declaration of Jack Keener in Support of Plaintiffs' Opp'n, Docket No. 789-3.

Plaintiff United States sued a number of defendants[15] under CERCLA Sections 106 and 107, seeking: (1) reimbursement of costs incurred by the EPA and the Department of Justice for response actions at the Omega Chemical Corporation Superfund Site in Whittier, California and (2) seeking performance of studies and "Work" by the "Settling Work Defendants"[16] at the Omega Site consistent with the National Contingency Plan ("NCP"). *See* Doty Decl. Ex. 13 at 4 (summarizing the complaint in that action). The complaint in the 2000 Action alleged that the United States had incurred at least $554,189 in response costs for responding to the release or threatened release of hazardous substances at the former hazardous waste treatment and storage facility of Omega Chemical Corporation. *See* Defs.' RJN Ex. A ¶ 6, 11. On February 28, 2001, Judge Terry J. Hatter ("Judge Hatter") entered an order approving a consent decree ("2001 CD") between the United States and certain settling defendants. *See generally* Doty Decl. Ex. 13. The 2001 CD provided that "[t]he Settling Work Defendants will install three sentinel groundwater monitoring wells at two or three

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[15] Defendants in that case are delineated on the first three pages of the 2001 Consent Decree and on the first three pages of the complaint in that matter. *See* Doty Decl. Ex. 13 at 1-3; *see also* Defs.' RJN Ex. A at 1-3, Docket No. 785.

[16] "Settling Work Defendants" is defined in the 2001 Consent Decree as "those parties identified in Appendix D, who are signatories to this Consent Decree, who are required to perform the Work, whether they perform the Work by themselves or through any legal entity that they may establish to perform the Work." *See* Doty. Decl. Ex. 13 at 8. Appendix D does not seem to appear in the materials provided by either party. *See* Docket.

locations downgradient of Phase 1a Area and upgradient of Water Supply Well 30R3." *See* Doty Decl. Ex. 13 at 49 (Task 3). The other two tasks required under the 2001 CD were: (1) the design and implementation of "a groundwater containment and mass removal treatment system in the Phase 1a Area" and (2) the implementation of a "Remedial Investigation/Feasibility Study ("RI/FS") at the Omega property for vadose zone contamination that has resulted from the release of hazardous substances on, at, or emanating from the Omega property." *See id.* at 44-49 (Tasks 1 and 2).

2. The 2004 Action and the Related 2007 Settlement

In 2004, in the case of *Omega Chemical PRP Group LLC v. Aeroscientific Corp.*, Case No. 04-cv-1340-TJH-(JWJx) ("2004 Action"), Omega Chemical PRP Group LLC sued over 200 defendants who were allegedly responsible for hazardous substances stored, treated, or disposed of at the Omega Site. *See* Doty Decl. Ex. 6 at 1. In February 2004, plaintiffs in that action filed a complaint alleging: (1) contribution under CERCLA against non-federal defendants and (2) contribution under CERCLA against federal defendants. *See generally* Doty Decl. Ex. 18 ("2004 Complaint"). Those plaintiffs sought to recover response costs incurred in connection with the Omega Site pursuant to CERCLA Sections 107 and 113.[17] *See id.* Approval of

[17] In more detail, the plaintiffs in the 2004 Complaint sought the relief delineated at pages 28-29 of Doty Decl. Ex. 18 (page

another settlement was entered on March 9, 2007 ("2007 Settlement") but in relation to the 2004 Action. *See generally* Doty Decl. Ex. 23. As part of an effort to establish that this was a good faith settlement, two declarations referenced an EPA $101.5 million cost estimate. *See* DRSUF ¶ 18; Doty Decl. Ex. 22 ¶ 10; *see id.* Ex. 24 ¶ 6. This cost estimate derives from a 2004 EPA memorandum ("2004 Cost Estimate Memo") by Dr. Tom Perina ("Dr. Perina" or "Perina"). *See* DRSUF ¶ 19; *see generally* Doty Decl. Ex. 19. In the 2004 Cost Estimate Memo, Dr. Perina described the groundwater as containing contamination dissolved within it over an area of at least 2.5 miles long and .75 miles wide (the "plume"). *Id.*, Ex. 19 at 2. The 2004 Cost Estimate Memo assumed extraction and treatment of contaminated groundwater as the presumptive remedies for the site – characterized as "pump and treat" using a complex treatment train to address chemicals in the plume. *See id.* at 2-3. This estimate included wells, water conveyance pipelines, and a treatment plant as components of the conceptual remediation system. *See id.* at 3. The pump and treat system would operate for 30 years with soil remediation taking 3 years. *See id.* Hexavalent chromium and PCE (tetrachloroethylene) were therein identified as contaminants detected in the Omega Site, with the 2004 Cost Estimate Memo noting that other contaminants may be identified in the future. *See id.* at 2-3. Dr. Perina estimated that soil remediation costs with a 3.1% discount rate would add

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numbers used for this citation are at the bottom right-hand side of the exhibit).

up to $3.9 million and groundwater pump and treat costs would amount to $97.5 million. *See id.* at pg. 5 Table 1. In a 2005 EPA fact sheet and EPA memo, $6.4 million is the estimate for the cost of pumping and treating OU-1's groundwater. *See* DRSUF ¶ 26; Doty Decl. Ex. 26 at 3. Eliminating that $6.4 million figure from the $97.5 million figure amounts to $91.1 million for pumping and treating.

The 2007 Settlement, in Section 2.03, defines "Claims or Claims and Liabilities" as:

> [A]ny and all claims (including without limitation all contribution claims in litigation or arbitration), losses, demands, causes of action, obligations, direct or consequential damages, injuries, liens, costs (including without limitation reimbursement of government response costs and legal costs), civil fines, penalties, expenses, fees and liabilities of any nature whatsoever (including without limitation attorneys' fees), whether contractual, statutory, equitable or under common law, whether known or unknown, whether accrued or unaccrued, that are based on or arise from the Site.

See Doty Decl. Ex. 6A § 2.03. "Site" is defined as "the Omega Chemical Corporation Superfund Site listed on the National Priorities List on January 19, 1999, 64 Fed. Reg. 2945." *See id.* § 2.19.

The 2007 Settlement provides for a release of "Settled Matters." *See id.* § 5.01. Section 5.02 sets out "Excluded Matters" from the 2007 Settlement, and for a claim or liability arising from the Site to be excluded it

must *not* be for Regional Response Work. *See id.* § 5.02(j). "Regional Response Work" is defined under the 2007 Settlement as "work that the Governments require the Parties, or any one of them to perform, or which they perform at the request or demand of the Governments or any one of them, regarding regional groundwater contamination alleged to be attributed to the Site." *See id.* § 2.16. In other words, Regional Response Work is not considered one of the Excluded Matters. *See id.* Except for Excluded Matters and certain ministerial tasks, and pursuant to terms and conditions in the 2007 Settlement, OPOG and Omega Chemical PRP Group LLC assumed "each Settling Party's responsibilities for the Site, including, but not limited to, all the response costs associated with the Site." *See id.* 3.01(a).

Sections 5.03 and 6.01 of the 2007 Settlement preserve certain rights to additional recovery by the Group[18] against some of the settling defendants and third parties. *See id.* §§ 5.03, 6.01. The Group could recover additional payments of the amount by which Total Collective Costs exceed $70 million, not to exceed the settling party's share of $93 million. *See* Doty Decl. Ex. 6A § 5.03. "Total Collective Costs" are defined in the 2007 Settlement as "total Site response costs that have been or are in the future expended by the Group and the Settling Parties." *See id.* § 2.21. Those costs include costs attributable to "PRPs the Group has or does otherwise settle with . . . [and] PRPs from whom the

[18] The 2007 Settlement defines "Group" as OPOG and the Omega Chemical PRP Group LLC.

Group recovers through litigation to judgment." *See id.* § 2.21.

As part of the papers arguing to Judge Hatter that the 2007 Settlement was a good faith settlement, the memorandum in support thereof stated that the 2007 Settlement resolves the settling parties' "claims against each other with regard to their responsibilities for the Omega Site, including claims for response costs under the completed UAO 95-15 work, Phase 1a Response work called for under the Consent Decree, as amended, and any future Regional Response Work, except as specifically limited in the [2007] Settlement Agreement." *See* Doty Decl. Ex. 6 at 4-5.

3. The 2010 Action and the Related 2010 Consent Decree

In 2010 in the case of *United States v. Alcoa Inc.*, Case No. 2:10-cv-05051-TJH-(PLAx) ("2010 Action"), Plaintiff United States sued a number of defendants under CERCLA Section 107 to recover response costs in connection with the Omega Site. *See generally* Complaint, Case No. 2:10-cv-05051-TJH-PLA Docket No. 1. The complaint in the 2010 Action alleged that the United States incurred at least $17 million in unreimbursed response costs in responding to the releases or threatened releases of hazardous substances at the former waste treatment and storage facility of Omega Chemical Corporation. *See id.* ¶¶ 6, 11.

On October 6, 2010, the EPA, settling work defendants ("2010 Settling Work Defendants"), settling cash

defendants ("2010 Settling Cash Defendants") and other parties entered into a Consent Decree ("2010 CD"). *See generally* Doty Decl. Ex. 32. "Site" under the 2010 CD means "the Omega Chemical Corporation Superfund Site, listed on the National Priorities List on January 19, 1999, 64 Fed. Reg. 2950." *See id.* at 10. Paragraph 88 of the 2010 CD provides that:

> Claims Against *De Minimis* and Ability to Pay Parties. Settling Defendants agree not to assert any claims or causes of action and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that they may have for all matters relating to the Site against any person that has entered or in the future enters into a final CERCLA Section 122(g) *de minimis* settlement, or a final settlement based on limited ability to pay, with EPA with respect to the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Defendant.

See Doty Decl. Ex. 32 ¶ 88. Under the 2010 CD, the 2010 Settling Work Defendants would pay $1.5 million toward the EPA's unrecovered costs at the Site, would pay all future response costs not inconsistent with the NCP, and would perform various remedial work as to the Site. *See id.* ¶¶ 9-16, 49-50. The 2010 Settling Cash

Defendants had various payment obligations under the 2010 CD. *See id.* ¶¶ 47-48

4. The 2016 Action and the Related 2017 Consent Decree

In the 2016 case of *United States v. Abex Aerospace*, Case No. 2:16-cv-02696-GW-(Ex) ("2016 Action"), the United States and the State of California on behalf of the Department of Toxic Substances Control ("DTSC") sued a number of defendants under Sections 106 and 107 of CERCLA and Section 7003 of the RCRA for injunctive relief and recovery of costs associated with the release and threatened release of hazardous substances at OU2 or which have come to be located at OU2. *See* Case No. 2:16-cv-02696-GW-(Ex) Docket No. 1 at pg. i and ¶ 1. The United States alleged it incurred at least $20 million in unreimbursed response costs in responding to hazardous substances or threatened hazardous substances at or in route to OU2. *See id.* ¶ 18. Plaintiffs' response actions allegedly included remedial investigation, oversight of work by certain defendants, community relations activities, and preparation feasibility studies and decision documents. *See id.*

In 2017, the Court entered a consent decree ("2017 CD") putting an end to the 2016 Action. *See* Order to Enter Consent Decree, Case No. 2:16-cv-02696-GW-(Ex) Docket No. 41. The 2017 CD bound the plaintiffs in that action and certain defendants ("2017 Settling

Defendants").[19] *See* Corrected Consent Decree ¶ 2, Case No. 2:16-cv-02696-GW-(Ex) Docket No. 19-1. The 2017 CD required the Settling Work Defendants to make cash payments to the United States and the DTSC in the amount of $8 million and $70,000 for past response costs, respectively. *See id.* ¶ 28. Additionally, the 2017 Settling Work Defendants agreed to pay all future response costs incurred by the EPA and DTSC in overseeing the response actions covered by the 2017 CD, as well as a performance guarantee of $70 million, which is the estimated cost of the "Work." *See id.* ¶¶ 21, 29. The Work was to include groundwater extraction and treatment in the Northern Extraction Area, Central Extraction Area, and a portion of the Leading Edge Area of the OU2 plume. *See id.* ¶¶ O-P. The Work also was to include investigative work to assist the EPA in determining the appropriate remainder of the response efforts. *See id.* In exchange for entering the 2017 CD, all 2017 Settling Defendants received covenants not to sue under CERCLA §§ 106 and 107, as well as RCRA § 7003 and parallel state provisions, for the entirety of Plaintiffs' past OU2 response costs and the Work required by the 2017 CD. *See id.* ¶¶ 59-60. The 2017 Settling Defendants are also entitled to contribution protection under CERCLA § 113(f)(2) for the "matters addressed" in the 2017 CD. *See id.* ¶¶ 4, 81.

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[19] The 2017 Settling Defendants comprised of entities listed in Appendix D and E of the 2017 CD. *See* 2017 CD at CM/ECF pgs. 330-338, Case No. 2:16-cv-02696-GW-(Ex) Docket No. 19-1.

III. MSJ Legal Standard

Summary judgment is proper when the pleadings, the discovery and disclosed materials on file, including any affidavits/declarations, show that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."[20] Fed. R. Civ. P. 56; *see also Miranda v. City of Cornelius*, 429 F.3d 858, 860 n.1 (9th Cir. 2005). To satisfy its burden at summary judgment, a moving party *with* the burden of persuasion must establish "beyond controversy every essential element of its [claim or defense]." *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003). By contrast, a moving party *without* the burden of persuasion "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, the nonmoving party

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[20] Under Federal Rule of Civil Procedure 56, the same legal standard applies to motions for partial summary judgment and to ordinary motions for summary judgment. *See* Fed. R. Civ. P. 56(a): *see also California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998); *Barnes v. Cnty. of Placer*, 654 F.Supp.2d 1066, 1070 (E.D. Cal. 2009), *aff'd*, 386 F.App'x 633 (9th Cir. 2010) ("A motion for partial summary judgment is resolved under the same standard as a motion for summary judgment.").

may not rely on the mere allegations in the pleadings in order to preclude summary judgment, [but instead] must set forth, by affidavit or as otherwise provided in Rule 56, *specific facts* showing that there is a genuine issue for trial. *T.W. Elec. Serv., Inc., v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (internal citations and quotation marks omitted, emphasis in original) (citing, among other cases, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

"A non-movant's bald assertions or a mere scintilla of evidence in his favor are both insufficient to withstand summary judgment." *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009). In addition, the evidence presented by the parties must be admissible. *See* Fed. R. Civ. P. 56(e); *see also Pelletier v. Fed. Home Loan Bank of S.F.*, 968 F.2d 865, 872 (9th Cir. 1992) (to survive summary judgment, the non-movant party "ordinarily must furnish affidavits containing admissible evidence tending to show the existence of a genuine dispute of material fact"). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). With that said, courts do not make credibility determinations or weigh conflicting evidence at the summary judgment stage, and must view all evidence and draw all inferences in the light most favorable to the non-moving party. *See T.W. Elec.*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)); *see also*

Motley v. Parks, 432 F.3d 1072, 1075, n.1 (9th Cir. 2005) (en banc).

IV. Discussion

Moving Defendants seek summary judgment as to Plaintiffs' first and third claims for relief,[21] arguing that the three-year statute of limitations in 42 U.S.C. § 9613(g)(3)(B), CERCLA § 113(g)(3)(B) bars them. *See* MSJ at 18-25. Plaintiffs disagree. *See* Opp'n at 11-25. The core of this Motion rests on whether any prior judicially approved settlement or consent decree triggered the statute of limitations, barring the first and third claims for relief in the 5AC.

A. Applicable Law on the Statute of Limitations

The Ninth Circuit has recognized the complexity of CERCLA, noting that the statute contains a "maze-like structure and baffling language." *California ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661, 663 (9th Cir. 2004). Nonetheless, "[w]hile the statutory language may be baffling and the structure maze-like, the statute clearly indicates

[21] In the 5AC, Plaintiffs style the first claim for relief as "Contribution Under CERCLA," alleged against all Defendants except for Burke Street LLC. *See* 5AC ¶¶ 396-407. The third claim for relief is labeled as "Declaratory Judgment Under Federal Law," alleged against all Defendants except Burke Street LLC. *See id.* ¶¶ 424-426. Because the first and third claims for relief are essentially the same, with the third merely adding a declaratory relief element, the Court will analyze them together.

that *any* contribution claim for particular remedial costs is subject to a three-year statute of limitations once liability for a potentially responsible party ('PRP') becomes recognized through a judicially approved settlement." *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1208 (9th Cir. 2015) (citing 42 U.S.C. § 9613(g)(3)(B)). Pursuant to CERCLA § 113, there are two express avenues for contribution:

> § 113(f)(1) ("during or following" specified civil actions) and § 113(f)(3)(B) (after an administrative or judicially approved settlement that resolves liability to the United States or a State). Section 113(g)(3) then provides two corresponding 3-year limitations periods for contribution actions, one beginning at the date of judgment, § 113(g)(3)(A), and one beginning at the date of settlement, § 113(g)(3)(B). . . . [T]o assert a contribution claim under § 113(f), a party must satisfy the conditions of either § 113(f)(1) or § 113(f)(3)(B).

Cooper Indus., 543 U.S. at 167. CERCLA § 113(g)(3), the statute of limitations provision at issue here, reads as follows:

> **(3) Contribution**
>
> No action for contribution for any response costs or damages may be commenced more than 3 years after –
>
> > **(A)** the date of judgment in any action under this chapter for recovery of such costs or damages, or

> **(B)** the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

See CERCLA § 113(g)(3). The Ninth Circuit has elaborated on the statute of limitations component, providing that:

> The statute of limitations for a contribution claim is triggered by the date upon which the judgment or settlement that underlies the claim is entered. *See id.* When the CERCLA §§ 106 or 107 lawsuit is over and a judgment is entered, the statute of limitations begins to run on the cause of action for contribution that accrued during the pendency of that litigation. *See* 42 U.S.C. § 9613(g)(3)(A). When a person resolves its liability to the United States or a State through an administrative or judicially approved settlement, a right to assert a contribution claim against other PRPs also accrues. *Id.* § 9613(f)(3)(B). Such a settlement starts the clock on the three-year statute of limitations for the contribution claim that accrues on the basis of that settlement. *Id.* § 9613(g)(3)(B).

Celanese, 792 F.3d at 1210. Under CERCLA § 113(g)(3)(B), private-party judicially approved settlements also trigger the statute of limitations. *See id.* at 1211.

The outstanding question is whether the 2007 Settlement constitutes a judicially approved settlement "with respect to" response costs or damages sought in the present action for contribution. There is no doubt that the 2007 Settlement constitutes a judicially approved settlement within the meaning of CERCLA § 113(g)(3). Therefore, the issue before the Court is merely whether the 2007 Settlement is *with respect to* the response costs or damages sought in this lawsuit. This inevitably requires a comparison of such costs.

B. Which Costs Are Sought in This Lawsuit?

It behooves the Court to begin with establishing what response costs or damages are sought in the present action for contribution. The Court has two primary sources for determining the costs sought here: the 5AC and the Costs Timeline that Plaintiffs provided. First, in the 5AC, Plaintiffs seek the following:

> (1) ON THE FIRST CLAIM FOR RELIEF, for contribut[i]on for all costs and damages incurred by Plaintiffs, including pre-judgment interest thereon as allowed by law, that exceed Plaintiffs' equitable share of the costs for which Plaintiffs are liable under the OU-2 Consent Decree;
>
> ***
>
> (3) ON THE THIRD CLAIM FOR RELIEF, for a judicial declaration that Defendants are liable for their respective equitable shares of

> all costs and damages incurred by Plaintiffs, including pre-judgment interest thereon as allowed by law, that exceed Plaintiffs' equitable share of the costs for which Plaintiffs are liable under the OU-2 Consent Decree. . . .

See 5AC at 102-103. Paragraph 9 also bears relevance:

> Plaintiffs have each voluntarily incurred significant costs to investigate the sources to, and the remediation of, the OU-2 Facility, collectively spending millions of dollars to address it, and may incur millions of dollars more in future response costs. EPA has determined that the contaminated groundwater should be contained, extracted, and treated so that it can be used in a beneficial manner. This remedy will require tens of millions of dollars in capital and operating expenditures for years to come. Upon information and belief, Defendants are responsible for releases of hazardous substances to the OU-2 Facility groundwater and therefore should bear the costs to clean up the resulting contamination.

See id. ¶ 9.

As the second source that the Court draws upon to discern what costs are sought here, Plaintiffs submitted the Costs Timeline. In the Costs Timeline, Plaintiffs include a three-page matrix. *See generally* Costs Timeline. That matrix, titled in full as "Timeline of OU2 Activities and OPOG Costs," bears four columns. *See id.* Those columns are titled as follows: (1) Year; (2) Major EPA OU2 Activities; (3) Major OPOG OU2 Activities; and (4) OPOG OU2 Costs. *See id.* Each row

represents a period of time (starting in 2001 and ending in 2018). Plaintiffs aver that $16,500,000 in OPOG OU2 costs have been incurred (or that they seek that much in costs). *See id.* at CM/ECF pg. 3. Some of the costs Plaintiffs seek relate to the "data collection on nature and scope of OU2 contamination;" "[d]ata collection on OU2 PRPs;" "work on OU2 RI;" "GNLs for RI;" "EPA work on OU2 RI;" "work on OU2 and [p]roposed [r]emedy;" "comments on draft RI;" "[f]inal OU2 RI/FS and Proposed Remedy Plan for public comment;" "OU2 ROD;" "SNLs with draft OU2 CD and Statement of Work;" "Good Faith Offers;" "negotiations with OPOG on GFO;" "settlement negotiations with OPOG and McKesson;" "[n]egotiations on CD and SOW continue based on term sheet;" and "ongoing oversight of OU2 CD SOW." *See generally* Costs Timeline.

C. Which Costs Were Covered in the 2007 Settlement?

Next, the Court must establish what costs the 2007 Settlement covers as a point of comparison. The Court applies California principles of contract interpretation in performing this task.[22] From reviewing

[22] Pursuant to California law, "the mutual intention of the parties at the time the contract is formed governs interpretation." *AIU Ins. Co. v. Super. Ct.*, 799 P.2d 1253, 1264 (1990) (citing Cal. Civ. Code § 1636). To discern the parties' intent, the Court looks solely to "the written provisions of the contract." *Id.* (citing Cal. Civ. Code § 1639). The Court applies the ordinary meaning of a contract's terms. *Id.*; Cal. Civ. Code § 1644. Regardless of how broad a contract may look, "it extends only to those things

the 2007 Settlement, it provides for a release of "Settled Matters." *See* Doty Decl. Ex. 6A § 5.01. On the other hand, Section 5.02 sets out "Excluded Matters," and for a claim or liability arising from the Site to be excluded from the settlement it must *not* be for "Regional Response Work." *See id.* § 5.02(j). In other words, Regional Response Work is not considered one of the Excluded Matters and would thus be settled. *See id.* "Regional Response Work" under the settlement means "work that the Governments require the Parties, or any one of them to perform, or which they perform at the request or demand of the Governments or any one of them, regarding regional groundwater contamination alleged to be attributed to the Site." Except for Excluded Matters and certain ministerial tasks, and pursuant to terms and conditions in the 2007 Settlement, OPOG and Omega Chemical PRP Group LLC assumed "each Settling Party's responsibilities for the Site, including, but not limited to, all the response costs associated with the Site." *See id.* 3.01(a). The Court would also construe the 2007 Settlement as covering OU2. To support this interpretation, Section 2.19 defines "Site" as "the Omega Chemical Corporation Superfund Site listed on the National Priorities List on January 19, 1999, 64 Fed. Reg. 2945." *See* Doty Decl. Ex. 6A § 2.19.

Three other documents and/or evidence, among others, contribute to the Court's understanding of

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concerning which it appears that the parties intended to contract." Cal. Civ. Code § 1648.

what the 2007 Settlement covers.[23] First, though the 2004 Cost Estimate Memo is not binding, it provides insight into what the 2007 Settlement covered because it had a hand in the Court's approval of that settlement. Dr. Perina described the groundwater as containing contamination dissolved within it over an area of at least 2.5 miles long and .75 miles wide (the plume). *See* Doty Decl. Ex. 19 at 2, Docket No. 749. The 2004 Cost Estimate Memo assumed extraction and treatment of contaminated groundwater as the presumptive remedies for the site, characterized as pump and treat using a complex treatment train to address chemicals in the plume. *See id.* at 2-3. This estimate included wells, water conveyance pipelines, and a treatment plant as components of the conceptual remediation system. *See id.* at 3. The pump and treat system would operate for 30 years with soil remediation taking 3 years, under this conceptual remedy. *See id.* at 3. Hexavalent chromium and PCE (tetrachloroethylene) were therein identified as contaminants detected in the Omega Site, with the memo noting that other contaminants may be identified in the future. *See id.* at 2-3. Dr. Perina estimated that soil remediation "Capital and O&M" costs with a 3.1% discount rate would add up to $3.9 million and groundwater pump and treat costs would amount to $97.5 million. *See* Doty Decl. Ex. 19 at pg. 5 Table 1. *See generally* Doty Decl. Exs. 6A, 19. The Court distinguishes this

[23] These documents and/or evidence give the Court context. The Court's decision rests with the language in the 2007 Settlement, though these documents and/or evidence reaffirm the Court's conclusion.

situation from that in *Celanese* where there was a concrete Remedial Action Plan incorporated into the settlement, but the 2004 Cost Estimate Memo nonetheless has some bearing on what the 2007 Settlement covered. *See Celanese*, 792 F.3d at 1212 (noting that the settlement included an agreement to "undertake site remediation to investigate, monitor, and abate actual or threatened contamination . . . caused by or related to the conditions at the site addressed by the Remedial Action Plan."). The 2004 Cost Estimate Memo also supports an interpretation that the 2007 Settlement covered OU-2, with a mention that the estimated cost for groundwater included multiple sites downgradient from the Omega processing plant and chemicals not connected to the Omega plant. *See* Doty Decl. Ex. 19 at 2. Second, Albert Cohen ("Mr. Cohen"), an attorney for certain Plaintiffs' counterparties in the 2007 Settlement, testified in his deposition that no representatives of OPOG communicated to him that the "60-80 million dollars' worth of costs EPA's talking about as of 2016" are different than what was "settled back in 2006." *See* Doty Decl. Ex. 27 at exhibit stamped pgs. 5-7. Third, the 2004 Complaint leading to the 2007 Settlement sought recovery of "costs expended and to be expended by . . . Plaintiff OPOG and its members in response to the releases and/or threatened releases of hazardous substances from the *Omega Site.*" *See* Doty Decl. Ex. 18 at 28-29 (emphasis added). There was no limitation to OU-1 or exclusion of OU-2. *See id.*

D. Were the Costs Sought in the Present Action with Respect to Those Covered in the 2007 Settlement?

With the Court identifying above the costs sought in the present action and the costs covered in the 2007 Settlement, the Court can now determine whether the specific response costs sought in the present action are "with respect to" such costs covered in the 2007 Settlement. *See* CERCLA § 113(g)(3). That is the crux of the CERCLA § 113(g)(3) inquiry currently before the Court.

This situation is somewhat similar to that in *Celanese*, and so the Court will address that case here before executing a cost comparison. *Celanese* involved a silver and lead smelter in Contract Costa County. *See ASARCO LLC v. Shore Terminals LLC*, No. C 11-01384 WHA, 2012 WL 2050253, at *1 (N.D. Cal. June 6, 2012), *aff'd sub nom., ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203 (9th Cir. 2015).[24] As a result of lead and refining operations, a waste product of smelting deposited in ASARCO's land as well as tidelands leased by ASARCO from the California State Lands Commission. *See id.* A company named Wickland Oil Company purchased ASARCO's portion of the site. *See id.* Wickland Oil Company subsequently commenced litigation against ASARCO and the California State Lands

[24] The Court uses the case name "*Celanese*" to refer to the entire litigation, both at the district court level and in the subsequent appeal to the Ninth Circuit. Any citation to "2012 WL 2050253" refers to the district court decision whereas the citation to "792 F.3d 1203" refers to the Circuit decision.

Commission. *See id.* at *2. In 1989, the parties entered into a judicially approved settlement where the parties undertook two broad categories of remediation costs. *See id.* One category included four "Interim Remedial Measures," among other things, with each party assuming one third of the cost responsibility. *See id.* at *2. The other category included "other remediation costs" such as future costs for remediation measures necessary and appropriate and costs associated with reimbursement of a government agency for costs incurred in connection with site remediation. *See id.* ASARCO filed the action in March 2011 against certain defendants not party to the 1989 settlement, seeking contribution under Section 113(f) for costs ASARCO incurred. *See id.* at *3. Ultimately, in *Celanese*, the district court held that the 1989 settlement's terms covered the costs in the contribution action, barring recovery beyond the three-year statute of limitations:

> While it may not have been known at the time the 1989 Wickland Settlement was entered into exactly how much the entire remediation efforts would cost, the Settlement's provisions demonstrate that the settling parties agreed to share responsibility for future remediation costs – such as those associated with acid-impacted soils, leaching of metals from the slag, and groundwater contamination. ASARCO's argument that the costs it seeks from defendant in the present dispute are not covered by the 1989 Wickland Agreement is not

> supported by the record, and defendant's motion must therefore be **GRANTED.**

See id. at *9.

On appeal, the Ninth Circuit affirmed the district court's decision, holding that the 1989 settlement triggered the statute of limitations. *See Celanese*, 792 F.3d at 1215. Reviewing the settlement *de novo*, the Ninth Circuit noted that the settlement included an agreement for the parties to "undertake site remediation to investigate, monitor, and abate actual or threatened contamination . . . caused by or related to the conditions at the site addressed by the Remedial Action Plan." *See id.* at 1212. This Remedial Action Plan was based on a report of an environmental consultant, eventually incorporated into the 1989 settlement. *See id.* The court held that "[t]he fact that the full costs were unknown at the time does not mean that the Wickland Agreement was less than comprehensive." *See id.* at 1213.

Earlier, this Court *tentatively* concluded that the response costs and damages sought herein were not "with respect to" the costs covered in the 2007 Settlement. *See generally* MSJ Tentative II. But, the Court has changed its perspective in light of reexamining the parties' arguments, CERCLA, the case law, and the relevant evidence. The 2007 Settlement cast a wide net that includes the costs sought in the 5AC and that are more specifically delineated in the Costs Timeline. That settlement is "comprehensive" like the one in *Celanese.* As discussed above, the 2007 Settlement

covers "Regional Response Work," which means "work that the Governments require the Parties, or any one of them to perform, or which they perform at the request or demand of the Governments or any one of them, regarding regional groundwater contamination alleged to be attributed to the Site." *See id.* § 2.16. Except for Excluded Matters and certain ministerial tasks, and pursuant to terms and conditions in the 2007 Settlement, OPOG and Omega Chemical PRP Group LLC assumed "each Settling Party's responsibilities for the Site, including, but not limited to, all the response costs associated with the Site." *See id.* 3.01(a). The Costs Timeline and 5AC fall within those definitions, and, like in *Celanese*, the Costs Timeline includes a mixture of costs known to the parties when they executed the 2007 Settlement and future demands made by regulators. Though the 2007 Settlement speaks for itself and is sufficient, the testimony of Cohen and the 2004 Cost Estimate Memo solidify and reaffirm that is the case from a practical perspective. It is also clear to the Court that Plaintiffs have not raised any evidence to create a triable issue of fact as to whether the 2007 Settlement covered OU-2. Discussed above, Section 2.19 of the 2007 Settlement defines "Site" as "the Omega Chemical Corporation Superfund Site listed on the National Priorities List on January 19, 1999, 64 Fed. Reg. 2945." *See* Doty Decl. Ex. 6A § 2.19. Also in support of this reading, the 2004 Complaint leading to the 2007 Settlement sought recovery of "costs expended and to be expended by . . . Plaintiff OPOG and its members in response to the releases and/or threatened releases of hazardous substances from the *Omega*

Site." *See* Doty Decl. Ex. 18 at 28-29 (emphasis added). The 2004 Complaint, and the 2007 Settlement that followed, did not limit themselves to costs associated with OU-1 only, but rather they covered the entire Omega Superfund Site, which would inherently include OU-2. In addition, the 2004 Cost Estimate Memo mentions that the estimated cost for groundwater included multiple sites downgradient from the Omega processing plant and chemicals not connected to the Omega plant. *See* Doty Decl. Ex. 19 at 20. The Cohen testimony discussed above also implies that the 2007 Settlement covered OU-2. *See* Doty Decl. Ex. 27 at exhibit stamped pgs. 5-7.

After reviewing Plaintiffs' various arguments, the Court rejects their (at least) three attempts to read additional requirements into CERCLA § 113(g)(3)(B) that are not supported by applicable statutory interpretation. First, the Court is not convinced by Plaintiffs' argument that the de minimis status of Plaintiffs' generator counter-parties in the 2007 Settlement is dispositive. *See* Pls.' Supp. at 11-14; *see also* Opp'n at 22-25. Instead, the Court is inclined to agree with Moving Defendants that "[r]ather than focus on *who* settled the cost-recovery action, in short, the statute asks us to focus on *what* was settled." *See RSR Corp. v. Commercial Metals Co.*, 496 F.3d 552, 557 (6th Cir. 2007) (cited in a *Celanese*, 792 F.3d at 1214). Congress could have included such a requirement in CERCLA § 113(g)(3)(B), but it did not and the Court is reluctant to read in such a requirement even after considering

Plaintiffs' policy arguments to do so.[25] Plaintiff has not pointed to legislative history that would alter the

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[25] The Court applies the following procedure in interpreting CERCLA's statute of limitations provisions, as worded in *Celanese*:

> "Statutes of limitations are intended to provide notice to defendants of a claim before the underlying evidence becomes stale." *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009 (9th Cir. 2008). A primary canon of statutory interpretation is that the plain language of a statute should be enforced according to its terms, in light of its context. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997); *Wilshire Westwood Assocs. v. Atl. Richfield Corp.*, 881 F.2d 801, 803 (9th Cir.1989).
>
> When interpreting a statute, our task is to construe what Congress has enacted. We look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress. We will resort to legislative history, even where the plain language is unambiguous, where the legislative history clearly indicates that Congress meant something other than what it said.
>
> *Carson Harbor Vill.*, 270 F.3d at 877 (internal quotation marks and citations omitted). "Thus, we examine the statute as a whole, including its purpose and various provisions." *Id.* at 880. We construe the statute in context to avoid superfluities. *Cooper Indus.*, 543 U.S. at 166, 125 S.Ct. 577 (citing *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004)). If possible, we "construe a statute to give every word some operative effect." *Id.* at 167, 125 S.Ct. 577 (citing *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 35–36, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992)). "Clearly, neither a logician nor a grammarian will find comfort in the world of CERCLA. It is not our task, however, to

Court's plain reading and policy considerations do not tip the scale for the Court. *See generally* Opp'n.

Second, the Court is not convinced that the supposed "contingent" nature of an obligation in the 2007 Settlement would somehow change the fact that the 2007 Settlement is "with respect to" costs sought in the present action. CERCLA § 113(g)(3)(B) bears no hint of such a requirement.[26] Plaintiffs cite to no canon of statutory construction that persuades the Court to be the first in this Circuit to carve out such a significant exception. Though there may be a few legitimate policy concerns, Congress could choose to act if its agrees with Plaintiffs; a plain reading of the statute and the absence of applicable legislative history lead the Court to this conclusion. The Ninth Circuit in *Celanese* seemed to reject ASARCO's somewhat similar argument "that the phrase 'such costs or damages' in the statute of limitations means that ASARCO's claim for contribution only came about when 'such costs or damages' became fixed." *See Celanese* 792 F.3d at 1214. Seemingly disagreeing with that argument, the Ninth Circuit responded that "ASARCO's new contribution claim via the 2008 Bankruptcy Settlement is for exactly the same liability ASARCO assumed in the 1989 Wickland Agreement, and is therefore time barred." *See id.*

> clean up the baffling language Congress gave us. . . ." *Carson Harbor Vill.*, 270 F.3d at 883.

Celanese, 792 F.3d at 1210-11.

[26] The text of CERCLA § 113(g)(3) is provided on page 7, *supra.*

Third, the Court is also not convinced that because certain costs were unknown at the time of the 2007 Settlement or because the exact procedure for remediating the Site was not established at the time of the settlement, that somehow the 2007 Settlement does not cover the costs sought herein. Indeed, this Court will respond to those concerns with the words of the Ninth Circuit responding to similar concerns in *Celanese*: "[t]he terms of the [2007 Settlement] clearly define who will pay for the work and the nature of the work to remediate the [ ] Site, while contemplating that additional tasks may be added to accomplish the remediation's goals."[27] *See*

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[27] Here, the situation is also not similar to that in *American Cyanamid v. Capuano*, 381 F.3d 6 (1st Cir. 2004). There, the statute of limitations did not bar a contribution claim because an earlier judgment covered a different set of costs altogether; the later time-barred lawsuit addressed groundwater contamination whereas the earlier judgment addressed soil cleanup. *See id.* at 10-14. At the time of the earlier judgment, regulators had not even assessed whether there was groundwater contamination at the site. *See id.* at 14. That is not the case here, where groundwater contamination is at issue in the present action came into focus as early as 1995. *See* Doty Decl. Ex. 3 at 2:24-3:5. Indeed, groundwater contamination is reference both in the 2007 Settlement and in the present action's 5AC. *See*, *e.g.*, 2007 Settlement § 2.16; *see also* 5AC ¶ 9.

The Court would similarly find *Whittaker Corp. v. United States*, 825 F.3d 1002 (9th Cir. 2016) distinguishable from this case. In that case, the plaintiff "explicitly alleged" that the costs sought were "separate from" costs covered by the earlier judicially approved settlement at issue. *See id.* at 1005. Unlike here, at issue there was a motion to dismiss, rather than a motion for summary judgment, so that explicit allegation was considered true and dispositive. *See id.* In addition, *Whittaker* did not direclty take on a statute of limitations argument but instead the Ninth Circuit merely determined that the plaintiff was not required to

Celanese 792 F.3d at 1213.[28] Upon reviewing the parties' additional briefing, the Court also concludes that

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bring a suit for contribution rather than cost recovery because he sought expenses separate from those established or pending. *See id.* at 1010-13. Those questions are "closely related" but they are not necessarily identical. *See id.* at 1010.

[28] For somewhat similar reasons to the Court's conclusions above, the Court would find that a contribution claim arose as early as November 29, 2000 when the United States sued Plaintiff under CERCLA § 107 for cost recovery of response costs and under CERCLA § 106 to compel the clean up of the Omega Site in its entirety. *See generally* 2000 Action Complaint ¶¶ 12-17, Docket No. 785. In addition, the 2004 Complaint against the de minimis generators alleged a contribution claim as the legal basis for the action, seeking contribution for Site costs, indicating that even Plaintiffs must have believed this at one point in time. *See generally* 2004 Complaint, Docket No. 749. As per CERCLA § 113(f)(1), "a person may seek contribution from any other person who is liable or potentially liable under section 9607(a) [CERCLA § 107(a)] of this title, during or following any civil action under section 9606 [CERCLA § 106] of this title or under section 9607(a) [CERCLA § 107(a)] of this title." That statute was satisfied here.

Separate but related, at the August 6, 2018 hearing, Moving Defendants requested that the Court give a "clear ruling" on their judicial estoppel argument. *See* Aug. 6, 2018 Hr. Tr. at 70:23-25. In one sentence and one accompanying footnote in the MSJ, Moving Defendants mention judicial estoppel. There, the extent of their argument is as follows:

> Plaintiffs' knowledge of the regional plume issue and their efforts to obtain contribution in connection with their liability for those costs present a fact pattern different from the *Capuano* decision and any claim now that the 2001 settlement did not trigger limitations for the entire Omega Superfund Site would fail by principles of judicial estoppel.
>
> [FN 12 from the MSJ attached to the end of the above excerpt:] *Samson v. NAMA Holdings, LLC*, 637 F.3d

> 915, 935 (9th Cir. 2011) provides the Ninth Circuit's three-part framework for judicial estoppel, which Moving Defendants will address if need be in their Reply.

See MSJ at 24. In the MSJ Reply, Moving Defendants briefly argue that "judicial estoppel prevents Plaintiffs from claiming that they lacked a CERCLA contribution claim inclusive of OU-2 until recently." Reply at 13-14. Moving Defendants seem to somewhat pivot to arguing that Plaintiffs' actions in the 2004 Action estop Plaintiffs from preferring the aforementioned argument. *See id.* The Ninth Circuit in *Samson* noted four factors that courts consider in deciding whether to apply the doctrine of judicial estoppel:

> Factors relevant in deciding whether to apply the doctrine include: (1) whether the party's later position is "clearly inconsistent" with its earlier position; (2) whether the party has successfully advanced the earlier position, such that judicial acceptance of an inconsistent position in the later proceeding would create a perception that either the first or the second court had been misled; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."
>
> In addition to these factors, the Ninth Circuit examines [4] "whether the party to be estopped acted inadvertently or with any degree of intent."

See Samson, 637 F.3d at 935 (citations omitted).

As a separate and independent basis for the Court's decision, it is inclined to agree with Moving Defendants' judicial estoppel position as argued in the Reply. *See* Reply at 13-14. Though there is no evidence of any intent on Plaintiffs' part, Plaintiffs are "clearly inconsistent" with their earlier position in the 2004 Action seeking relief costs inclusive of the entire Site; allowing Plaintiffs to essentially argue that they never had a contribution claim that they litigated before Judge Hatter is an unfair advantage based on an inconsistent position. Moreover, Plaintiffs do not persuade the Court otherwise and they never mention the phrase "judicial estoppel" in the Opposition or any supplemental briefing. *See generally* Opp'n; Pls.' Supp.; Pls.' Supp. II.

the statute of limitations provision in CERCLA § 113(g)(3) does not require a party to accept liability or responsibility to trigger the statute of limitations. Plaintiffs point to no legislative history that would indicate otherwise, and the fact that a different provision, CERCLA § 113(f)(3)(B), narrows itself to situations where a person "has ***resolved its liability*** to the United States or a State for some or all of a response action" indicates that Congress purposefully left out such a requirement in CERCLA § 113(g)(3). The Court would therefore not read this additional requirement into CERCLA § 113(g)(3).

In sum, the Court would conclude that the 2007 Settlement, which was entered more than three years prior to the filing of the present action, bars the first and third causes of action in the 5AC. The response costs sought here are "with respect to" those covered in the 2007 Settlement.[29] Plaintiffs provide no material

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[29] In a brief 1.5 page section of the MSJ, Moving Defendants seem to argue that even if the 2007 Settlement did not trigger the statute of limitations to preclude this action, the 2001 CD and the 2010 CD independently triggered the statute of limitations. *See* MSJ at 23-25. This section, in its brevity and with its lack of supporting evidence and analysis, does not sufficiently convince the Court that the 2001 CD or the 2010 CD trigger the statute of limitations to run as to this action. Moving Defendants backtracked from invoking the 2001 CD and the 2010 CD in the Reply, asserting that these settlements "[b]oth were clearly identified [in the MSJ] as background support. . . ." *See* Reply at 18. They even include a heading that concedes that "[t]he 2001 and 2010 Consent Decrees Were and Remain Tertiary." *See id.* With the Court determining that the 2007 Settlement bars the first and third causes of action, the Court need not entertain the possibility that

evidence to put that conclusion in dispute and thus the statute of limitations applies.

V. Conclusion

For the reasons stated above, the Court would **GRANT** the Moving Defendants' MSJ and **DISMISS WITH PREJUDICE** the first and third causes of action in the 5AC.[30]

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those consent decrees (or others) also could have triggered the statute of limitations.

[30] Moving Defendants filed three requests for evidentiary rulings on specified objections as to three separate declarations. *See* Docket Nos. 781, 782, 783. Of those objections, only two objections relate to evidence the Court has relied on in this ruling. Those two objections in Docket No. 783, made against Paragraphs 4 and 6 of the Lucero Declaration, are overruled. Plaintiffs filed one objection, aiming at an exhibit attached to Moving Defendants' Reply. *See* Docket No. 786. The Court did not rely on this exhibit for its ruling and it therefore need not rule on its admissibility. At both of the hearings, neither party made a further request for specific rulings on evidentiary objections.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ARCONIC INC., et al., Plaintiffs, v. APC INVESTMENT CO., et al., Defendants.	Case No. CV 14-6456 GW(Ex) **FINAL JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 54(b)**
AND RELATED CROSS ACTIONS, COUNTERCLAIMS AND THIRD-PARTY COMPLAINTS	

For the reasons stated in the Court's January 15, 2019, Order on Summary Judgment [Dkt. No. 809] and February 4, 2019, Order Directing Entry of Final Judgment Pursuant to Federal Rule of Civil Procedure 54(b) (the "Order Directing Entry of Final Judgment"), Plaintiffs' First and Third Causes of Action for contribution and declaratory relief under the Comprehensive Environmental Response, Compensation, and Liability Act are hereby DISMISSED WITH PREJUDICE and final judgment is hereby entered for the Moving Defendants and Non-Moving Defendants, as those terms are defined under the Order Directing Entry of Final Judgment, as to those claims.

IT IS SO ORDERED.

DATED: February 4, 2019 /s/ George H. Wu
GEORGE H. WU,
U.S. District Judge

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APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARCONIC INC., FKA Alcoa, Inc.; et al., Plaintiffs-Appellants, v. APC INVESTMENT CO.; et al., Defendants-Appellees.	No. 19-55181 D.C. No. 2:14-cv-06456-GW-E Central District of California, Los Angeles ORDER (Filed Oct. 21, 2020)

Before: CALLAHAN and NGUYEN, Circuit Judges, and CHRISTENSEN,* District Judge.

The panel has voted to deny the appellees' petition for panel rehearing. Judges Callahan and Nguyen have also voted to deny the petition for rehearing en banc, and Judge Christensen so recommends. The full court has been advised of the petition, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Accordingly, the petitions for rehearing and rehearing en banc are DENIED.

* The Honorable Dana L. Christensen, United States District Judge for the District of Montana, sitting by designation.

APPENDIX E

CERCLA § 107
(42 U.S.C. § 9607)

Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

. . . .

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

CERCLA § 113
(42 U.S.C. § 9613)

Civil Proceedings

. . . .

(f) Contribution

(1) Contribution

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. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) 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 paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the

dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.