No. 10-15639

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SOLUTIA, INC., et al.
Appellants

v.

MCWANE, INC., et al.
Appellees

Appeal from the United States District Court
for the Northern District of Alabama
No. 1:03-cv-1345-PWG

BRIEF OF APPELLEES UNITED STATES PIPE AND FOUNDRY COMPANY, LLC, WALTER ENERGY, INC., MEADWESTVACO CORPORATION, BAE SYSTEMS LAND & ARMAMENTS, L.P., FMC CORPORATION, and SCIENTIFIC-ATLANTA, INC.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Appellees U.S. Pipe and Foundry Company, LLC and Walter Energy, Inc. United States Pipe and Foundry Company LLC, Walter Energy, Inc., MeadWestvaco Corporation, BAE Systems Land & Armaments, L.P. (formerly, and at the time the initial complaint was filed, known as United Defense, L.P.), FMC Corporation, and Scientific-Atlanta Inc. adopt and incorporate Appellants Solutia, Inc. and Pharmacia Corporation's Second Amended Certificate of Interested Persons with the following corrections:

- Shelly Ellerhorst should be removed from the Certificate of Interested Persons.
- Jody M. Rhodes should be added to the Certificate of Interested Persons.

Appellees U.S. Pipe and Foundry Company, LLC and Walter Energy, Inc. United States Pipe and Foundry Company LLC, Walter Energy, Inc., MeadWestvaco Corporation, BAE Systems Land & Armaments, L.P., FMC Corporation, and Scientific-Atlanta Inc. adopt and incorporate the Corporate Disclosure Statements filed by each of these Appellees.

Statement Regarding Oral Argument

Appellees United States Pipe and Foundry Company LLC, Walter Energy, Inc., MeadWestvaco Corporation, BAE Systems Land & Armaments, L.P., FMC Corporation, and Scientific-Atlanta Inc. respectfully request oral argument only if it would be helpful to the Court's consideration of the issues in this matter.

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Statement of Jurisdiction

By order dated May 31, 2011, this Court confirmed its jurisdiction over this action and permitted the appeal to proceed.

Statement of the Issues

I. Whether the District Court erred in holding that Appellants are barred from bringing a cost recovery claim against Defendants under CERCLA Section 107 because Appellants have a claim for contribution under CERCLA Section 113.

II. Whether the District Court erred in holding that Appellants have a legal obligation under their Partial Consent Decree with the United States to clean up certain lead contamination in and around Anniston, Alabama.

III. Whether the District Court abused its discretion by denying Appellants' motion to alter or amend the judgment on the grounds that the motion was based solely on arguments not raised until after the grant of summary judgment.

Statement of the Case

This appeal arises from the attempt of Appellants Solutia Inc. and Pharmacia Corp. (together "Solutia") to avoid the legal effect of a settlement between certain Defendants-Appellees ("Settling Defendants") and the United States under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq. ("CERCLA"). The settlement resolved Settling Defendants' CERCLA liability for lead and polychlorinated biphenyl ("PCB") contamination in Anniston, Alabama. By operation of law, that settlement provided complete protection to Settling Defendants against contribution claims brought by third-parties, such as Solutia, under 42 U.S.C. § 9613 ("Section 113").[1] The absolute bar against Section 113 contribution claims is based on the United States' determination that Settling Defendants will pay their fair share of cleanup costs in Anniston by performing the work required by the settlement and complying with the settlement's other terms. Solutia seeks to circumvent this third-party claim bar by bringing a CERCLA claim under 42 U.S.C. § 9607 ("Section 107").[2]

[1] 42 U.S.C. § 9613(f) contains two contribution provisions: § 9613(f)(1) and § 9613(f)(3)(B). These provisions are collectively referred to as "Section 113."

[2] Even if Solutia were allowed to proceed under Section 107, Appellees contend that such a claim would be similarly barred by CERCLA's contribution protection provision. This issue, however, is not a part of the current appeal.

The integrity of settlements between potentially responsible parties ("PRPs") and the United States is fundamental to effectuating the goals of CERCLA – to promote the expeditious cleanup of environmental contamination and to ensure that the parties responsible for the contamination bear the cost.[3] To this end, CERCLA authorizes the United States Environmental Protection Agency ("EPA") to conduct the cleanup work itself[4] and recover the costs from any PRP by bringing a cost recovery action pursuant to Section 107. That PRP, in turn, can bring a contribution claim against other PRPs under Section 113.[5] Such a contribution claim may not be brought, however, against a PRP that has settled its liability to the United States, as the Settling Defendants have here. CERCLA provides complete statutory protection from contribution claims to PRPs that settle their liability with the United States[6] – protection that Congress added to in order to encourage parties to expeditiously settle their liability for environmental contamination.[7]

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[3] *See Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1501-02 (11th Cir. 1996); *Broward Garden Tenants Ass'n v. EPA*, 157 F. Supp. 2d 1329, 1338 (S.D. Fla. 2001).

[4] 42 U.S.C. § 9604.

[5] 42 U.S.C. § 9613(f)(1).

[6] 42 U.S.C. § 9613(f)(2).

[7] *See E.I. DuPont Nemours & Co. v. United States*, 460 F.3d 515, 537 (3d Cir. 2006) (legislative history of SARA Amendments states that contribution protection "*should*

CERCLA also authorizes EPA to compel a PRP to perform cleanup work by filing suit against it.[8] If EPA prevails in the lawsuit, the PRP may bring a contribution action against other PRPs pursuant to Section 113 to seek recovery of any portion of the response costs that it incurs above its fair share.[9] If the PRP settles with EPA instead of litigating, CERCLA permits the PRP to pursue the same remedy – a contribution action against other PRPs under Section 113.[10]

The issue in this case is whether a private party that has a Section 113 contribution claim may also assert a Section 107 claim – that is, whether Congress intended for those PRPs with an express right of contribution to nevertheless seek cost recovery. Section 107 plaintiffs have several benefits not available to Section 113 plaintiffs. For example, while Section 113 requires the court to equitably allocate response costs among PRPs, including the plaintiff,[11] Section 107 potentially allows the court to impose

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encourage quicker, more equitable settlements, decrease litigation, and thus facilitate cleanups") (citation omitted) (emphasis in original), vacated on other grounds by 551 U.S. 1129, 127 S. Ct. 2971 (2007); *Transtech Indus. v. A & Z Septic Clean*, 798 F. Supp. 1079, 1085 (D.N.J. 1992) (purpose of contribution protection "is to encourage parties to settle with the government, which, in turn, serve[s] to quickly effectuate urgent clean-up operations").

[8] 42 U.S.C. § 9607(a).

[9] 42 U.S.C. § 9613(f)(3).

[10] *Id.* at § 9613(f)(1).

[11] *See id.*

joint and several liability against any PRP for 100% of the response costs.[12] Also, Section 107 claims have a six-year statute of limitations, while Section 113 claims are subject to a three-year limitations period.[13] For these reasons and others, courts have consistently recognized that Sections 107 and 113 of CERCLA "have differing restrictions and different purposes,"[14] with remedies that are "complementary yet distinct."[15] Nonetheless, Solutia argues that it should be able to choose between pursuing a Section 107 cost recovery claim and a Section 113 contribution claim. The District Court correctly ruled that Solutia does not have this choice, holding that Solutia may only assert a Section 113 claim for contribution.

Statement of Facts and Procedural History

Anniston Superfund Sites

In 1999, in response to numerous citizen complaints, EPA began formal investigations in Anniston of polychlorinated biphenyl ("PCB") contamination.[16] PCBs have been found "to cause cancer, decreased

[12] *See Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1880-81 (2009).

[13] 42 U.S.C. § 9613(g)(2)-(3).

[14] *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 127 (2d Cir. 2010).

[15] *United States v. Atl. Research Corp.*, 551 U.S. 128, 138, 127 S.Ct. 2331, 2337 (2007).

[16] R2-72 PCD Ex. C at 7, 2001 AOC § IV ¶ K.

fertility, still births, and birth defects in test animals," posing "such health and environmental dangers that the Toxic Substances Control Act bans the manufacturing of PCBs in this country without a special exemption from the EPA."[17] EPA's investigations in Anniston revealed extensive PCB contamination.[18] EPA also found lead contamination, as well as soils containing both PCB and lead contamination.[19] As a result, EPA designated portions of Anniston as two federal Superfund sites. The two sites – the Anniston PCB Site and the Anniston Lead Site – overlap geographically and contain PCBs, lead, and other hazardous substances.[20]

[17] R16-397 at 4 n.3, 2008 Mem. Op.

[18] R2-72 PCD Ex. C at 7-8, 2001 AOC § IV ¶ K.

[19] R5-296 Ex. A at 9, Foundry AOC § IV ¶ 9(a).

[20] R2-72 PCD at 7, 10, PCD § IV ¶¶ 4 (B) & (FF). The Anniston PCB Site and Anniston Lead Site are defined differently in the various EPA documents. For instance, the Partial Consent Decree ("PCD") between Solutia and the United States sets out definitions for both the Anniston PCB Site and Anniston Lead Site. *Id.* The 2001 AOC between Solutia and the United States, which is appended to the PCD, contains a different definition of the Anniston PCB Site. R2-72 PCD Ex. C at 6, 2001 AOC § IV ¶ A. The AOC between certain Appellees and the United States has its own set of definitions for both the PCB and Lead Sites as well. R5-296 Ex. A at 5 & 7, Foundry AOC § III ¶¶ 8(e) & (bb). Despite the differences in these definitions, the Sites are delineated by both the source of the contamination and their location, which overlap geographically. *See* R2-72 PCD at 7, 10, PCD § IV ¶¶ 4 (B) & (FF).

Solutia's Anniston Operations

From 1929 through 1971, Solutia's legal predecessor, the former Monsanto company,[21] manufactured PCBs at its Anniston facility.[22] Monsanto was the sole manufacturer of PCBs in the United States, and the Anniston facility was one of just two PCB plants operated by Monsanto.[23] During the Anniston plant's operations, Monsanto disposed of large volumes of waste – including PCB waste – at two unlined landfills located adjacent to the plant.[24] Rain events and surface water runoff carried PCBs from the landfills off-site, including to a nearby stream leading to Snow Creek.[25] Similarly, EPA sampling found PCBs in the sediments of drainage ditches leading away from Monsanto's plant.[26] Monsanto's production of PCBs resulted in "substantial" PCB air emissions.[27] PCBs from Monsanto

[21] Through a variety of transactions detailed in Solutia's brief, *see* Appellants' Br. at 5-6, Solutia and Pharmacia are the successors to Monsanto.

[22] R3-86 at 5, Compl. ¶ 11.

[23] R13-330 Ex. 15 at 11, EPA's Resp. to Public Comments.

[24] R2-72 PCD Ex. C at 6, 2001 AOC § IV ¶ E.

[25] *Id.* at 6-7, 2001 AOC § IV ¶ F.

[26] *Id.*

[27] R13-330 Ex. 15 at 59, EPA's Resp. to Public Comments.

operations also volatilized directly into the atmosphere through spills, landfills, road oils, and other sources.[28]

In addition to releases of PCBs, EPA discovered significant releases of lead caused by Monsanto's former operations.[29] From the late 1920s to 1964, Monsanto made PCBs using a lead-pot process, which involved passing benzol vapor through molten lead to produce biphenyl, an essential element in PCBs.[30] The lead-pot process resulted in air emissions of lead whenever the units were in use or being repaired.[31] EPA investigations determined that Monsanto had as many as 34 pots in use containing approximately 150,000 pounds of molten lead.[32] Lead was also released from Monsanto's production of ferroalloy, the shipping and processing of lead as a raw material, and various facility waste streams that were released into the surrounding waterways and environment.[33]

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[28] *Id.* at 12, 57-69.

[29] *See id.* at 19-20.

[30] *Id.* at 123.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 19-20.

Solutia's Cleanup Obligations

Based on the results of its investigation of the contamination caused by Solutia's former operations in Anniston, EPA initiated enforcement action against Solutia under CERCLA.[34] In 2000, Solutia entered into an Administrative Order on Consent with EPA ("2000 AOC"), which required Solutia to commence sampling and PCB clean-up activities.[35] In 2001, Solutia entered into a second AOC with EPA ("2001 AOC"), requiring Solutia to conduct additional sampling and soil removal actions at certain properties in Anniston and to reimburse EPA for its oversight costs.[36] Importantly, the 2001 AOC required Solutia to sample properties for both PCBs and lead regardless of the origin of the contamination.[37]

In 2002, EPA filed suit against Solutia under CERCLA (the "Enforcement case"), seeking an injunction requiring Solutia to perform certain additional response actions in Anniston, reimbursement of EPA's study and cleanup costs for addressing PCBs and other hazardous substances in Anniston, and a declaratory judgment regarding Solutia's liability for

[34] *See* R2-72 PCD Ex. C at 3, 8, 2001 AOC § I & § IV ¶ O.

[35] R25-622 at 3, July 2010 Mem. Op.

[36] R2-72 PCD Ex. C at 9-15, 23-25, 2001 AOC §§ VI & VIII.

[37] *Id.* at 12-13, 2001 AOC § VI ¶ 2.0(h).

response costs.[38] In 2003, Solutia agreed to settle these claims and entered into a Partial Consent Decree ("PCD").[39]

Under the PCD, which is still in effect, Solutia is required to perform the remaining removal action work pursuant to the 2001 AOC; a Remedial Investigation/Feasibility Study ("RI/FS") pursuant to the RI/FS Agreement and Statement of Work; and a Non-time Critical Removal ("NTC Removal") pursuant to the NTC Removal Agreement.[40] Solutia is further obligated to reimburse EPA for the agency's future response costs and AOC oversight costs.[41] In exchange, EPA agreed to settle the Enforcement case, and Solutia received contribution protection from third-party claims pursuant to 42 U.S.C. § 9613(f)(2).[42]

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[38] R25-622 at 4-5, July 2010 Mem. Op. (citing Complaint in the Enforcement case, *United States v. Pharmacia Corp.*, No. 1:02-cv-749-PWG (N.D. Ala.) (Mar. 25, 2002) ECF No. 1). The District Court relied on the Enforcement case Complaint to establish the subject matter of that litigation. *See Young v. City of Augusta ex rel. DeVaney*, 59 F.3d 1160, 1167 n.11 (11th Cir. 1995) (a court may take judicial notice of another court's order to recognize the subject matter of the litigation) (citing *United States v. Jones*, 29 F.3d 1549, 1553-54 (11th Cir. 1994)). *See also Universal Express, Inc. v. SEC*, 177 F. App'x 52, 53-54 (11th Cir. 2006) (district court did not err in taking judicial notice of a complaint filed in another case).

[39] R2-72 PCD at 4, PCD § I ¶ C.

[40] *See generally* R2-72 PCD Exs. A-C, G. EPA ordered Solutia to perform the NTC Removal pursuant, in part, to its authority under CERCLA Section 106, 42 U.S.C. § 9606, the statutory provision that allows EPA to order a PRP to perform remedial action.

[41] R2-72 PCD at 17, PCD § IX ¶¶ 28-29.

[42] R2-72 PCD at 17, 19-20, PCD § X ¶ 30, § XII ¶¶ 38-41.

As is the case under the 2001 AOC, Solutia's work under the PCD includes certain sampling and removal actions relating to lead contamination. For instance, Solutia is required to conduct sampling for lead contamination at residential properties where the surface soil had PCB concentrations greater than 1 part per million ("ppm") and lead concentrations greater than 400 ppm.[43] The NTC Removal Agreement further provides that "[i]f there is lead contamination greater than 400 ppm below a depth of twelve (12) inches that will not be removed by the PCB removal action, then [Solutia] shall notify EPA and coordinate the PCB removal pursuant to this NTC Removal Agreement with any lead removal action EPA determines is necessary."[44]

In 2005, Solutia challenged the scope of its cleanup obligations and threatened to seek suspension or termination of the PCD.[45] This dispute ultimately resulted in a stipulation (the "Stipulation"), which "resolve[d] certain issues between the Parties and clarifie[d] [Solutia's] obligations under the Partial Consent Decree."[46] The Stipulation provided that Solutia

[43] R2-72 PCD Ex. G at 15, NTC Removal Agreement ¶ 2.0(h)(4).

[44] *Id.*

[45] R20-545-2 at 4, United States' Partial Consent Decree Status Report Clarifying Issues Raised by the Court at the September 9, 2009 Hearing.

[46] R20-545-3 at 1, Stipulation.

must clean up all residential properties within certain defined geographical zones, including properties with comingled PCB and lead contamination, regardless of the source(s) of the contamination.[47] EPA also reconfirmed its right to take over any of the removal action and to sue Solutia for the associated response costs if Solutia failed to complete the work properly.[48]

Defendants' Cleanup Work in Anniston

Appellees are current and former operators of foundry or other industrial operations in the Anniston area. In May 2005, certain Appellees – U.S. Pipe and Foundry Company, Walter Energy, MeadWestvaco Corporation, BAE Systems Land & Armaments, L.P., FMC Corporation, McWane, Inc., DII Industries, Huron Valley Steel, and Phelps Dodge Industries (collectively, "Settling Defendants") – reached a settlement with the United States, resolving their CERCLA liability for lead and PCB contamination in Anniston. That settlement was memorialized in an administrative order on consent ("Foundry AOC").[49] EPA contended that the Settling Defendants' historical operations released lead via air emissions, surface water runoff, and the off-site disposal of waste, including foundry

[47] R20-545-3 at 4, 6, Stipulation ¶¶ 8, 11.

[48] R20-545-3 at 2-3, Stipulation ¶ 3.

[49] *See* R5-296 Ex. A, Foundry AOC.

sand.[50] EPA also determined that these historical operations resulted in only minimal potential releases of PCBs, concluding that Settling Defendants' potential contribution to PCB contamination in Anniston was *de minimis*.[51]

In an attempt to reach a global resolution for addressing both the PCB and lead contamination in Anniston, EPA asked Solutia to participate in the negotiations with the Settling Defendants. Solutia initially participated in the negotiations of what would become the Foundry AOC, but later withdrew.[52] Despite Solutia's withdrawal, EPA and the Settling Defendants reached the settlement that was memorialized in the Foundry AOC. As required by CERCLA, the proposed Foundry AOC was published in the Federal Register for public notice and comment. Solutia filed over 250,000 pages in opposition to the proposed settlement.[53] EPA addressed all of Solutia's comments, dedicating an entire section of its response to public

[50] R13-330 Ex. 15 at 18-19, EPA's Resp. to Public Comments.

[51] R5-296 Ex. A at 9, Foundry AOC § IV ¶ 9(d). The AOC constituted a *de minimis* settlement of the Settling Defendants' liability for the Anniston PCB Site pursuant to 42 U.S.C. § 9622(g) ("Section 122").

[52] R13-330 Ex. 15 at 20, EPA's Resp. to Public Comments.

[53] R13-330 Ex. 15 at 49, EPA's Resp. to Public Comments.

comments to Solutia's specific concerns.[54] EPA finalized the Foundry AOC in January 2006.[55]

Under the Foundry AOC, the Settling Defendants are required to clean up properties in defined geographic zones of Anniston with soil lead concentrations greater than or equal to 400 ppm.[56] In addition, Settling Defendants must clean up any properties in those zones where PCB concentrations in the soil are at or above 1 ppm and lead concentrations are greater than or equal to 400 ppm.[57] The Settling Defendants also agreed to reimburse EPA $3.25 million for its past response costs, to reimburse EPA for its future response costs, and to reimburse the Alabama Department of Environmental Management for its oversight costs.[58] EPA estimated that the amount to be expended by Settling Defendants pursuant to the Foundry AOC would range between $87 and $125 million.[59] The Settling Defendants have been performing the work required under the Foundry AOC since 2006 and that work continues.

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[54] *See* R13-330 Ex. 15 at 49-156, EPA's Resp. to Public Comments.

[55] R13-330 Ex. 15 at 1, EPA's Resp. to Public Comments.

[56] R5-296 Ex. A at 14-18, Foundry AOC § VIII ¶ 16(b), (c) & (d).

[57] *Id.* at 14, 17, Foundry AOC § VIII ¶¶ 16(b)(iii) & 16(c)(iii)(1).

[58] *Id.* at 35-38, Foundry AOC § XV ¶¶ 39-43.

[59] R15-348 at 6, United States Amicus Curiae Mem.

The Present Lawsuit

In 2003, Solutia filed suit against all Appellees (collectively, "Defendants"), seeking joint and several liability for all of its response costs for the Anniston Lead Site under Section 107 and contribution of certain costs for the Anniston PCB and Lead Sites under Section 113.[60]

Following the 2006 entry of the Foundry AOC, the Settling Defendants moved for summary judgment, arguing that the Foundry AOC's statutory contribution protection barred all of Solutia's claims.[61] Solutia, in turn, filed a motion for contempt against EPA in the Enforcement case, arguing that the United States' entry of the Foundry AOC violated the PCD.[62] The court denied the motion for contempt but offered to suspend Solutia's obligations under the PCD upon motion by Solutia.[63] Solutia never filed such a motion. Instead, Solutia and EPA entered into negotiations, which resulted in the Stipulation, under which Solutia expressly waived its right to seek a suspension of its obligations under the PCD.[64]

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[60] R3-86, Compl. ¶¶ 338, 348.

[61] R5-295. Defendants Southern Tool LLC and Scientific-Atlanta, Inc., who are not parties to the Foundry AOC, filed a separate motion for summary judgment as to the cost recovery count. R16-355 & 356.

[62] R25-622 at 13, July 2010 Mem. Op.

[63] R2-152 PCD at 2, Order on Contribution Dispute.

[64] R20-545-3 at 13, Stipulation § II ¶ 27.

While Defendants' motions for summary judgment were still pending, the United States Supreme Court decided *United States v. Atlantic Research Corp.*,[65] in which the Court held that a Section 107 claim was available to a PRP that did not have a Section 113 claim.[66] The Court expressly left open, however, the issue presented in this case – whether a PRP that has a Section 113 claim for cleanup expenses required by the United States pursuant to a consent decree may alternatively bring a cost recovery suit under Section 107.[67]

In June 2008, the District Court ruled on Defendants' motions for summary judgment, holding that Solutia's Section 113 claim against the Settling Defendants was barred by the statutory contribution protection in the Foundry AOC, but allowing Solutia's Section 107 claim to proceed.[68] The Court subsequently acknowledged that the Section 107 part of its ruling

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[65] 551 U.S. 128, 127 S. Ct. 2331 (2007).

[66] Prior to *Atlantic Research*, the United States Courts of Appeal had consistently held that Section 107 claims could only be brought by "innocent" parties – that is, PRPs could not bring Section 107 claims. *Atl. Research*, 551 U.S. at 132, 127 S. Ct. at 2334; *see, e.g., Blasland, Bouck & Lee v. City of N. Miami*, 283 F.3d 1286, 1301-02 (11th Cir. 2002). The plaintiff in *Atlantic Research* had voluntarily cleaned up the contamination at issue and was not subject to any EPA order or settlement; therefore, it did not have a Section 113 claim. 551 U.S. at 133, 127 S. Ct. at 2335. Under these circumstances, the Supreme Court held that the *Atlantic Research* plaintiff could pursue recovery of its costs under Section 107. *Id.* at 138-41, 127 S. Ct. at 2337-39.

[67] *Atl. Research*, 551 U.S. at 139 n.6, 127 S. Ct. at 2338 n.6.

[68] R16-397 at 22, 25, 2008 Mem. Op.

was based on an incomplete understanding of Solutia's obligations under the PCD, as later clarified by the Stipulation.[69] At a hearing in September 2009, EPA confirmed to the District Court that the PCD requires Solutia to remediate both lead and PCB contamination in certain areas of Anniston.[70] As a result, the court stated its willingness to entertain a motion for reconsideration on whether Solutia had a viable Section 107 claim.[71]

In December 2009, Defendants filed motions for reconsideration of the District Court's order denying in part their prior motion for summary judgment.[72] In light of new authority after *Atlantic Research*, a re-examination of the statutory language of Section 113, and additional information regarding the Stipulation, on July 2, 2010, the District Court granted the motions and dismissed Solutia's Section 107 claim against all Defendants.[73] Solutia's Section 113 claim is still pending below against two defendants who are not parties to the Foundry AOC and therefore do not

[69] R25-622 at 19-20, July 2010 Mem. Op.

[70] R24 - 5_2010 Transcript, Tr. at 57:18-59:11; R20-545-2 at 15, United States' Partial Consent Decree Status Report Clarifying Issues Raised by the Court at the September 9, 2009 Hearing.

[71] R19-541, Tr. at 66:13-24.

[72] *See* R20-542, 544, 546 & R21-558.

[73] R25-622 at 20, 42, July 2010 Mem. Op.

have Section 113 contribution protection - Southern Tool LLC and Scientific-Atlanta, Inc. (the "Non-Settling Defendants").

In response to the court's July 2, 2010 ruling, Solutia did not seek an immediate appeal. Instead, Solutia filed a Rule 59(e) motion to amend or clarify the judgment, arguing *for the first time* that Solutia had sustained certain expenses outside of the PCD and was entitled to recover those costs under Section 107.[74] The District Court denied Solutia's motion, holding that the argument was untimely.[75] Solutia's appeal followed.

Standard of Review

This appeal seeks reversal of orders granting a motion for reconsideration and denying a motion to alter or amend a judgment pursuant to Federal Rule of Civil Procedure 59(e). This Court reviews such orders deferentially, reversing only when the lower court has abused its discretion.[76]

Appellants have framed the first issue on appeal as a question of law, which this Court reviews *de novo*.[77] To the extent Appellants are

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[74] R26-629 at 2, Pls.' Mot. to Clarify And/Or Amend.

[75] R26-645 at 7.

[76] *See Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehabilitative Servs.*, 225 F.3d 1208, 1218 (11th Cir. 2000); *Drago v. Jenne*, 453 F.3d 1301, 1305 (11th Cir. 2006) (citing *Lockard v. Equifax, Inc.*, 163 F.3d 1259, 1267 (11th Cir. 1998)).

[77] *Damiano v. FDIC*, 104 F.3d 328, 332 (11th Cir. 1997).

challenging the District Court's decision to reconsider its prior order based on new facts and intervening case law, the Court of Appeals should review that decision for abuse of discretion.[78]

Appellants have characterized the second issue on appeal – whether the PCD required Appellants to clean up certain properties in Anniston contaminated with lead – as a question of contract interpretation, which is reviewed *de novo*.[79] This issue is actually a mixed question of law and fact. Therefore, while the standard of review is still *de novo*,[80] "deferential review of mixed questions of law and fact is warranted when it appears that the District Court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine."[81] To the extent Appellants are challenging the District Court's reconsideration of its prior order based on new facts, that decision must be reviewed for abuse of discretion.[82]

Appellants correctly state that the third issue on appeal is whether the District Court properly denied Appellants' motion to alter or amend the

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[78] *See Harper v. Lawrence Cnty.*, 592 F.3d 1227, 1231-32 (11th Cir. 2010) (citations omitted).

[79] *Bragg v. Bill Heard Chevrolet, Inc.*, 374 F.3d 1060, 1065 (11th Cir. 2004).

[80] *United States v. Hurtado*, 779 F.2d 1467, 1472 (11th Cir. 1985).

[81] *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233, 111 S. Ct. 1217, 1222 (1991).

judgment under Rule 59(e). The case law makes clear that a denial of a Rule 59(e) motion should be reviewed for abuse of discretion. "The decision to alter or amend a judgment is committed to the sound discretion of the district court."[83] In addition,

> [m]otions to amend should not be used to raise arguments which could, and should, have been made before the judgment was issued . . . . Denial of a motion to amend is 'especially soundly exercised when the party has failed to articulate any reason for the failure to raise the issue at an earlier stage in the litigation.'[84]

Summary of the Argument

A party with a CERCLA Section 113 claim may not seek relief pursuant to Section 107. As every federal appellate court to consider this issue has held, permitting a party with a Section 113 claim to nonetheless proceed under Section 107 would eviscerate both the limited right of contribution and the contribution protection that Congress provided for in Sections 113 and 122[85] of CERCLA. Such a result also would be inconsistent with the mandate that statutes, including CERCLA, be read as a whole. Accordingly, a party that has a Section 113 claim – i.e., has been

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[82] *See Harper,* 592 F.3d at 1231-32 (citations omitted).

[83] *Drago,* 453 F.3d at 1305.

[84] *O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992) (citations omitted).

[85] Section 122(h)(4) confers contribution protection on parties that resolve their liability to the United States for claims made under Section 107.

subject to an enforcement action under Section 106 or 107 of CERCLA or has resolved its liability to the United States or a State through settlement – may not pursue a cost recovery claim against other PRPs under Section 107. Because Solutia's claims fit squarely within the provisions of Section 113, Solutia must proceed with a claim for contribution under that section.

In addition, the expenses Solutia seeks to recover arise out of its obligations under the PCD. Such expenses, including those associated with the cleanup of lead contamination, were therefore sustained solely as part of the resolution of Solutia's liability to the United States. Because Solutia may seek contribution for these expenses under Section 113, it is precluded from bringing a Section 107 claim.

Finally, Solutia may not belatedly attempt to raise claims for expenses allegedly incurred outside of the PCD and other federal administrative orders. These claims are not be found in the Complaint, and Solutia's attempt to raise them after the fact in a Rule 59(e) motion to alter or amend the judgment was properly rejected by the District Court. The District Court's ruling should be affirmed in its entirety.

Argument

I. Section 113 is Solutia's Exclusive Remedy for Expenses Sustained Pursuant to the PCD.

The District Court correctly held that Congress intended Section 113 to serve as the exclusive remedy to recover expenses sustained while engaged in response actions required by the United States: "[t]he evidence establishes as a matter of law that [Solutia does] have contribution rights under . . . § 113(f) with respect to their cleanup costs at issue. Therefore, [Solutia's] ***exclusive remedy*** to apportion or otherwise recoup those costs is a contribution action, precluding [its] § 107(a) cost recovery claims."[86]

A. Solutia's Claim Fits Squarely Within the Statutory Language and Purpose of Section 113.

Solutia cannot dispute that its claim falls within the statutory language and purpose of both Section 113(f)(3)(B) and Section 113(f)(1). Therefore, Solutia cannot be permitted to assert a Section 107 claim. To hold otherwise would give plaintiffs, like Solutia, an impermissible choice of reimbursement remedies between Section 107 and Section 113. Given such

[86] R-25-622 at 48, July 2010 Mem. Op. (emphasis added). The District Court dismissed with prejudice Count I of Solutia's First Amended Complaint for contribution under Section 113 against the Settling Defendants on the grounds that the Foundry AOC barred the claim as a matter of law. Solutia does not appeal that decision.

a choice, it is inconceivable that a plaintiff would opt for a Section 113 contribution claim over a Section 107 cost recovery claim.[87]

In its entirety, Section 113(f)(3)(B) states:

> A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement referred to in paragraph (2).[88]

Importantly, Congress did not limit Section 113 to contribution claims for costs incurred reimbursing EPA or a State for response actions. As the District Court correctly noted, Section 113's plain language contemplates that a party that performs cleanup work has a Section 113 claim as well – i.e., a party that has resolved its liability for "some or all of a *response action*" may seek contribution.[89]

Here, there is no dispute that Solutia is "a person who has resolved its liability to the United States."[90] It is also undisputed that the liability Solutia has resolved includes "response action[s]," as well as "the costs of such

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[87] *See infra* notes 11-13 and accompanying text, discussing the advantages to a plaintiff of a Section 107 claim. *See also Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 603 (8th Cir. 2011) (listing the "limitations" of a Section 113 claim).

[88] 42 U.S.C. § 9613(f)(3)(B).

[89] R25-622 at 47-48, July 2010 Mem. Op.

[90] The PCD states that it "seeks to partially resolve the claims of the [United States] against [Solutia]." R2-72 PCD at 4, PCD § I ¶ C.

action[s]."[91] Finally, there is no dispute that the PCD is a "judicially approved settlement." Therefore, it is clear that the cleanup costs for which Solutia seeks reimbursement fall squarely within the scope of Section 113(f)(3)(B).

Solutia's claim also fits the criteria of Section 113(f)(1). This section of CERCLA provides:

> 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.[92]

The Supreme Court has interpreted this provision as conferring a right to seek contribution under Section 113(f)(1) only on a plaintiff that has been sued under Section 106 or 107 of CERCLA.[93] Further, a contribution claim under Section 113(f)(1) itself stems from a "common liability" for the contamination at issue.[94]

As applied here, Solutia does not dispute that it meets the first prerequisite – that the United States sued Solutia in the Enforcement case

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[91] *See* R2-72 PCD at 5, PCD § I ¶ H.

[92] 42 U.S.C. § 9613(f)(1).

[93] *Cooper Indus. Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166, 125 S. Ct 577, 583 (2004).

[94] *Atl. Research,* 551 U.S. at 139, 127 S. Ct. 2338.

under Sections 106 and 107 of CERCLA.[95] Similarly, it is undisputed that the United States sought to hold Solutia liable for both PCB and lead contamination in Anniston.[96] There is also no dispute that the Foundry AOC requires the Settling Defendants to address certain lead and PCB contamination in Anniston as well.[97] Therefore, Solutia's lawsuit to recover certain expenses related to this common liability, which is the very essence of a contribution claim,[98] clearly meets the criteria of Section 113(f)(1).

B. Principles of Statutory Construction Confirm that Solutia Cannot Assert a Section 107 Claim.

It is a cardinal rule of statutory construction that statutes – including CERCLA specifically – must be read "as a whole."[99] Solutia's attempt to

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[95] R25-622 at 4-5, July 2010 Mem. Op. (citing Complaint in the Enforcement case, *United States v. Pharmacia Corp.*, No. 1:02-cv-749-PWG (N.D. Ala.) (Mar. 25, 2002)).

[96] The scope of the United States' Complaint is evidenced by the contaminants addressed in the settlement documents, which resolved liability for both PCBs and lead. See R25-622 at 4-5, July 2010 Mem. Op. (citing Complaint in the Enforcement case, *United States v. Pharmacia Corp.*, No. 1:02-cv-749-PWG (N.D. Ala.) (Mar. 25, 2002)); *see also supra* notes 40-44 and accompanying text, discussing the scope of work under the PCD and NTC Removal Agreement.

[97] R5-296 Ex. A at 9-11, Foundry AOC §§ IV-V.

[98] *See also* Brief of Appellee DII at Section I, adopted and incorporated by reference herein, for a detailed explanation of the nature of Solutia's contribution claim.

[99] *Atl. Research,* 551 U.S. at 135, 127 S. Ct. at 2336. *See, e.g. Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666, 127 S. Ct. 2518, 2534 (2007) ("[I]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S. Ct. 1291, 1300-01 (2000)); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112

prove its argument by looking at one section of CERCLA in isolation violates this rule of statutory interpretation. This Circuit has "affirmed many times that [it does] not look at one word or term in isolation but rather look[s] to the *entire statute and its context*."[100] One way this Circuit has "ascertain[ed] the true meaning of a statute" is to "delve into the structure of a statute and the context in which different provisions are written."[101] Along similar lines, this Court has been reluctant to follow a statutory interpretation that "renders several statutory provisions useless or absurd."[102]

In the case of CERCLA, the Supreme Court has also rejected such interpretations, confirming that courts must observe CERCLA's plain language, as well as the statutory preconditions to a Section 113 claim. In *Aviall*, a case deciding when a PRP may bring a Section 113 claim, the Supreme Court held "[t]here is no reason why Congress would bother to specify conditions under which a person may bring a [Section 113] claim, and at the same time allow [Section 113] actions absent those

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S. Ct. 570, 574 (1991) ("[A] statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context.") (citation omitted).

[100] *Edison v. Douberly*, 604 F.3d 1307, 1310 (11th Cir. 2010) (emphasis added).

[101] *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1249 (11th Cir. 2003).

[102] *Id.*

conditions."[103] This rationale applies equally to Solutia's situation. If Solutia's claim fits the specific conditions of Section 113, then why would Congress have given Solutia the right to opt out of a Section 113 claim in favor of a Section 107 claim? The answer is simple: Congress did not give PRPs, like Solutia, this choice. The result does not change here simply because the Foundry AOC provides Settling Defendants with statutory protection against Solutia's Section 113 contribution claim.

In addition to falling within the statutory requirements of Section 113, Solutia's situation is the exact type of claim Congress contemplated when it added Section 113(f) to CERCLA as part of its SARA amendments.[104] Prior to the 1986 SARA amendments, CERCLA did not expressly provide for a right of contribution, although many courts read such an "implied" right into Section 107.[105] In response, Congress amended CERCLA to create an express right of contribution.[106] The House Report cited by the District Court summed up Section 113(f)'s purpose as follows:[107]

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[103] *Aviall*, 543 U.S. at 166, 125 S. Ct at 583.

[104] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (1986).

[105] *See Aviall*, 543 U.S. at 161-162, 125 S. Ct. at 581 (collecting cases).

[106] H.R. Rep. No. 99-253(I) at 79 (1985), *reprinted in* 1986 U.S.S.C.A.N. 2835.

[107] R25-622 at 47, July 2010 Mem. Op.

> This section also confirms a ***Federal right of contribution*** or indemnification ***for persons alleged or held to be liable under section 106 or 107 of CERCLA***. . . . This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has ***assumed a share of the cleanup or cost*** that may be greater than its equitable share under the circumstances. . . . ***Parties who settle for all or part of a cleanup or its costs***, . . ., can attempt to recover some portion of their expenses and obligations in contribution litigation from parties who were not sued in the enforcement action or who were not parties to the settlement.[108]

"When Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect."[109] Here, Congress made it clear that it added Section 113 "for the purpose of codifying the contribution remedy that most courts had already read into the statute."[110] The Second Circuit has held that allowing a plaintiff that has an express right of contribution, like Solutia, to instead pursue a Section 107 claim "would in effect nullify the SARA amendment and abrogate the requirements Congress placed on contribution claims under § 113."[111]

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[108] H.R. Rep. No. 99-253(I) at 79-80 (emphasis added).

[109] *Stone v. INS*, 514 U.S. 386, 397, 115 S. Ct. 1537, 1545 (1995).

[110] *Niagara Mohawk*, 596 F.3d at 127. Section 113's right of contribution was designed to "'clarif[y] and confirm . . . the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the [PRP] believes that it has assumed a share of the *cleanup or cost* that may be greater than its equitable share under the circumstances.'" *Id.* (quoting H.R. Rep. No. 99-253(I), at 79) (emphasis added).

[111] *Niagara Mohawk*, 596 F.3d at 127-28.

The Eighth Circuit recently concurred, holding that "[t]o ensure the continued vitality of the precise and limited right to contribution Congress set forth in § 113," plaintiffs in Solutia's position may not bring a claim under Section 107.[112] Accordingly, this Court should affirm the District Court's finding that Solutia is limited to a Section 113 contribution claim as a matter of law.

Solutia's reading of Section 107 would not only nullify the SARA amendments by abrogating the requirements Congress placed on contribution actions, but also would eviscerate the contribution protection Congress provided in Sections 113(f)(2), 122(g) and 122(h). These sections collectively protect PRPs that settle their liability with the United States from contribution suits by other PRPs. Congress intended these contribution bars to encourage PRPs to settle their CERCLA liability with the United States as quickly as possible.[113] If a PRP like Solutia could simply plead around the Section 113 and 122 contribution bars by asserting a Section 107

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[112] *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 603 (8th Cir. 2011). For example, if, despite fitting the specific parameters of a Section 113(f)(3)(B) claim, Solutia could still to proceed under Section 107, the "*response action*" language of Congress' Section 113(f) amendment would be left without effect.

[113] *See E.I. DuPont Nemours & Co.*, 460 F.3d at 537 (legislative history of SARA Amendments states that contribution protection "*should encourage quicker, more equitable settlements, decrease litigation, and thus facilitate cleanups*") (citation omitted); *Transtech Indus. v. A & Z Septic Clean*, 798 F. Supp. 1079, 1085 (D.N.J. 1992) (purpose of contribution protection "is to encourage parties to settle with the government, which, in turn, serve[s] to quickly effectuate urgent clean-up operations").

claim, the SARA amendments would effectively be meaningless. It would also strongly discourage settlement by PRPs.

Solutia's reading of Section 107 also unavoidably leads to an "absurd" result in a case like this one, i.e., where a consent decree has been entered. In such situations, the United States files suit in order to obtain compliance from a PRP. If the United States has been forced to use its limited judicial resources to compel a cleanup by a PRP, that PRP should not be allowed to then simply bring a Section 107 claim and seek to recover all of its expenses from other PRPs.[114] Instead, a PRP in that position, such as Solutia, may only bring a Section 113 claim.

Solutia attempts to sidestep this result by suggesting instead that the Court rely on certain EPA regulations interpreting Section 107, instead of CERCLA itself.[115] Specifically, Solutia asserts that EPA regulations defining "consistent with the National Contingency Plan" ("NCP") authorize it to bring a Section 107 claim. Even if the NCP regulations were relevant, which they are not, the regulations have no impact on the outcome here. This Court is being asked whether a party incurring cleanup costs pursuant

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[114] The Supreme Court has interpreted Section 107 to permit joint and several liability when a defendant cannot show that a reasonable basis for apportionment of harm exists. *Burlington N. & Santa Fe Ry. Co.*, 127 S. Ct. at 1880-81 (2009).

[115] Appellants' Br. at 23-26.

to a consent decree may bring both a Section 107 claim and a Section 113 claim, not whether the party's costs are consistent with the NCP. Moreover, as the District Court correctly recognized, Congress has not authorized EPA to determine which parties can bring suit under Section 107.[116] Rather, as EPA itself has acknowledged, the courts are responsible for making that determination.[117] Therefore, Solutia's attempt to use the NCP regulations to circumvent the statutory language itself and the application of statutory canons of interpretation has no relevance to the question of law at issue here.[118]

[116] R25-622 at 44, July 2010 Mem. Op.

[117] *See id.* (citing 50 Fed. Reg. 47,934) ("EPA agrees that the courts will make the ultimate determinations of what parties may sue under section 107 of CERCLA.").

[118] *See Gonzalez v. Oregon*, 546 U.S. 243, 258-59, 126 S. Ct. 904, 916 (2006); *Cremeens v. City of Montgomery*, 602 F.3d 1224, 1230 n.4 (11th Cir. 2010) ("Courts extend *Chevron* deference to an agency's permissible interpretation of an ambiguous enabling statute to the extent Congress delegated rulemaking authority to the agency.").

C. When Performing Work Required by the PCD, Solutia is Not Incurring its Own Costs as a Section 107 Claim Requires.

Solutia has not "incurred costs" cleaning up lead contamination in Anniston as that phrase is specifically used in Section 107. Instead, Solutia has "sustain[ed] expenses"[119] in fulfilling its requirements under the PCD. The Supreme Court's decision in *Atlantic Research* highlights the importance of this distinction.

In *Atlantic Research*, the Court noted that "we recognize that a PRP may *sustain expenses* pursuant to a consent decree following a suit under § 106 or § 107(a)."[120] It is not an accident that the Court chose the phrase "sustain expenses" instead of using Section 107's statutory language of "incur costs." This distinction aligns with the Court's earlier statement that "[w]hen a party pays to satisfy a settlement agreement or a court judgment, it does *not incur its own costs of response*."[121] In other words, a PRP, like Solutia, that has entered into a consent decree is not incurring its own costs. Instead, the PRP is resolving the claims that the United States has brought

[119] *See Atl. Research*, 551 U.S. at 139 n.6, 127 S. Ct. at 2338 n.6.

[120] *Id.* (emphasis added).

[121] *Id.* at 139, 127 S. Ct. at 2338 (emphasis added).

against it. Put another way, the PRP is sustaining expenses that have been imposed on it by the United States.

The language of the PCD confirms this interpretation. Nowhere does the PCD state that Solutia will be incurring costs.[122] Instead, Solutia's obligations are discussed in other terms, such as "finance and perform,"[123] "provide funding for,"[124] and "complete all such requirements."[125] In fact, in summarizing Solutia's obligations, the PCD states that the United States will not sue Solutia because of the "actions that will be performed" and the "payments that will be made"[126] – not because of the costs that Solutia will incur.

Equally important, the PCD reserves Section 107's "incurred" language for the United States. "Future Response Costs" are defined as those "the United States *incurs*" and "costs *incurred* by the U.S. Government."[127] Similarly, "Interim Response Costs" are those that the

[122] *See* R2-72 PCD.

[123] *Id.* at 11, PCD § V ¶¶ 6(a) & (b).

[124] *Id.*, PCD § V ¶ 6(a).

[125] *Id.*, PCD ¶ 6(b).

[126] *Id.* at 17, PCD § X ¶ 30.

[127] *Id.* at 7-8, PCD § IV ¶ 4(L).

United States previously "*incurred*."[128] The parties' objectives in entering into the PCD include the recovery of costs "*incurred* by EPA."[129]

In sum, the legal distinction between incurring costs versus sustaining expenses allows courts to differentiate between Sections 107 and 113 by recognizing "the complementary yet ***distinct*** nature of the rights established"[130] by each section. Section 107 is limited to PRPs that have "incurred" their own costs (as distinct from costs imposed on them by the United States), while Section 113 is limited to PRPs that have "resolved [their] liability to the United States" or PRPs that have been sued under Section 106 or Section 107.[131] Under this framework, "neither remedy swallows the other."[132] Thus, because the expenses Solutia sustained pursuant to the PCD were imposed upon it by the United States, Solutia is limited to a Section 113 claim.

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[128] *Id.* at 8, PCD § IV ¶ 4(M).

[129] *Id.* at 10, PCD § V ¶ 5.

[130] *Atl. Research*, 551 U.S. at 138, 127 S. Ct. at 2337 (emphasis added).

[131] 42 U.S.C. §§ 9607(a)(4)(B), 9613(f)(3)(B).

[132] *Atl. Research*, 551 U.S. at 139 n.6, 127 S. Ct. at 2338 n.6.

D. The Weight of Federal Authority Recognizes that a Party in Solutia's Position May Not Bring a Section 107 Claim.

Every federal appellate court to consider the issue in dispute here has held that a PRP with a Section 113 claim may not bring an action under Section 107.[133] Like the District Court, these courts have recognized that allowing a PRP in Solutia's position to proceed under Section 107 would eviscerate the contribution rights added by Congress in the SARA Amendments.[134] In holding that Solutia is limited to a Section 113 claim, the District Court aligned itself with the three other circuits that have examined the interplay of Sections 107 and 113 after *Atlantic Research*, as well as the majority of district courts that have considered this issue.[135]

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[133] *See, e.g., Morrison,* 638 F.3d at 603-04 ("To ensure the continued vitality of the precise and limited right to contribution Congress set forth in § 113 . . . the right to bring a cost-recovery action under § 107 'is available to parties who have incurred necessary costs of response, but have neither been sued nor settled their liability under §§ 106 or 107.'") (citation omitted); *Niagara Mohawk*, 596 F.3d at 128 ("To allow NiMo to proceed under § 107(a) would in effect nullify the SARA amendment and abrogate the requirements Congress placed on contribution claims under § 113.")); *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.,* 602 F.3d 204, 225-26, 229 (3d Cir. 2010).

[134] *Morrison,* 638 F.3d at 603-04; *Niagara Mohawk*, 596 F.3d at 128; *Agere Sys.,* 602 F.3d at 225-26, 229.

[135] *See Morrison,* 638 F.3d at 603-04; *Niagara Mohawk*, 596 F.3d at 128; *Agere Sys., Inc.,* 602 F.3d at 225-26, 229; *ITT Indus., Inc. v. BorgWarner, Inc.*, 615 F. Supp. 2d 640, 646 (W.D. Mich. 2009) ("[B]ecause Plaintiff ITT entered into a consent decree . . ., and because ITT could have brought a § 113(f) contribution claim, but failed to do so in a timely manner, ITT should not be able to evade the statute of limitations and the allocation scheme of a § 113(f) contribution claim by bringing a contribution claim under the guise of a § 107(a) cost recovery action."); *Appleton Papers, Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1043 (E.D. Wis. 2008) ("[T]he operative principle appears to be that § 107(a) is available to recover payments only in cases where § 113(f) is not"); Order at 22, *Carolina Power & Light Co. v. 3M Co.*, No. 5:08-CV-463-

Solutia's brief does not (because it cannot) distinguish these cases or the other cases cited by the District Court from the situation here.

II. Solutia's Expenses for Cleanup of Lead Contamination are Recoverable Only Under Section 113 Because They Were Sustained Pursuant to the PCD.

There are a number of "Site" definitions having to do with the PCB and lead contamination in and around Anniston. They include the definitions set out in Solutia's 2001 AOC, in the PCD, and the Foundry AOC. None of them, however, is relevant to whether Solutia may properly bring a Section 107 claim. Instead, the District Court correctly held that the determination turns on whether the expenses Solutia seeks to recover arise out of its fulfillment of its PCD obligations.[136] The District Court concluded that "[t]here is no question that the costs [Solutia is] now seeking to recover or apportion in this action arise out of [its] fulfillment of [its] obligations under the PCD . . ., rather than from work performed beyond or outside the scope of those obligations."[137] Accordingly, the District Court correctly held that Solutia is limited to asserting a Section 113 contribution claim and cannot assert a Section 107 cost recovery claim.

FL (E.D.N.C. Mar. 24, 2010) ("[T]he court agrees with many of the other courts that have addressed this question that response costs incurred pursuant to an administrative settlement with the United States are recoverable only under § 113.").

[136] R25-622 at 51, July 2010 Mem. Op.

A. The PCD and Stipulation between the United States and Solutia Require Solutia to Clean Up Lead.

Solutia contends that the PCD requires it to address only PCB contamination, giving it standing to pursue a Section 107 claim for any expenses sustained in addressing lead contamination.[138] This contention is contradicted by the undisputed facts in the record. The PCD and the documents appended to it, as well as the subsequent Stipulation with the United States, explicitly require Solutia to address lead contamination. For example, the Stipulation requires Solutia to "clean up all yards containing surface soil PCB concentrations greater than or equal to 1ppm, ***regardless of the levels of lead*** found in such yards."[139] The Stipulation further requires that "[i]f any yard containing PCBs greater than or equal to 1ppm to be cleaned by [Solutia] . . . also contains surface soil lead concentrations greater than or equal to 400ppm, ***[Solutia] agree[s] to clean up the lead in that yard*** in a manner consistent with the lead cleanup described in the AOC."[140]

This is unsurprising given EPA's determination that Solutia's former operations were a significant source of lead releases in Anniston. Because

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[137] *Id.*

[138] *See* Appellants' Br. at 32-33.

[139] R20-545-3 at 10, Stipulation § II ¶ 18.

[140] R20-545-3 at 10, Stipulation § II ¶ 18 (emphasis added).

the PCD was entered to settle EPA's claims under Sections 106 and 107, Solutia can seek contribution from other PRPs for its lead-related expenses under Section 113(f)(1). Solutia may also seek contribution pursuant to Section 113(f)(3)(B) because it has resolved part of its liability to the United States. As explained in Section I, *supra*, the existence of a Section 113 claim for these expenses precludes Solutia from pursuing a Section 107 remedy. Accordingly, the Court should affirm the District Court's finding that Solutia's sole CERCLA claim regarding lead cleanup is for contribution under Section 113.

B. CERCLA's Terms – and Not Any Particular "Site" Definition – Dictate the Remedy Available to Solutia.

As a last reach, Solutia argues that its obligations under the PCD are limited to the PCB Site; therefore it can bring a cost recovery claim under Section 107 for any expenses related to the Lead Site.[141] The right to recover under Section 113, however, is not tied to the definition of any particular "Site." Instead, CERCLA by its terms ties a right to recovery to the undertaking of a "response action" or sustaining "the costs of such action," or the expenses sustained "during or following any civil action under [Section 106] or [Section 107]." Solutia's "response action" and all

[141] *See* Appellants' Br. at 32.

of its "costs" have been a result of the work that it is required to perform under the PCD in and around Anniston. This work is required regardless of whether the contamination is considered a part of the Lead Site or the PCB Site.

Specifically, Solutia's PCD obligations require the cleanup of properties where sampling results indicate the presence of PCBs in surface soils at a concentration of 1ppm or greater.[142] Moreover, the PCD does not exempt from Solutia's cleanup obligations properties where there are lead contaminants in addition to PCBs.[143] Put another way, the PCD does not allow Solutia to avoid cleaning up properties with commingled lead and PCBs. To the extent that Solutia has cleaned up lead, it is only because the lead was co-mingled with PCBs at or above the 1 ppm threshold.[144] That is, every shovel of dirt that Solutia has removed from a property has been done pursuant to its obligation in the PCD. Because all of Solutia's work has been part of its "response action" under the PCD, Solutia is limited to asserting a Section 113 claim and cannot bring a Section 107 claim.

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[142] R2-72 PCD Ex. G at 15, NTC Removal Agreement ¶ 2.0(h)(3); R2-72 PCD Ex. C at 11-12, 2001 AOC ¶ 2.0(b)-(d), (f).

[143] *See id.*

[144] *E.g.*, R2-72 PCD Ex. G at 15, NTC Removal Agreement ¶ 2.0(h)(4).

C. Solutia's Contention that it Performed Work not Required by the Consent Decree is Wrong.

Solutia's brief sets out four bulleted quotes as purported "proof" that Defendants have conceded that Solutia's expenses for the Anniston Lead Site were voluntary.[145] Defendants have conceded no such thing. Moreover, Solutia cannot dispute that all of the cleanup work at issue was required under the PCD. In fact, Solutia's own Complaint expressly limits its claims to costs Solutia incurred pursuant to the PCD and other "federal and state orders."[146] Because Solutia itself alleged that all of its work in Anniston has been conducted pursuant to the PCD and other "federal and state orders," Solutia cannot bring a Section 107 claim for cost recovery for that work as a matter of law.

III. Solutia's Claims for Alleged Costs Sustained Before or Outside of the PCD were not Properly Before the District Court.

In the event this Court upholds the dismissal of Solutia's Section 107 claim, Solutia contends that the District Court erred in denying its Rule 59(e) motion to alter or amend the judgment on the grounds that Solutia had

[145] *See* Appellants' Br. at 35. These quotes are irrelevant for at least three reasons: first, they are selective and misleading; second, even if the quotes were not taken out of context, defendants' characterization of Solutia's actions does not make them so; and third, two of the four bullets are not defendants' statements.

[146] R3-86, Compl. ¶¶ 334, 335, 338, 344, 346, 348.

incurred certain cleanup costs voluntarily.[147] Specifically, Solutia claimed for the first time that, contrary to the allegations in its Complaint and its arguments over the previous seven years in the litigation, some of the work for which it was seeking "cost recovery" had actually not been conducted pursuant to the PCD and other federal administrative orders. Solutia therefore argued that the District Court erred in dismissing those claims in its grant of the Settling Defendants' motion for reconsideration and the resulting entry of summary judgment. This argument cannot be reconciled with the claims in Solutia's Complaint. Nor does it address why Solutia failed to bring this contention to the District Court's attention until after the Settling Defendants had been granted summary judgment. Under these circumstances, the denial of Solutia's Rule 59(e) motion was clearly correct.

In its Complaint, Solutia seeks recovery for costs that it sustained pursuant to the PCD and other "federal and state orders."[148] Indeed, the only response costs identified in the Complaint are those sustained "in connection with work performed under various federal and state orders" and that are "consistent . . . with the federal and state orders."[149] Similarly, Solutia's

[147] *See* Appellants' Br. at 36.

[148] R3-86, Compl. ¶¶ 334, 335, 338, 344, 346, 348.

[149] *Id.* at ¶¶ 334, 335, 344, 346.

contribution and cost recovery counts allege that Defendants are liable to Solutia for the response costs sustained "in performing response activities pursuant to the federal and state orders."[150] In short, nowhere in the Complaint does Solutia allege that it sustained cleanup expenses other than as required under these orders. Under these circumstances, the District Court's rejection of Solutia's attempt to change the scope of its Complaint after the grant of summary judgment was proper.[151]

Furthermore, if Solutia believed that summary judgment should not have been granted as to the costs identified for the first time in its Rule 59(e) motion, Solutia had an affirmative duty to present that argument to the District Court while the motion for reconsideration was still pending.[152] "It is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary

[150] *Id.* at ¶¶ 338, 348.

[151] *See Brown v. Conn. Gen. Life Ins. Co.*, 934 F.2d 1193, 1198 (11th Cir. 1991) ("It is axiomatic that the plaintiff controls her own complaint and that she alone may decide which claims to advance.") (Johnson, J., dissenting) (citing *The Fair v. Kohler Die and Specialty Co.*, 228 U.S. 22, 25, 33 S. Ct. 410, 411-12 (1913)).

[152] *See, e.g., Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002) (upholding grant of summary judgment on due process and equal protection claims where the claims were included in the complaint but not raised by plaintiffs in opposition to the motion for summary judgment); *Liberles v. Cook Cnty.*, 709 F.2d 1122, 1126 (7th Cir. 1983).

judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal."[153]

Applying these legal principles here, Solutia had multiple opportunities to raise with the District Court its newly alleged "voluntary" cleanup costs, including: (1) in the briefing on the initial summary judgment motion in 2006; (2) in the supplemental briefing after *Atlantic Research* was decided in 2007; (3) at the September 9, 2009 hearing when the District Court raised the possibility of the filing of an amended complaint; (4) in the briefing on the motion for reconsideration in 2010; (5) in its responses to certain questions posed in the court's May 6, 2010, Order;[154] and (6) finally, at the May 2010 hearing on the motion for reconsideration itself.

In short, Solutia had the burden of informing the District Court, prior to the grant of the motion for reconsideration and the resulting entry of summary judgment, of the legal and factual reasons why summary judgment should not be granted. Having failed to do so, Solutia cannot raise the issue

[153] *Liberles*, 709 F.2d at 1126.

[154] R24-604, Plaintiffs' Supplemental Brief and Memorandum in Opposition to Defendants' Motions to Reconsider at 30-33.

after the fact in a Rule 59(e) motion. The District Court properly denied Solutia's motion.[155]

Conclusion

For all of the foregoing reasons, the judgment of the District Court should be affirmed in its entirety.

Respectfully submitted,

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[155] Even if the District Court had addressed the merits of Solutia's newly-raised claim, the motion still would have been denied. As explained in Appellees' briefing on the Rule 59(e) motion, Solutia was not entitled to prevail on the merits of the claims raised in that motion. *See* R26-631, 634, 635, 636, 637, 638, 639 & 640.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B), exclusive of the items that are exempt under FRAP 32(a)(7)(B)(iii) and Eleventh Circuit Rule 32-4. This brief contains 9,997 words, which word count was performed by Microsoft Word 2003.

This 29th day of June, 2011

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that an original and six copies of the foregoing brief were hand delivered to the Clerk, United States Court of Appeals for the Eleventh Circuit, on June 29, 2011.

I further certify that a true and correct copy of the foregoing brief was sent on June 29, 2011, via first-class prepaid mail to the following counsel of record:

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