No. 13-568

In the Supreme Court of the United States

PATRICIA A. BANKERT, INDIVIDUALLY AND IN HER CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JONATHAN W. BANKERT, SR., JONATHAN W. BANKERT, ROBERT H. BANKERT, KATHERINE L. BANKERT, CYNTHIA M. RUSSELL, ENVIROCHEM CORPORATION,

Petitioners,

v.

NORMAN W. BERNSTEIN AND PETER M. RACHER, AS TRUSTEES OF THE THIRD SITE TRUST FUND,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

NORMAN W. BERNSTEIN
Counsel of Record
INGA CALDWELL
N.W. BERNSTEIN & ASSOCIATES, LLC
800 Westchester Ave.
Suite N-319
Rye Brook, NY 10573
(914) 358-3500
nwbernstein@nwbllc.com

GEORGE M. PLEWS
FREDERICK D. EMHARDT
PLEWS SHADLEY RACHER & BRAUN LLP
1346 North Delaware Street
Indianapolis, IN 46202
(317) 637-0700

Counsel for Respondents

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

RULE 29.6 NOTATION

Pursuant to Supreme Court Rule 29.6, Norman W. Bernstein and Peter M. Racher, as Trustees of the Third Site Trust Fund (the "Trustees") state that the Trustees have no parent corporation and no publicly held corporation has a 10% or greater interest in the Trust.

TABLE OF CONTENTS

RULE 29.6 NOTATION i

TABLE OF AUTHORITIES iv

STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 5

STATEMENT OF THE CASE 12

REASONS FOR DENYING THE PETITION 19

1. The Petitioners have misrepresented their role in this case and Questions 1 and 2 presented in the Petition are not raised: there is no “consent decree”, no “settlement decree” and no “effective” covenant not to sue. 19

2. There is no split in the circuits. 24

3. The AOCs in the instant case are based on an earlier form of AOC that has not been used for many years and this case is thus of limited precedential value. 28

4. The arguments against the Original Opinion were addressed by the Seventh Circuit in its Amended Opinion. 30

5. In the unlikely event this Court were to both grant review and conclude that the Trustees’ only claim was a contribution claim under CERCLA § 113(f)(3)(B), a correct interpretation of CERCLA § 113(g)(2) and (g)(3) would provide an alternative ground for affirming the result in Seventh Circuit. 33

CONCLUSION 37

APPENDIX

Appendix A 2002 Amendment to Third Site Trust Fund Agreement . . . . App. 1

Appendix B List of Non-Premium Respondents and Premium Respondents to the 2002 Administrative Order By Consent . . . . App. 40

Appendix C Misstatements of Fact and Law in the Petition . . . . App. 44

TABLE OF AUTHORITIES

Cases:

Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.,
602 F.3d 204 (3d Cir. 2010) 23

Bernstein v. Bankert,
702 F.3d 964 (7th Cir. 2012) *amended and superseded on reh'g*,
733 F.3d 190 (7th Cir. 2013) . . . 10, 11, 16, 17, 30

Burlington N. and Santa Fe Ry. Co. v. United States,
556 U.S. 599 (2009) 33

Cooper Indus., Inc. v. Aviall Servs., Inc.,
543 U.S. 157 (2004) 12, 28

Frey v. Envtl. Prot. Agency,
403 F.3d 828 (7th Cir. 2005) 29

GenCorp., Inc. v. Olin Corp.,
390 F.3d 433 (6th Cir. 2004) 35

Geraghty and Miller, Inc. v. Conoco, Inc.,
234 F.3d 917 (5th Cir. 2000) 35

ITT Indus., Inc. v. BorgWarner, Inc.,
506 F.3d 452 (6th Cir. 2007) 10, 26, 27, 35

Morrison Enters., LLC v. Dravo Corp.,
638 F.3d 594 (8th Cir. 2011) 23

Niagara-Mohawk Power Corp. v. Chevron U.S.A., Inc.,
596 F.3d 112 (2d Cir. 2010) 24

RSR Corp. v. Commercial Metals Co.,
496 F.3d 552 (6th Cir. 2007) . . . . *passim*

Solutia Inc. v. McWane, Inc.,
672 F.3d 1230 (11th Cir. 2012) 23

Sun Co., Inc. (R&M) v. Browning-Ferris, Inc.,
124 F.3d 1187 (10th Cir. 1997) 35

United States v. Atl. Research Corp.,
551 U.S. 128 (2007) . . . . *passim*

W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.,
559 F.3d 85 (2d Cir. 2009) 28

* * * * * * * *

Statutory Provisions:

40 C.F.R. § 300.415(b)(4)(i) 13

Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq.:*

42 U.S.C. §9606 21

42 U.S.C. §9606(a) 12, 14

42 U.S.C. §9607 . . . . 5, 21, 36

42 U.S.C. §9607(a) . . . . *passim*

42 U.S.C. §9607(a)(4)(B) 27

42 U.S.C. §9613 . . . . 5, 26, 35

42 U.S.C. §9613(b)(2)(B) 35

42 U.S.C. §9613(f) 25, 26, 28, 33

42 U.S.C. §9613(f)(1) 21

42 U.S.C. §9613(f)(3)(B) . . . . *passim*

42 U.S.C. §9613(g) 33, 34

42 U.S.C. §9613(g)(2) 33

42 U.S.C. §9613(g)(2)(A) 16, 35, 36

42 U.S.C. §9613(g)(3) . . . . *passim*

42 U.S.C. §9613(g)(3)(B) 12, 26, 27, 36

42 U.S.C. §9622 . . . . 5, 11, 16, 18, 20

42 U.S.C. §9622(c)(1) 2

42 U.S.C. §9622(d)(1) 2, 3, 20

42 U.S.C. §9622(f) 11, 30

42 U.S.C. §9622(f)(1) 2, 3, 4, 20

42 U.S.C. §9622(f)(2) 20

42 U.S.C. §9622(f)(3) 2, 4

42 U.S.C. §9622(g) 12, 13, 20, 23, 34

42 U.S.C. §9622(h) 23, 34

* * * * * * * *

Other Authorities:

Fed. R. Civ. P. 14 21

Model Remedial Design/Remedial Action (RD/RA) Consent Decree (2012), http://www2.epa.gov/sites/production/files/2013-11/documents/rdra-2012-amd.pdf 23, 24

Office of Site Remediation Enforcement, U.S. Envtl. Prot. Agency, Issuance of "Revised Model Administrative Settlement Agreement and Order on Consent for Removal Actions" (2007) 29

Office of Enforcement and Compliance Monitoring, U.S. Envtl. Prot. Agency, Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions (1990) 20

Office of Site Remediation Enforcement, U.S. Envtl. Prot. Agency, and Env't and Natural Resources Div., U.S. Dep't of Justice, Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f) (2005) 29

Superfund Program; Revised Model CERCLA RD/RA Consent Decree, 60 Fed. Reg. 38817 (July 28, 1995) 23

Sup. Ct. R. 10 9

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 9607(a)
(CERCLA § 107(a))

(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—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) . . . 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; . . . .

42 U.S.C. §§ 9622(c)(1), (d)(1)(A), (f)(1), (f)(3) (CERCLA §§ 122(c)(1), (d)(1)(A), (f)(1), (f)(3))

(c) Effect of agreement

(1) Liability

Whenever the President has entered into an agreement under this section, the liability to the United States under this chapter of each party to the agreement, including any future liability to the United States, arising from the release or threatened release that is the subject of the agreement shall be limited as provided in the agreement pursuant to a covenant not to sue in accordance with subsection (f) of this section. A covenant not to sue may provide that future liability to the United States of a settling potentially responsible party under the agreement may be limited to the same proportion as that established in the original settlement agreement. Nothing in this section shall limit or otherwise affect the authority of any court to review in the consent decree process under subsection (d) of this section any covenant not to sue contained in an agreement under this section. In determining the extent to which the liability of parties to an agreement shall be limited pursuant to a covenant not to sue, the President shall be guided by the principle that a more complete covenant not to sue shall be

provided for a more permanent remedy undertaken by such parties.

* * *

(d) Enforcement

(1) Cleanup agreements

(A) Consent decree

Whenever the President enters into an agreement under this section with any potentially responsible party with respect to remedial action under section 9606 of this title, following approval of the agreement by the Attorney General, except as otherwise provided in the case of certain administrative settlements referred to in subsection (g) of this section, the agreement shall be entered in the appropriate United States district court as a consent decree. The President need not make any finding regarding an imminent and substantial endangerment to the public health or the environment in connection with any such agreement or consent decree.

* * *

(f) Covenant not to sue

(1) Discretionary covenants

The President may, in his discretion, provide any person with a covenant not to sue concerning any liability to the United

States under this chapter, including future liability, resulting from a release or threatened release of a hazardous substance addressed by a remedial action, whether that action is onsite or offsite, if each of the following conditions is met:

(A) The covenant not to sue is in the public interest.

(B) The covenant not to sue would expedite response action consistent with the National Contingency Plan under section 9605 of this title.

(C) The person is in full compliance with a consent decree under section 9606 of this title (including a consent decree entered into in accordance with this section) for response to the release or threatened release concerned.

(D) The response action has been approved by the President.

* * *

(3) Requirement that remedial action be completed

A covenant not to sue concerning future liability to the United States shall not take effect until the President certifies that remedial action has been completed in accordance with the requirements of this chapter at the facility that is the subject of such covenant.

INTRODUCTION

Respondents Norman W. Bernstein and Peter M. Racher, as Trustees of the Third Site Trust Fund (the "Trustees" or the "Trust Fund"), respectfully request that this Court deny the instant petition for a writ of certiorari (the "Petition") to review the Seventh Circuit's decision reinstating the Trustees' claims against Petitioners[1] under § 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and under Indiana state law.

The Trustees brought this action to recover monies expended by the Trust Fund in conducting a removal action at a CERCLA site called "Third Site" located in Zionsville, Indiana.[2] The Trust Fund was created in 1999 and amended in 2002 for the purpose of carrying out two administrative orders on consent ("AOCs") voluntarily entered into by United States Environmental Protection Agency ("EPA") and certain AOC respondents, initially to do a study of Third Site (the "1999 AOC") and, after EPA had selected a remedy, to do what EPA refers to as a "removal" action to address the contamination at Third Site (the "2002 AOC").

---

[1] We refer to the Petitioners collectively as the "Bankerts" or the Bankert family.

[2] Because of nomenclature differences, CERCLA §§ 107, 113, and 122 are referred to respectively in 42 U.S.C. as §§ 9607, 9613, and 9622. For simplicity in this brief in opposition we will use only CERCLA §§ 107, 113, and 122 without parallel citation to the U.S.C. form of citation (unless we are quoting from an opinion that uses the U.S.C. form of citation).

Until its bankruptcy in the early 1980s, EnviroChem Corporation operated a major mid-west solvent recycling facility that is now known as the EnviroChem site. Adjacent to EnviroChem to the east was the Bankert family-owned Northside Sanitary Landfill. What became known as Third Site was a physically separate site to the southwest of EnviroChem used from time to time by EnviroChem as a parking and storage area for waste chemicals. The Bankert family currently owns Third Site and owned it at the time of disposal (roughly 1975 to 1981). The Bankert family also had an interest in EnviroChem.

As explained in more detail below, the Third Site AOCs had two parts: Non-Premium Respondents agreed to form and fund a Trust to carry out the terms of the 1999 and 2002 AOCs; and Premium Respondents who were deemed by EPA to be *de minimis* were allowed to "cash out". The Premium Respondents were not required to fund the Trust or conduct the remedy. They have no interest in this litigation.

As to the Non-Premium Respondents, the government reserved all its rights to sue them notwithstanding the AOCs, they received no covenant not to sue on signing the AOCs, and would only get one at some indefinite time in the future after EPA certified completion of the work. The 1999 AOC to do a study of Third Site was completed in or about October 2000. As to the 2002 AOC, it is not disputed that the implementation of the cleanup removal action is still underway, EPA has issued no notice of completion, and the Non-Premium Respondents who continue to fund the Trust have thus received no covenant not to sue for

the ongoing implementation of the removal action at Third Site.

The Petition states that "Several potentially responsible parties ('PRPs'), including *the Petitioners* and Respondents, agreed to form a trust to clean up [Third Site] . . . ." Pet. at 10 (emphasis added). The statement is false. Petitioners never signed the trust agreement, no such claim was ever made below, no support for the statement is provided and Petitioners have never paid anything to the Trust toward cost of the cleanup of their own site. For purposes of this Petition, the only CERCLA dispute before this Court arises out of the 2002 AOC and the 2002 Trust Agreement Amendment that provided for the funding of the remedy. The full text of the 2002 Trust Agreement Amendment and all of the signature pages to it are appended to this brief in opposition as Respondents' Appendix ("Res. App.") A.[3] Additionally, a list of the Non-Premium and Premium Respondents to the 2002 AOC is appended to this brief as Res. App. B. (The full text of the 2002 AOC without the list of participants and signature pages is found at Plaintiffs-Appellants' Appendix at 171-235).[4] *The Bankerts were not participants in the Trust Fund or the AOCs.*

The Bankerts' failure to participate in the AOCs, failure to participate in the Trust Agreement (or its Amendment) and failure to pay anything toward the

---

[3] Individual company percentages and dollar amounts have been redacted.

[4] We refer to the Respondents' (Plaintiffs-Appellants in the Seventh Circuit) appendix below as "Plaintiffs-Appellants' Appendix".

cleanup, required this action to be brought by the Trustees to recover cleanup costs incurred by the Trust.[5] The Petitioners seek to turn CERCLA's "polluter pays" principle on its head and obtain a "free ride" for themselves and their insurance carrier. Failure to hold the Bankerts liable would discourage others from settling—they too would hope for a free ride. Other misstatements in the Petition are addressed in Res. App. C.

Beyond misstatements, there are numerous problems with this Petition. Question 1. refers to a "consent decree" and Question 2. refers to a "settlement decree." Pet. at i. There was no "consent decree" and no "settlement decree." A consent decree and settlement decree (by which we assume Petitioners mean a judicially approved settlement) presuppose that there was a prior civil action. Such a prior action would, as explained below, trigger considerations under CERCLA not involved on the facts of this case. Moreover, that problem is not limited to the questions presented; the entire Petition is riddled with an effort to conflate consent decrees and AOCs. *See* Pet. at 9, 10, 12, 13, 26, 30, 34, 38-41. That effort is also endemic to its effort to show that there is a split in the circuits. It may be argued that CERCLA § 113(f)(3)(B) provides a right of contribution for anyone who resolves liability

---

[5] At one point in its Opinion, the Seventh Circuit says: "The Bankert appellees were listed as Non-Premium Respondents under the 1999 and 2002 AOCs, but have not met their obligations by paying into the Trust or otherwise." Petitioners' Appendix (hereafter "Pet. App.") at 7a. It would be more correct to say that Bankerts did not sign the 1999 or 2002 AOCs, nor did they sign the Trust Agreement or pay anything into the Trust.

"in an administrative or judicially approved settlement" and therefore consent decrees and AOCs are all the same thing. This argument ignores other material language in the statute. We respond to it in Section 1 of the Reasons For Denying the Petition below.

Additionally, Question 2. is misleading. It asks whether contribution rights are unavailable when a party [meaning Non-Premium Respondents] enters into a settlement decree with the United States "but has not yet fully performed its settlement obligation, *but has an effective covenant* not to sue *if it complies* with the settlement." Pet. at i. (emphasis added). The phrase "[i]f it complies" should be "only when it completes compliance." Non-Premium Respondents have no "effective covenant" not to sue.

As noted in more detail below, Non-Premium Respondents will not receive a covenant not to sue under the 2002 Order until EPA issues a notice of completion. It is undisputed that the work under the 2002 AOC is ongoing and EPA has not issued a notice of completion. Moreover, notwithstanding the 2002 AOC, EPA reserved all its rights including the right to sue Non-Premium Respondents under CERCLA. What happens when a party *has* an effective covenant not to sue is simply not a question raised by this case. Finally, the remaining Question Presented relates to an Indiana statute of limitations (Question 3). There is no compelling reason for this Court to consider that state law question under Rule 10 of the Rules of this Court.

Contrary to assertions in the Petition (Pet. at 26), there is no split between the Sixth and Seventh

Circuits. The Seventh Circuit issued two opinions. Its first opinion was issued on December 19, 2012 (the "Original Opinion"), and an Amended Opinion was issued on July 31, 2013 (the "Amended Opinion"). The opinions are reported as *Bernstein v. Bankert*, 702 F.3d 964 (7th Cir. 2012) *amended and superseded on reh'g*, 733 F.3d 190 (7th Cir. 2013). The Amended Opinion is Appendix A to the Petition.[6] It expressly considered and rejected Petitioners' argument that there was a split in the Circuits based on *RSR Corp. v. Commercial Metals Co.,* 496 F.3d 552 (6th Cir. 2007). Pet. App. at 41a-42a. The facts in *RSR* were fundamentally different than those instant case; *RSR* involved an express contribution action after entry of a consent decree (i.e., a "judicially approved settlement" within the meaning of CERCLA § 113(g)(3)) that resolved liability on entry of the decree. A judicially approved settlement is one of the triggers for that statute of limitations. *Id*. In the instant case, there was no such trigger and no such resolution of liability. As explained below, the closer case in the Sixth Circuit is *ITT Industries, Inc. v. BorgWarner, Inc*., 506 F.3d 452 (6th Cir. 2007) which involved an AOC that left liability unresolved. *ITT* is consistent with the Seventh Circuit's Amended Opinion.

The form of AOCs involved in this case (issued in 1999 and 2002) was modified in key ways by EPA in 2005 and again in 2007 to provide a covenant not to sue when the AOC is signed. This was done because of EPA's concern that the old form of AOC would have the effect that the Seventh Circuit concluded it had. The

---

[6] For convenience all citations to the Amended Opinion are to Pet. App. A.

form of AOCs in this case has not been in use for almost eight years and it is unlikely, as explained below, that many such early AOCs remain open. Thus, this case has limited precedential value. Additionally, the Petition does not discuss the specific language of AOCs that the Seventh Circuit found controlling.

The Department of Justice ("DOJ") filed an amicus brief in support of the Bankerts' petition for rehearing from the Original Opinion for several reasons.[7] The Original Opinion relied in part on language in CERCLA § 122(f) and appeared to broadly assert that EPA lacked the statutory authority to issue covenants not to sue in AOCs until all work at a CERCLA site was complete. *Bernstein*, 702 F.3d at 975-77, 981, 983. One of the government's concerns was that reliance on CERCLA § 122(f) "threatens to curtail the United States' settlement authority. . . ." Amicus br. at 4-5. The Amended Opinion narrowed the decision to the specific language in the old form of AOCs the Seventh Circuit had before it and deleted the references to CERCLA § 122. Pet. App. at 3a, 18a-21a, 28a-29a, 39a-43a. The Petition now before this Court repeats (with a few minor language changes) many of the amicus' arguments addressed to the Original Opinion. *Compare* Amicus br. at 2-3, 9-11 *with* Pet. at 27, 30-33. Those arguments, however, were responded to by the Seventh Circuit in its Amended Opinion. Pet. App. at 43a-45a. The government has not filed an amicus in support of the Petition to review the Amended Opinion.

In the unlikely event that this Court both granted review and then determined that the Seventh Circuit

---

[7] The amicus brief is Document 77 and we cite to it as "Amicus br."

was incorrect as to the effect of the old form of AOC (which it was not), a question would be presented that was briefed but not resolved by the Seventh Circuit. That question is whether one of the statutes of limitation in CERCLA, § 113(g)(3)(B), which is expressly limited to contribution actions based on (a) *de minimis* and cost recovery AOCs, and (b) judicially approved settlements, means just what is says. As explained below, the correct answer to that question would provide an alternative basis for affirming the result in the Seventh Circuit.

For all of the foregoing reasons, this case is not a good vehicle for resolving questions that might be viewed as still open about EPA cleanup AOCs after this Court's landmark decisions in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004) and *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007).

STATEMENT OF THE CASE

As noted briefly above, the 1999 AOC had two separate parts, one regarding "Premium Respondents" and one regarding "Non-Premium Respondents." The Premium Respondents were parties found by EPA to be *de minimis*. They settled and cashed out pursuant to § 122(g) of CERCLA. Pet. App. at 6a. Premium Respondents did not undertake to conduct the work required by the 1999 AOC, nor did they become settlors to the Trust.[8] Pet. App. at 6a.

Non-Premium Respondents accepted the 1999 AOC pursuant to § 106(a) of CERCLA, committed to do the

---

[8] Separate provisions were made for certain Federal Premium Respondents.

work required by the Order—the implementation of an Engineering Evaluation and Cost Analysis ("EE/CA") of Third Site. Pet. App. at 5a-6a. Non-Premium Respondents became settlors of the Trust which was created pursuant to the 1999 AOC. Pet. App. at 6a. The Non-Premium Respondents accepted the obligation to fund the Trust to the extent needed to carry out the EE/CA. Pet. App. at 6a. An EE/CA is a step in the removal action process under EPA's National Contingency Plan and is classified by EPA as a "removal action" at 40 C.F.R. § 300.415(b)(4)(i). Plaintiffs-Appellants' Appendix at 305.

EPA subsequently approved the work done under the 1999 AOC and, based on the results of the EE/CA, in 2001 issued an Enforcement Action Memorandum that selected a type of removal action for Third Site. Pet. App. at 6a. In November 2002, the parties entered into another AOC, also expressly voluntary, to implement the remedy called for in the Enforcement Action Memorandum. Pet. App. at 6a. The 2002 AOC followed the same pattern as in the 1999 AOC. Pet. App. at 6a. Premium Respondents that EPA determined were *de minimis* settled and cashed out pursuant to the *de minimis* settlement provisions of § 122(g) of CERCLA. Pet. App. at 6a. By contrast, Non-Premium Respondents to the 2002 AOC committed to perform the removal action required by the 2002 AOC, to amend the Trust Fund Agreement to cover the implementation of the removal action, and to fund the Trust with monies as needed to do so. Pet. App. at 6a-7a.

Both the 1999 and the 2002 AOCs had identical reservations of rights by EPA. Notwithstanding the AOCs, EPA reserved all its rights to:

> take, direct, or order all actions necessary to protect public health, welfare, or the environment . . . or minimize an actual or threatened release of hazardous substances . . . on, at, or from the Site . . . . U.S. EPA also reserves the right to take any other legal or equitable action as it deems appropriate and necessary, or to require the Non-Premium Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

1999 AOC, Sec. XI at 23-24, Plaintiffs-Appellants' Appendix at 127-28; 2002 AOC, Sec. XI at 25, Plaintiffs-Appellants' Appendix at 196. The 1999 and 2002 AOCs also provided:

> Except as expressly provided in Section XIII (Covenant Not To Sue), nothing in this Order constitutes a satisfaction of or release from any claim or cause of action against the Respondents or any person not a party to this Order, for any liability such person may have under CERCLA, other statutes, or the common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106(a) or 107(a) of CERCLA, 42 U.S.C. §§9606(a), 9607(a).

1999 AOC, Sec. XII at 24, Plaintiffs-Appellants' Appendix at 128; 2002 AOC, Sec. XII at 26, Plaintiffs-Appellants' Appendix at 197.

The 1999 and 2002 AOCs further provided:

> [U]pon issuance of the U.S. EPA notice referred to in Section XVII (Notice of Completion), U.S. EPA covenants not to sue Respondents for judicial imposition of damages or civil penalties or to take administrative action against Respondents for any failure to perform actions agreed to in this Order except as otherwise reserved herein.

1999 AOC, Sec. XIII(a) at 25, Plaintiffs-Appellants' Appendix at 129; 2002 AOC, Sec. XIII(a) at 26, Plaintiffs-Appellants' Appendix at 197. It is undisputed that the implementation of the removal action called for in the 2002 AOC is still underway. EPA has issued no notice of completion and the covenant not to sue under the 2002 AOC has not become effective. Pet. App. at 7a.

On September 29, 2010, the District Court granted summary judgment against the Trustees on the grounds that the statutes of limitations barred this action. The court found that the settlors of the Trust did not voluntarily undertake the cleanup of Third Site and that the Trustees' claims were for contribution under CERCLA § 113(f)(3)(B), not for cost recovery under CERCLA § 107(a). Pet. Supp. App. at 12a-13a. The court also reasoned that the 1999 and 2002 AOCs resolved some or all of the Non-Premium Respondents' CERCLA liability. Pet. Supp. App. at 16a. The court applied the three-year statute of limitations set forth in CERCLA § 113(g)(3) to bar the contribution claims. Pet. Supp. App. at 20a-21a. The District Court also held that the Trustees' Indiana common law claims and their claims under the Indiana Environmental Legal

Action ("ELA") statute were time-barred under Indiana law. Pet. Supp. App. at 21a-24a. On February 3, 2011, the District Court entered final judgment in favor of all the Defendants. Pet. Supp. App. at 31a. The Plaintiffs filed a timely notice of appeal and Auto Owners cross-appealed from the earlier denial of its motion for summary judgment on *res judicata* grounds.

On December 19, 2012, the Seventh Circuit issued its Original Opinion. The Seventh Circuit relied on CERCLA § 122, as well as the language of the 1999 and 2002 AOCs to state that the trigger of a contribution action under CERCLA § 113(f)(3)(B) is "resolution of liability through [a] settlement, which, *pursuant to the statute*, does not occur until satisfactory performance has been certified." *Bernstein*, 702 F.3d at 976 (emphasis added). As to the 1999 AOC, the court held that, because the Trustees completed the EE/CA and received a notice of completion from EPA, the Trustees had resolved liability and thus satisfied the prerequisites for a contribution action under CERCLA § 113(f)(3)(B). *Id.* at 977-78. The court held that a plaintiff is limited to a contribution action, when one is available. *Id.* at 980. The court declined to decide whether the statute of limitations for contribution actions set forth in CERCLA § 113(g)(3) applied (as argued by the Bankerts) or whether the limitations period under CERCLA § 113(g)(2)(A) for removal actions applied (as argued by the Trustees), noting that the Trustees' claim arising out of the 1999 AOC would be time-barred either way. *Id.* at 980-81.

As to the 2002 AOC, the court held that because the work is ongoing and EPA had not issued a notice of completion that would trigger the conditional

covenants not to sue, a contribution action under CERCLA § 113(f)(3)(B) was unavailable. *Id.* at 981. The court stated the Trustees' action was one for cost recovery under CERCLA § 107(a) and since the work was not complete the three-year statute of limitations for "removal" actions had not begun to run. *Id.* at 983-84. The court also revived the Trustees' CERCLA declaratory judgment count against the Bankerts and held that their claim against the Bankerts' carrier was not moot. *Bernstein*, 702 F.3d at 984, 991.

With respect to the Trustees' ELA claim, the Seventh Circuit applied Indiana's ten-year catchall statute of limitations and held that any costs which occurred subsequent to April 1, 1998 (ten years before this action was filed) were actionable under the ELA and not time-barred. *Id.* at 989-90. As to the *res judicata* cross-appeal by the Bankerts' carrier, the court also ruled that Auto Owners was not entitled to issue preclusion (*id*. at 994-95) or to claim preclusion (*id*. at 995-96).

Auto Owners petitioned for panel or en banc rehearing on the *res judicata* issues and the Bankerts petitioned for panel or en banc rehearing on the CERCLA issues. The DOJ filed an amicus brief in support of the Bankerts' petition for rehearing on the CERCLA issues only and the Trustees' filed an amended answer to the petitions for rehearing and to respond to the amicus brief.

On July 31, 2013, the Seventh Circuit denied rehearing en banc and the panel issued its Amended Opinion primarily to address issues raised in the

amicus brief. Pet. App. at 3a.[9] In its Amended Opinion, the Seventh Circuit did not rely on CERCLA § 122. Instead, the court limited its holding to the language of the 1999 and 2002 AOCs before it, stating: "Whether, and when, a given settlement 'resolves' a party's liability to the EPA within the meaning of 42 U.S.C. § 9613(f)(3)(B) is ultimately a case-specific question dependant [sic] on the terms of the settlement before the court." Pet. App. at 3a.

As to the 1999 AOC, the Court held that the Non-Premium Respondents had resolved their liability to the United States because they completed the EE/CA and EPA approved their performance. Pet. App. at 20a-21a. It ruled that the Trustees' claim was thus only in contribution under CERCLA § 113(f)(3)(B) and that the statute of limitations had run as to the CERCLA claims under the 1999 AOC. Pet. App. at 26a-28a.

As to the claims arising under the 2002 AOC, the Seventh Circuit held that the liability to the United States has not been resolved because the Third Site removal action is ongoing, no notice of completion has been issued, the government reserved its rights, the covenant not to sue has not been triggered, and thus a contribution action is not available. Pet. App. at 29a. "What the Trustees *have* done, with respect to the work called for by the 2002 AOC, is incur costs of response consistent with the national contingency plan, as is required to file a cost recovery action under § 9607(a)." Pet. App. at 29a (emphasis in the original). The court

---

[9] The Amended Opinion assumed that DOJ was filing on behalf of the EPA. The amicus does not actually say that.

rejected arguments seeking to equate signing any settlement agreement regardless of its terms with resolution of liability under CERCLA § 113(f)(3)(B). Pet. App. at 35a-43a.

As in its Original Opinion, the Seventh Circuit revived the Trustees' CERCLA § 107(a) action as to the 2002 AOC, and their declaratory judgment claim under CERCLA for future response costs, Pet. App. at 46a-47a, and also held that the Trustees' Indiana ELA claim was not time-barred under Indiana's ten-year statute of limitations (Pet. App. at 48a-60a). Additionally, the Seventh Circuit reinstated the Trustees' claim for declaratory judgment against Auto Owners. Pet. App. at 60a-61a. As to Auto Owners' cross-appeal on *res judicata* grounds, the court again ruled that Auto Owners was not entitled to issue preclusion (Pet. App. at 68a-69a) or to claim preclusion (Pet. App. at 70a-73a) and affirmed the dial of its motion for summary judgment. Auto Owners did not file a petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

1. The Petitioners have misrepresented their role in this case and Questions 1 and 2 presented in the Petition are not raised: there is no "consent decree", no "settlement decree" and no "effective" covenant not to sue.

Contrary to the Petition (Pet. at 10), the Bankerts never signed the Trust Agreement or its Amendment. They also never signed the 1999 or 2002 AOCs and have paid nothing to the Trust toward the cleanup of Third Site.

There is no "consent decree" involved in this case (Petitioners' Question 1) nor is there any "settlement decree" (Petitioners' Question 2). Pet. at i. The effort to conflate consent decrees or judicially approved settlements with AOCs underlies the Petition, *see* Pet. at 9, 10, 12, 13, 26, 30, 34, 38-41, and, contrary to Petitioners' Question 2, the Non-Premium Respondents have no "effective" covenant not sue.

Under CERCLA, AOCs and consent decrees are not one and the same. First, a consent decree presupposes a prior lawsuit under the Federal Rules of Civil Procedure and a court decree includes an element of judicial compulsion not present in an AOC. Indeed, DOJ in its amicus claimed the panel's reliance in the Original Opinion on CERCLA § 122(f)(1) and (f)(2) was incorrect "because they address only 'remedial' actions." Amicus br. at 6. "Removal" actions and "remedial" actions are treated differently under CERCLA and EPA's guidance interpreting the statute. Except for *de minimis* cash out settlements under CERCLA § 122(g), CERCLA requires that remedial action settlement must be "entered in the appropriate United States district court as a consent decree." CERCLA § 122(d)(1). EPA's guidance also states that: ". . . Agency agreements entered into under § 122 with respect to a remedial action must be in the form of a consent decree, entered in the appropriate United States district court." OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING, U.S. ENVTL. PROT. AGENCY, GUIDANCE ON CERCLA SECTION 106(A) UNILATERAL ADMINISTRATIVE ORDERS FOR REMEDIAL DESIGNS AND REMEDIAL ACTIONS 6 n.12 (1990). By contrast, AOCs are simply agreements between EPA and potentially liable parties. AOCs do not involve a lawsuit or judicial

approval. The settlors of the Third Site Trust Fund entered into AOCs to perform removal actions; there were no lawsuits and no consent decrees to perform remedial actions.

Second, CERCLA § 113(f)(1) provides that:

> [a]ny 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 . . . .

Thus, once a civil action under the Federal Rules of Civil Procedure has been initiated, the defendant may utilize Fed. R. Civ. P. 14 to bring a contribution action during the suit or bring a contribution claim or suit during or following the suit under CERCLA § 113(f)(1).

But where there is no such civil action, "any person" who has incurred response costs consistent with the NCP should be able to bring a § 107(a) action to recover its response costs exactly as *Atlantic Research* authorized. Footnote 6 in *Atlantic Research* is consistent with that approach: "[W]e recognize that a PRP may sustain expenses pursuant to a *consent decree following a suit* under § 106 or § 107 . . . . We do not decide whether *these compelled costs* of response are recoverable under § 113(f), § 107(a), or both." 551 U.S. at 139 n.6 (emphasis added). The underlying assumption was, as to a party seeking to recover its own costs that had not been sued, there was no such question.

Third, the District Court reasoned that once the respondents had signed the AOCs the costs of response were compelled and that that was compulsion enough to distinguish between "voluntary" actions and "compelled" actions. Pet. Supp. App. at 11a-12a. But because there was no suit, the entry into the AOCs was voluntary—that is what AOCs expressly say. 1999 AOC, Sec. I at 1, 2002 AOC, Sec. I at 1, Plaintiffs-Appellants' Appendix at 105 and 172. The District Court's reasoning is like saying a contractor is compelled to build a new roof on my house. That would be true only if the contractor first voluntarily entered into a contract to do so. An obligation contracted for voluntarily is not a compelled action, otherwise the word "voluntary" is deprived of any meaning. In any event, the Seventh Circuit rejected the District Court's reasoning, noting that the principal distinction that this Court was making in *Atlantic Research* was between a suit that sought recovery of costs directly incurred by the plaintiff in cleaning up a site (a direct action under CERCLA § 107(a)), and a suit for recovery of costs that one had not incurred directly but had reimbursed to others (a contribution claim). Pet. App. at 22a, 30a-35a. In the instant case, it is not disputed that the Trustees are only suing to recover the costs that they have incurred in implementing the removal action.

Fourth, in the event that this Court were to *both* grant review and conclude the that the Trustees only have a cause of action for contribution, a determination would be needed as to the District Court's reliance on CERCLA § 113(g)(3) to bar the Trustees' claims (a question fully briefed but not decided by the Seventh Circuit). Section 113(g)(3) by its terms only applies to

AOCs under § 122(g) (relating to *de minimis* settlements) and under § 122(h) (relating to cost recovery settlements) but *does not* by its terms apply to *non-de minimis* cleanup AOCs. On the other hand, CERCLA § 113(g)(3) *does* expressly include settlements based on a court "judgment" or "a judicially approved settlement". Thus, if this Court were to conclude that the Trustees' claim under the 2002 AOC was only in contribution, the mischaracterization of the instant case as posing questions related to consent decrees or judicially approved settlements would take on increased significance.

The principal circuit court cases relied upon by the Petition, *Solutia Inc. v. McWane, Inc.,* 672 F.3d 1230 (11th Cir. 2012); *Agere Systems, Inc. v. Advanced Environmental Technology Corp*., 602 F.3d 204 (3d Cir. 2010); and *RSR,* 496 F.3d 552, not surprisingly involved actions by PRPs after they entered into consent decrees.[10] The reason is simple. Since at least 1995, the DOJ Model Consent Decree for EPA settlements (like the current form of AOC) has provided for a covenant not to sue upon signing. *See* Superfund Program; Revised Model CERCLA RD/RA Consent Decree, 60 Fed. Reg. 38817, 38833-34 (July 28, 1995). That provision in the model Consent Decree has not materially changed to this date. MODEL REMEDIAL DESIGN/REMEDIAL ACTION (RD/RA) CONSENT DECREE 56-57 (2012), http://www2.epa.gov/sites/

---

[10] *Morrison Enters., LLC v. Dravo Corp*., 638 F.3d 594 (8th Cir. 2011), also relied upon by the Petition, involved AOCs, at least three subsequent consent decrees, and an untimely motion to amend the complaint to try to get two "bites at the apple". *See id*. at 599-601, 610-11.

production/files/2013-11/documents/rdra-2012-amd.pdf.[11]

One circuit court case relied upon by Petitioners that involved an AOC is *Niagara-Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112 (2d Cir. 2010). That case does not support the Petition either. After citing to footnote 6 in *Atlantic Research,* the Second Circuit ruled: "We similarly *do not decide* whether a § 107(a) action could be pursued by a PRP that incurs clean up costs after engaging with the federal or a state government, but is not released from any CERCLA liability." 596 F.3d at 127 n.17 (emphasis added).

In summary, the donors to the Trust have not been released from any CERCLA liability, have no "effective" covenant not to sue, and an AOC is not the same under CERCLA as "consent decree" or a "settlement decree". The Bankerts have misrepresented their role in this matter, and this case does not present either of the first two questions proffered. The third question proffered only relates to state law issues, and does not involve any federal law or Constitutional issue. *See* Pet. at i.

2. There is no split in the circuits.

The Petitioners argue, based on the Sixth Circuit's *RSR* decision, that there is a split between the Sixth and Seventh Circuits over the question of when a party has "resolved" its liability to the United States within the meaning of CERCLA § 113(f)(3)(B). *See* Pet. at 9-

[11] As with the current form of AOC, the immediately effective covenants in the Model Consent Decree can be lost if the consent decree is not complied with.

10, 12-14, 26. In its Amended Opinion, the Seventh Circuit considered and rejected that argument:

> Of course, if the EPA [in the instant case] had included an immediately effective promise not to sue as consideration for entering into the agreement, the situation would be different. That is exactly what occurred in *RSR Corporation* [citation omitted] . . . In that case . . . "the United States agreed 'not to sue or take administrative action' that would impose additional liability on RSR and its co-defendants[.]" *Id*. at 554. As a result, all parties agreed that RSR had resolved its liability through settlement . . . .

Pet. App. at 41a.

> . . . . [W]e—like the Sixth Circuit—simply read the statute as requiring that liability be "resolved." Our result differs from the result reached in the Sixth Circuit in *RSR Corporation* not because we apply a contradictory rule of law, but because of the obvious and dispositive differences in the facts. In that case, the consent order contained an immediately effective release from liability. In this case, it did not. In fact, far from immediately resolving all liability, *see* 496 F.3d at 558 [citing to *RSR*], our AOC immediately resolved none . . . Given the nature of the statutory trigger, that distinction clearly warrants a different result . . . .

Pet. App. at 41a-42a.

The Seventh Circuit's analysis is sound, although it should have said "consent decree" rather than "consent

order." *See RSR*, 496 F.3d at 554. In *RSR*, the plaintiff had been sued, entered into a consent decree to settle the suit and received an immediately effective covenant not to sue from the government. *Id.* at 554, 558. The plaintiff then brought a contribution action under CERCLA § 113(f). *Id.* at 555-56. In the instant case, by contrast, there was no suit, no consent decree, no immediately effective covenant and the Trustees have sued under CERCLA § 107(a).

The Petition quotes language from *RSR* that "the statute of limitations for contribution runs from the 'entry' of the settlement, 42 U.S.C. § 9613(g)(3)(B) . . . ." Pet. at 14. But the citation gives the game away—CERCLA § 113(g)(3)(B) deals with the "entry" of a judicially approved settlement. There was no judicially approved settlement in the instant case.

The Sixth Circuit's *ITT* case is much closer to the instant case. There, the plaintiff brought an action both under CERCLA § 107(a) and in contribution under CERCLA § 113. ". . . Plaintiff voluntarily entered into an Administrative Order by Consent with EPA (hereinafter 'AOC') with respect to the NBFF Site." *ITT,* 506 F.3d at 455. (Plaintiff also subsequently entered into a consent decree apparently to resolve state law claims of the Michigan Department of Environmental Quality to do remedial action at another related site, the NBIA site. *Id.*) As with the 2002 AOC in the instant case, in the *ITT* case there were reservations of rights by EPA. *Id.* at 460.

The Sixth Circuit reversed the dismissal of ITT's CERCLA § 107(a) claim as to the NBIA site in light of *Atlantic Research*, but affirmed the dismissal of ITT's contribution claim under CERCLA § 113 as to the

NBFF site since the AOC with EPA was *not* a resolution of its liability. *Id*. at 459-61. Also, as in the instant case, ITT was not suing for costs it had reimbursed to others, but rather seeking to recover its own costs. *ITT* is consistent with the Seventh Circuit's Amended Opinion that the Trustees could not bring a contribution based on the 2002 AOC but could bring a CERCLA § 107(a) action to recover the costs they incurred in implementing the 2002 AOC.[12]

In the unlikely event that this Court grants certiorari, the Trustees reserve the right to argue that the result in the Seventh Circuit was correct for several additional reasons. The right to bring a CERCLA § 107(a) cost recovery action for cleanup costs against PRPs like the Bankerts that are seeking "a free ride" should not be lost even if the plaintiff may also have a contribution action. CERCLA § 107(a)(4)(B) says "any person" that has incurred response costs consistent with the NCP may bring a cost recovery action—it does not say "any person not having a contribution action" may bring a cost recovery action. Additionally, there may be an implied right of contribution under CERCLA

---

[12] Petitioners argue that there is a split in the two panels of the Sixth Circuit, Pet. at 13 n.1, because the judge that wrote *ITT* dissented in *RSR*. The difference between the majority and the dissent in *RSR* was whether a "consent decree" of the type involved in that case was a "judicially approved settlement" within the meaning of § 113(g)(3)(B). In the instant case there is no consent decree or judicially approved settlement. Moreover, a split within a circuit (assuming *arguendo* that there is one) is not a split among the circuits. Although claiming a split among the circuits, Petitioners also cite district court cases (Pet. at 39). As to a misstatement regarding one case *see* Res. App. C. If certiorari is granted, we will further address the district court cases.

§ 107(a) that would sustain the Trustees' claims. "[W]e need not address the alternative holding of the Court of Appeals that § 107(a) contains an additional implied right to contribution for PRPs who are not eligible for relief under § 113(f)[citations omitted]." *Atl. Research*, 551 U.S. at 141 n.8.

The Petition seeks to distinguish *W.R. Grace & Co.-Conn. v. Zotos International, Inc.*, 559 F.3d 85 (2d Cir. 2009), which held that a party that voluntarily entered into an AOC with a state could bring a CERCLA § 107(a) action to recover the response costs it incurred. Pet. at 40. According to the Petition, "[a] key distinction, however, was that the state claims did not resolve CERCLA liability and the government could still bring a CERCLA enforcement action in the future." Pet. at 40. That is not a distinction. In our case, the 2002 AOC did not resolve CERCLA liability, there is no effective covenant under that AOC, and the government expressly reserved its right to bring a CERCLA enforcement action notwithstanding the AOC. 2002 AOC, §§ XI and XII at 25-26, Plaintiffs-Appellants' Appendix at 196-97. *W.R. Grace* cannot be distinguished and is consistent with the Seventh Circuit's decision.

3. The AOCs in the instant case are based on an earlier form of AOC that has not been used for many years and this case is thus of limited precedential value.

Beginning in August 2005, after this Court's decision *Cooper Industries*, EPA began a process of modifying its model AOCs because concerns had been expressed to it: "that the current model AOCs *do not* clearly state that a settling PRP has resolved liability

for response costs or response actions addressed in the order . . . ." OFFICE OF SITE REMEDIATION ENFORCEMENT, U.S. ENVTL. PROT. AGENCY, AND ENV'T AND NATURAL RESOURCES DIV., U.S. DEP'T OF JUSTICE, INTERIM REVISIONS TO CERCLA REMOVAL, RI/FS AND RD AOC MODELS TO CLARIFY CONTRIBUTION RIGHTS AND PROTECTION UNDER SECTION 113(F) 2 (2005) (emphasis added). That process culminated in more extensive revisions on January 30, 2007, among other things to expressly provide that EPA *does* covenant not to sue *on the effective date* of the AOC (or upon receipt of payment if past costs are involved). The covenant can be lost in the future in the event that the AOC's terms are not complied with. *See* OFFICE OF SITE REMEDIATION ENFORCEMENT, U.S. ENVTL. PROT. AGENCY, ISSUANCE OF "REVISED MODEL ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER ON CONSENT FOR REMOVAL ACTIONS" Sec. XIX (2007). The AOCs in this case were agreed to before these changes were made to model AOCs. As found by the Seventh Circuit, the plain language of the 1999 and 2002 AOCs does not resolve the Non-Premium Respondents' liability until after completion and approval of the work by EPA.

In addition to being the old form of AOC, the Third Site 2002 AOC is unusual in another way. The removal action at Third Site is still ongoing because conditions at the site did not respond to the EPA approved remedy as expected. By contrast, most removal actions are short term. *See, e.g., Frey v. Envtl. Prot. Agency*, 403 F.3d 828, 835 (7th Cir. 2005). Because most removal AOCs are short term, and EPA has not used the language contained in the Third Site AOCs since at least January 2007 (and probably as far back as August

2005), it is unlikely that many such AOCs are still in use. Thus, this case has limited precedential effect.

4. The arguments against the Original Opinion were addressed by the Seventh Circuit in its Amended Opinion.

The Petition argues that "The major difference between the original opinion and the opinion issued upon rehearing is the court's discussion of RSR [sic]." Pet. at 13. That is too limited a view. Although the Seventh Circuit directly addressed *RSR* in response to a claim of a split in the Circuits, there were two other important differences in the Amended Opinion.

First, in the Original Opinion the Seventh Circuit appeared to broadly rule that based on CERCLA § 122(f) EPA could never issue a covenant not to sue until a remedy was complete. *Bernstein*, 702 F.3d at 975-77, 981, 983. In the Amended Opinion, the court narrowed its opinion, removed all reference to CERCLA § 122(f), and instead focused on the wording of the old form of AOC before it. In declining to equate the resolution of liability, as a legal proposition, with the signing of a settlement agreement regardless of the terms of the settlement agreement, the Seventh Circuit stated:

> The ordinary and natural reading of the statute is that a contribution action becomes available when a PRP's liability is resolved—as in decided or determined—through settlement. Whether or not liability is resolved . . . is not the sort of question which can or should be decided by universal rule. Instead, it requires a look at the terms of the settlement on a case-by-case basis.

> The parties to a settlement may choose to structure their contract so that liability is resolved immediately upon execution of the contract [citations omitted]. Or, the parties may choose to leave the question of liability open through the inclusion of reservations of rights, conditional covenants, and express disclaimers of liability [citations omitted]. In this case, the parties clearly chose to do the latter—a choice which the EPA typically has great weight to influence.

Pet. App. at 43a.

Indeed, EPA's model AOC now contains a covenant not to sue that *does* take effect immediately *on the effective date of the order*, and *does* expressly resolve liability to the United States. With respect to EPA's current model AOC, the Seventh Circuit noted: "This opinion has no effect on the validity of such agreements; as already stated, the parties to an AOC can structure the resolution of liability in whatever way they see fit, within the bounds of the authority granted by statute." Pet. App. at 45a.

Additionally, Petitioners' argument would reduce the phrase "resolved its liability" to surplusage so that any "administrative or judicially approved settlement" would do. That is *not* what the statute says. The phrase "resolved its liability" limits the term "administrative or judicially approved settlement" and should not be read out of the statute. The panel correctly determined that liability under the terms of the 2002 AOC had not been resolved.

Second, it was argued in the challenges to the Original Opinion that deferring contribution rights would be a disincentive for parties to settle since without a right of contribution they would be forced to carry all cleanup costs until the remedy was completed. Pet. App. at 43a-44a. In response, the Seventh Circuit's Amended Opinion noted that while settling parties would not have a contribution right, they would have a right to bring a CERCLA § 107(a) action for their costs of response consistent with the NCP, and that was at least as good as a right of contribution. Pet. App. at 44a. Moreover, EPA could restructure its AOCs to provide an immediate covenant not to sue and that is what EPA had in fact done. *See* Pet. App. at 45a.

The Petition in effect also argues that delaying contribution rights impliedly means delaying contribution protection and that that is a disincentive to settle. *See* Pet. at 9, 10, 12, 27-28, 30. However, whether that implication is (or is not) correct need not be decided. The Bankerts did not settle, never had contribution protection, and have no standing to raise the hypothetical delay in their non-existent contribution protection. As the Seventh Circuit noted, the EPA is free to fashion its AOCs so as to provide both a grant of contribution and contribution protection immediately on signing an AOC if it chooses to do so. That same type of "contribution bar" argument as a hypothetical disincentive to settlement was rejected by this Court in *Atlantic Research*. The government argued that allowing private parties to bring CERCLA § 107(a) actions would "eviscerate" the contribution bar because the contribution bar provision does not bar CERCLA § 107(a) actions. This Court stated:

> For several reasons, we doubt this supposed loophole would discourage settlement. First, as stated above, a defendant PRP may trigger equitable apportionment by filing a § 113(f) counterclaim . . . Second, the settlement bar continues to provide significant protection from contribution suits by PRPs that have inequitably reimbursed the costs incurred by another party. Third, settlement carries the inherent benefit of finally resolving liability as to the United States or a State.

Atl. Research, 551 U.S. at 140-41. Additionally, even assuming *arguendo* that the Bankerts cannot counterclaim, they can defend against any claim of joint and several liability by showing a reasonable basis of apportionment under *Burlington Northern and Santa Fe Railway Co. v. United States*, 556 U.S. 599 (2009). *See* Pet. App. at 23a-25a. There are no policy reasons to grant certiorari.

5. In the unlikely event this Court were to both grant review and conclude that the Trustees' only claim was a contribution claim under CERCLA § 113(f)(3)(B), a correct interpretation of CERCLA § 113(g)(2) and (g)(3) would provide an alternative ground for affirming the result in Seventh Circuit.

CERCLA § 113(g) provides:

> (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.

In the instant case, none of the events that trigger the limitation period in CERCLA § 113(g)(3) have taken place. There was no "judgment" and no "entry of a judicially approved settlement." The District Court recognized that the Non-Premium Respondents in the 1999 and 2002 AOCs were not *de minimis*, had not entered into a CERCLA § 122(g) cashout settlement, and the Bankerts never argued that either of the AOCs were cost recovery settlements under CERCLA § 122(h). Nevertheless, the District Court applied the statute because it said it could find no case that specifically held that the statute meant what it said. *See* Pet. Supp. App. at 20a-21a. In the Seventh Circuit, the Bankerts sought to conflate the two types of settlement embodied in the AOCs and assert that somehow the rights of the Non-Premium Respondents should be limited by the rights of the Premium Respondents. That was inconsistent with the District Court's clear finding (not disturbed on appeal) that there were two distinct settlements in the AOCs and that it was only the rights of the Non-Premium Respondents that were before the court. Pet. Supp. App. 4a-6a.

On rehearing, DOJ conceded that: "The Bankerts waived the argument that the AOCs are cost-recovery settlements . . . and the AOCs are not de-minimis settlements as to the Trustees." Amicus br. at 13 n.8. It argued that Congress inadvertently "overlooked" AOCs to cleanup CERCLA sites in § 113(g)(3) and that that section should be applied to instant AOCs notwithstanding the plain language of the statute. Amicus br. at 15. The question was not decided by the Seventh Circuit because, as to the 1999 AOC, it found the Trustees' claim would be time barred either way. Pet. App. at 28a. As to the 2002 AOC, it concluded that the claim for costs could be brought under CERCLA § 107(a) and all parties agreed that, if that claim could be asserted under CERCLA § 107(a), the removal action statute had not run because the remedy was still underway. Thus, the issue of the "gap" in CERCLA § 113(g)(3) arises only if this Court both grants review and concludes that the Trustees' claim for response costs can only be brought under § 113 and not under §107.

At least three circuit courts have filled the gap in CERCLA § 113(g)(3) by first asking whether the contribution claim was for the costs of a "removal" action or the costs of a "remedial" action and then applying the statute of limitations for removal actions (CERCLA § 113(g)(2)(A)), or for remedial actions (CERCLA § 113(b)(2)(B)). *See Geraghty and Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 927 (5th Cir. 2000); *Sun Co., Inc. (R&M) v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1192-93 (10th Cir. 1997); *ITT Indus., Inc.*, 506 F.3d at 460-61; *GenCorp., Inc. v. Olin Corp.*, 390 F.3d 433, 443-45 (6th Cir. 2004).

It is not disputed that the work being done at Third Site is classified by EPA as a "removal" action. Section § 113(g)(2)(A) provides:

> "(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. . . ."

This is the initial action for recovery of costs, there being no prior suit. It is undisputed that the removal action at Third Site is still underway and has not been completed. Thus, as to the 2002 AOC, applying the removal action statute of limitations to this removal action fills the gap in CERCLA § 113(g)(3)(B) and provides an alternate ground for affirming the result in the Seventh Circuit even if this action were deemed a contribution action as the Petition contends.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

NORMAN W. BERNSTEIN
Counsel of Record
INGA CALDWELL
N.W. Bernstein & Associates, LLC
800 Westchester Ave., Suite N-319
Rye Brook, NY 10573
(914) 358-3500
nwbernstein@nwbllc.com

GEORGE M. PLEWS
FREDERICK D. EMHARDT
Plews Shadley Racher & Braun LLP
1346 North Delaware Street
Indianapolis, IN 46202
(317) 637-0700

Counsel for Respondents

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A 2002 Amendment to Third Site Trust Fund Agreement . . . . App. 1

Appendix B List of Non-Premium Respondents and Premium Respondents to the 2002 Administrative Order By Consent . . . . App. 40

Appendix C Misstatements of Fact and Law in the Petition . . . . App. 44

APPENDIX A

2002 AMENDMENT TO THIRD SITE TRUST FUND AGREEMENT

Amendment

to

Third Site Trust Fund Agreement

Whereas, effective 1999 the parties to the Third Site Fund Trust Agreement ("the Agreement") entered into an administrative Order on Consent (the "1999 Order") with the United States Environmental Protection Agency ("EPA") to conduct an Engineering Evaluation/ Cost Analysis (EE/CA) at Third Site which is located in Boone County, Indiana, near Zionsville Indiana, and

Whereas, the EE/CA was approved by EPA on June 12, 2001 and the parties to the Agreement have now negotiated and reached an agreement with EPA in the form of a new Consent Order (the "Implementation Order") to implement response actions at Third Site that are consistent with the EE/CA and the Implementation Order, and

Whereas, the Agreement provides at Section 1.01 thereof that the Agreement may be amended if the Settlors or some of them decide to implement the response actions selected as a result of the EE/CA, Section 2.05 of the Agreement provides that the Trustees may use the balance of the Premium Funds (as defined therein) if authorized to do so pursuant to an amendment of the Agreement and Section 2.10 of

the Agreement permits the amendment of the Agreement upon the written consent or direction of the holders of 67% of the Individual Percentages (as defined therein), and

Whereas the parties to the Agreement wish to amend the Agreement to provide for the implementation of the response actions at Third Site consistent with the Implementation Order and the EE/CA.

Now, therefore, the parties to the Agreement hereby amend the Agreement as follows:

1. Section 1.01A is hereby added immediately after Section 1.01 as follows:

"**1.01A THE IMPLEMENTATION ORDER**. The Settlors having reached agreement with EPA to implement response actions consistent with the EE/CA in the form of a new proposed consent order ("the Implementation Order"), the purposes of the Trust Fund include implementation of the response actions as provided in the Implementation Order, payment of past costs including EPA past costs and oversight costs as provided in the Implementation Order, and holding segregated funds as provided in the Implementation Order. All references in the Agreement to powers, rights, authority, duties, and obligations related to the Order, also apply to the Implementation Order."

2. Section 1.02A is added immediately after Section 1.02, as follows:

"**1.02A PAYMENTS PURSUANT TO THE AMENDMENT**. In accordance with the terms of the Implementation Order, each Settlor listed on

Attachment 3 to this Amendment is to contribute funds to this Trust Fund by check or wire transfer initially in such amount as set forth on Attachment 3 hereto. Each Settlor's initial contribution under this Amendment shall be due on signing this Amendment to Third Site Trust Fund Agreement. Future contributions by persons listed on Attachment 3 hereto to the Trust Fund shall be due in such amounts and at such times as are set forth in written requests for contributions issued by the Trustees pursuant to Sections 2.03, 2.04 and 2.04A, as modified by this Amendment. All references to "Individual Percentages" shall, after the effective date of this Amendment, refer only to the percentages set forth in Attachment 3 to this Amendment. Except as provided in Section 2.03, future payments, if any, of the Settlors shall be limited to the same proportion as set forth in Attachment 3. Additionally, upon the effective date of this Amendment: the term "Settlor" shall refer only to those persons or entities listed on Attachment 3, all references to the "Order" shall be deemed to include the "Implementation Order", all references to the "Agreement" mean the Agreement as modified by this Amendment and all references to "Attachment 1" shall be deemed to refer only to Attachment 3 to this Amendment as to payments to be made or actions to be taken after the effective date of this Amendment.

3. Section 2.05A is added immediately after Section 2.05, as follows:

2.05A **USE OF THE BALANCE OF THE PREMIUM FUNDS**. In light of the agreement with EPA reflected in the Implementation Order, the

Trustees are hereby authorized to use the balance of the Premium Funds to perform the response actions at the Site.

This Amendment shall become effective upon receipt by the Trustees of the Third Site Trust Fund of the consent of companies with Individual Percentages totaling more then 67%.

____
Print Name of Company/Client

____
Print Name and Title of Person Signing

____
Signature

____
Date

____
Phone Number, Fax Number & E-mail Address

Third Site Trust Fund Agreement
Attachment 3

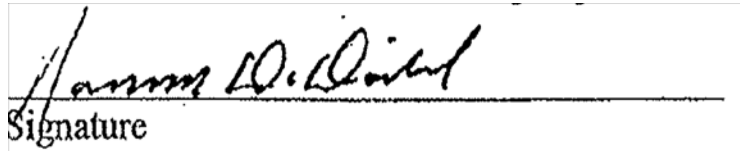
Company Name	Total Initial Commitment Non-Cashout	Individual Percentages
Radio Materials Corp.		
Liberty Solvents & Chemical		
Chemart		
H C Industries, Inc.		
Stolle Corp.		
Whirlpool Corp.		
McDonnell Douglas Corp.		
Jenn-Air, Div. of Maytag		
Lilly Ind. Coatings, Inc.		
Valspar Corporation		
Anderson Development		
Detrex Corporation		
Batesville Casket Co.		
Kimberly-Clark Corp. (Brown Bridge)		
Waste Research & Reclamation		
AT&T Company		
RCA with GE		
Beazer Materials (Koppers)		
Pratt & Lambert, Inc.		
Bemis Company, Inc.		
Bridgestone/Firestone, Inc.		
Honeywell, Inc.		
Kendall Co., The		
Union Carbide Chemicals & Plastics		
Freightliner Corp.		
Ford Motor Company		
Mobil Oil Corporation		
Jones Chemicals		
S.C. Johnson (Lenk Company; Drackett)		

Ludlow Corporation
General Electric with RCA
Arvin Industries, Inc.
ALCOA
Jeffboat, Inc.
General Motors Corp.

App. 7

____Alcoa Inc.________________________________
Print Name of Company/Client

____Ronald D. Dickel, Vice President__________
Print Name and Title of Person Signing



_____March 21, 2002________________________
Date

____
Phone Number, Fax Number & E-mail Address

App. 8

Anderson Development Company
Print Name of Company/Client

Larry L. Hardy – Vice President
Print Name and Title of Person Signing

Signature

April 3, 2002
Date

Phone: 517-263-2121 Fax: 517-263-1000
Phone Number, Fax Number & E-mail Address

ArvinMeritor, Inc.
Successor in interest to Arvin Industries, Inc.
Print Name of Company/Client

Vernon G. Baker, II
Senior Vice President and General Counsel
Print Name and Title of Person Signing

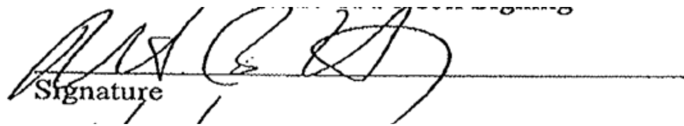
Signature

March 26, 2002
Date

(248) 435-0786 Fax (248) 435-2184
E-mail Vernon.Baker@arvinmeritor.com
Phone Number, Fax Number & E-mail Address

Lucent Technologies Inc. as successor to AT+T
Print Name of Company/Client

Richard H. Bennett, Jr.
Print Name and Title of Person Signing



4/2/02
Date

908-582-8752, 908-582-8238
Phone Number, Fax Number & E-mail Address

Batesville Casket Company, Inc.
Print Name of Company/Client

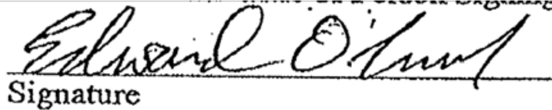
Ken Camp, President & CEO
Print Name and Title of Person Signing

4-1-02
Date

812-934-8184, 812-934-8675,
ken.camp@batesville.com
Phone Number, Fax Number & E-mail Address

___Beazer East, Inc.________________________
Print Name of Company/Client

Edward O'Connell – Assistant Secretary_______
Print Name and Title of Person Signing

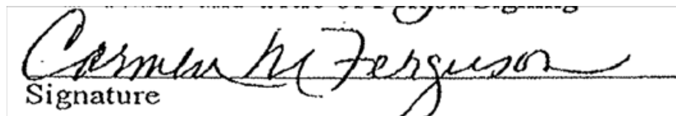


______4/3/02________________________________
Date

(412) 208-8840 (412) 208-8803
oconnell@hamsonle.com_____________________
Phone Number, Fax Number & E-mail Address

Bemis Company, Inc.
Print Name of Company/Client

Carmen M. Ferguson
Director of Risk Management
Print Name and Title of Person Signing

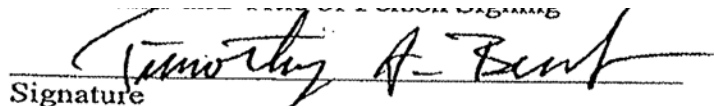


March 21, 2002
Date

Phone: 612-376-3085
Fax: 612-376-3180
cmferguson@bemis.com
Phone Number, Fax Number & E-mail Address

Bridgestone/Firestone North American Tire, LLC
Print Name of Company/Client

Timothy A. Bent,
Dir. Env. Affairs
Print Name and Title of Person Signing



Signature

April 23, 2002
Date

615-872-1426/ 615-872-1490
Phone Number, Fax Number & E-mail Address

Chemical Marketing Corp.
Print Name of Company/Client

Thomas A. Peterson – Pres.
Print Name and Title of Person Signing

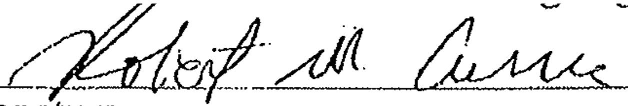
Print Name and Title of Person Signing
Signature

April 29, 2002
Date

(763) 785-0055 x 207
tap9945@aol.com
(763) 785-0088 (R)
Phone Number, Fax Number & E-mail Address

Detrex Corporation
Print Name of Company/Client

Robert M. Currie, Vice President,
General Counsel + Secretary
Print Name and Title of Person Signing


Signature

4-16-02
Date

248-358-5800 248-799-7192
rcurrie@detrex-HQ.com
Phone Number, Fax Number & E-mail Address

____Ford Motor Company______________________
Print Name of Company/Client

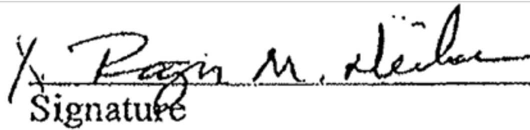
___Thomas DeZure Assistant Secretary________
Print Name and Title of Person Signing

____3-20-02________________________________
Date

_313-594-0096 (E. Mills)   emills@ford.com____
Phone Number, Fax Number & E-mail Address

FREIGHTLINER LLC
(FORMERLY FREIGHTLINER CORP.)______
Print Name of Company/Client

Roger Nielsen, COO_________________________
Print Name and Title of Person Signing



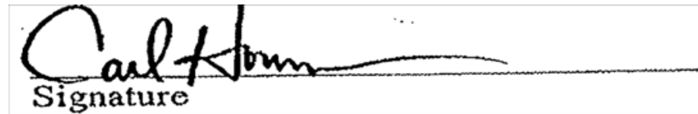
___March 25, 2002____________________________
Date

ATTN: Legal Dept. (Chris Edwardsen)
503-745-8799________________________________
Phone Number, Fax Number & E-mail Address

FAX – 503-745-7959

General Electric Company
Print Name of Company/Client

H. Carl Horneman
Senior Counsel – Environmental Law
Print Name and Title of Person Signing



March 26, 2002
Date

(502) 452-7582
(502) 452-0347
H.Horneman@appl.ge.com
Phone Number, Fax Number & E-mail Address

_General Motors Corporation_________________
Print Name of Company/Client

_Linda L. Bentley, Legal Assistant___________
Print Name and Title of Person Signing

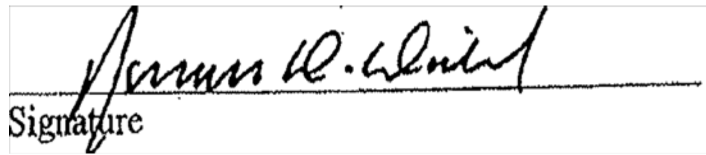
Signature

___3/18/2002______________________________
Date

313-665-4883 (Phone) 4896 (Fax)
___linda.l.bentley@gm.com__________________
Phone Number, Fax Number & E-mail Address

___HC Industries, Inc._______________________
Print Name of Company/Client

___Ronald D. Dickel, Vice President___________
Print Name and Title of Person Signing

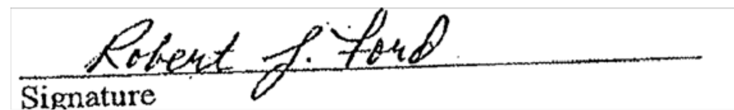


______March 21, 2002_______________________
Date

____
Phone Number, Fax Number & E-mail Address

_Honeywell International Inc.__________________
Print Name of Company/Client

Robert J. Ford, Director
Remediation & Evaluation Services__________
Print Name and Title of Person Signing

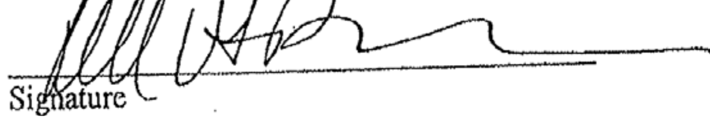


_April 10, 2002_______________________________
Date

973-455-4947; 973-455-3082;
_robert.ford@honeywell.com____________________
Phone Number, Fax Number & E-mail Address

_Jeffboat LLC________________________________
Print Name of Company/Client

_Robert G. Burns General Counsel & Secretary
Print Name and Title of Person Signing

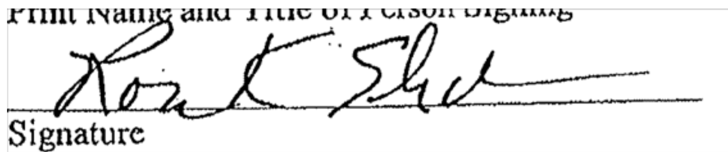


___March 26, 2002___________________________
Date

ph fax
812 288-0211__________0294__________________
Phone Number, Fax Number & E-mail Address

Maytag Corporation/Dean Stonner____________
Print Name of Company/Client

Roger K. Scholten___________________________
Print Name and Title of Person Signing



April 9, 2002________________________________
Date

641-787-8577/641-787-8102/
dstonn@maytag.com_________________________
Phone Number, Fax Number & E-mail Address

JCI Jones Chemicals, Inc.____________________
Print Name of Company/Client

Timothy J. Gaffney Executive V.P.___________
Print Name and Title of Person Signing

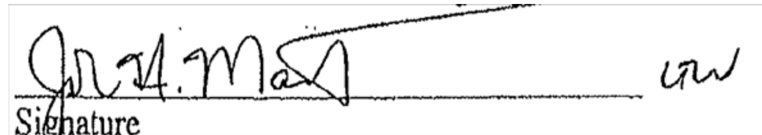
April 1, 2002_________________________________
Date

716-538-2314; 716-538-2316;
tgaffney@jcichem.com___ ____________________
Phone Number, Fax Number & E-mail Address

App. 26

Tyco Healthcare Group LP, As Successor in
Interest To The Kendall Company____________
Print Name of Company/Client

John H. Masterson, Vice President__________
Print Name and Title of Person Signing

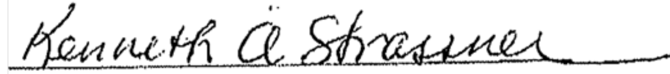


_4/2/02_______________________________________
Date

_508-261-8242, 508-261-8544_________________
Phone Number, Fax Number & E-mail Address

Kimberly-Clark Corporation________________
Print Name of Company/Client

__Kenneth A. Strassner____________________
Print Name and Title of Person Signing

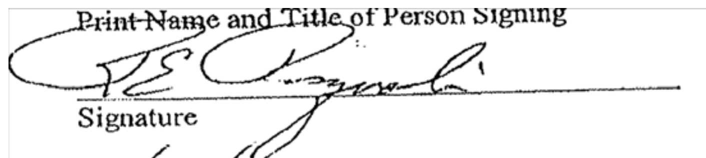

Signature

April 2, 2002______________________________
Date

770-587-8634
770-587-7093
ken.strassner@kcc.com_____________________
Phone Number, Fax Number & E-mail Address

Liberty Solvents & Chemicals________________
Print Name of Company/Client

Raymond E. Pasquali   Pres_________________
Print Name and Title of Person Signing

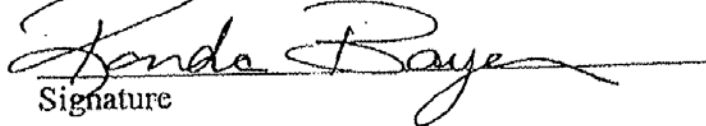


3/12/02_____________________________________
Date

330-425-4484________________________________
Phone Number, Fax Number & E-mail Address

Lilly Ind. Coatings, Inc. n/k/a The Valspar Corporation and The Valspar Corporation
Print Name of Company/Client

Ronda P. Bayer, Associate General Counsel
Print Name and Title of Person Signing

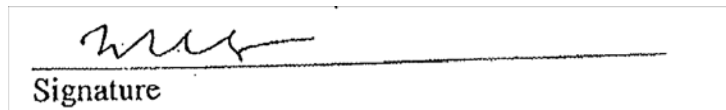


March 15, 2002
Date

612-375-7359 612-375-7313 Fax
rbayer@valspar.com
Phone Number, Fax Number & E-mail Address

Ludlow Corporation__________________________
Print Name of Company/Client

M. Brian Moroze [Secretary – Ludlow Corporation
Print Name and Title of Person Signing



_March 26, 2002______________________________
Date

(603) 778-9700, (603) 778-2823,
bmoroze@tyco.com___________________________
Phone Number, Fax Number & E-mail Address

McDonnell Douglas Corporation,
A wholly-owned subsidiary of
The Boeing Company
Print Name of Company/Client

Kirk J. Thomson
Director, Environmental Affairs
Print Name and Title of Person Signing

Print Name and Title of Person Signing

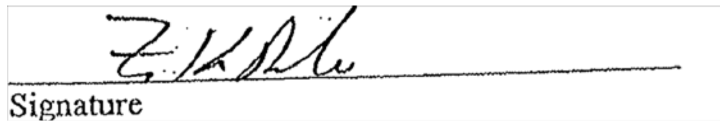
Signature

April 9, 2002
Date

(Ph) 425-865-6709
(Fax) 425-865-6608
kirk.j.thomson@boeing.com
Phone Number, Fax Number & E-mail Address

Exxon Mobil Corporation for
Mobil Oil Corporation
Print Name of Company/Client

Zane K. Bolen Area Manager, Superfund
Print Name and Title of Person Signing

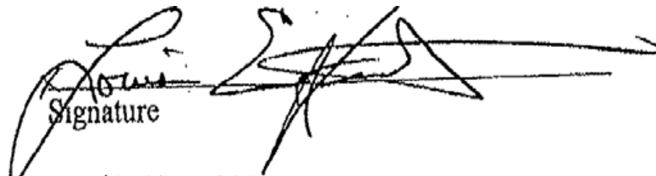

Signature

April 3, 2002
Date

713.656.9060, 713.656.9030
zane.k.bolen@exxonmobil.com
Phone Number, Fax Number & E-mail Address

Pratt & Lambert
Print Name of Company/Client

Louis E. Stellato
Print Name and Title of Person Signing

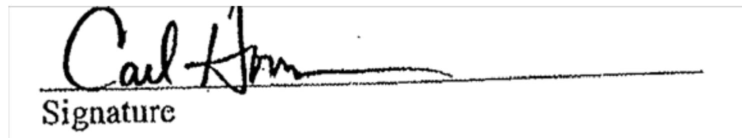


April 15, 2002
Date

c/o Donald J. McConnell
Phone: (216) 566-3741
FAX: (216) 515-4400
Email: don.j.mcconnell@sherwin.com
Phone Number, Fax Number & E-mail Address

_RCA Corporation____________________________
Print Name of Company/Client

H. Carl Horneman
Senior Counsel - Environmental Law__________
Print Name and Title of Person Signing

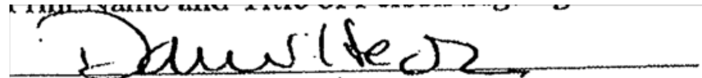


_March 26, 2002_____________________________
Date

(502) 452-7582 (p) (502) 452-0347 (f)
H.Horneman@appl.ge.com___________________
Phone Number, Fax Number & E-mail Address

S.C. JOHNSON & SON, INC.
Print Name of Company/Client

David Hecker, Senior Vice President
Print Name and Title of Person Signing

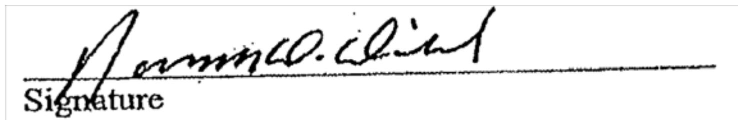


March 26, 2002
Date

Phone: (262) 260-2000
Fax: (262) 260-4253
E-mail: dhecker@scj.com
Phone Number, Fax Number & E-mail Address

Stolle Corporation
Print Name of Company/Client

Ronald D. Dickel, Vice President
Print Name and Title of Person Signing

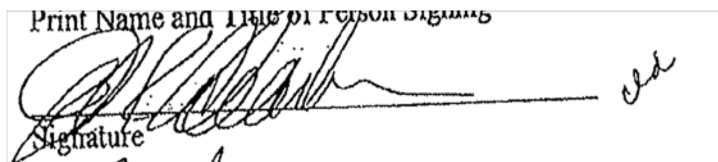


March 21, 2002
Date

Phone Number, Fax Number & E-mail Address

_Union Carbide Corporation__________________
Print Name of Company/Client

_John R. Dearborn, President_________________
Print Name and Title of Person Signing



_March 22, 2002______________________________
Date

203-794-2788 Phone
203-794-2851 Fax
DEARBOJR@dow.com________________________
Phone Number, Fax Number & E-mail Address

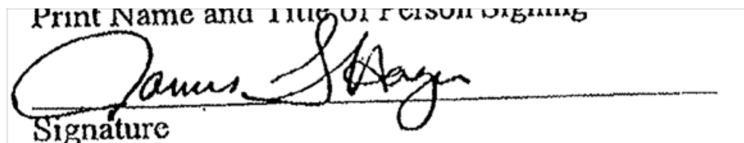
ALL NOTIFICATIONS TO UNION CARBIDE CORPORATION SHOULD BE SENT TO:

Carol Dudnick, Esq.
Legal Department, K-3
Union Carbide Corporation
39 Old Ridgebury Road
Danbury, CT 06817-0001

Phone: 203-794-6233
Fax: 203-794-6261
E-mail: dudniccl@dow.com

Waste Research & Reclamation Co. Inc.__ ____
Print Name of Company/Client

James L. Hager   President________________
Print Name and Title of Person Signing


Signature

_____4/3/02________________________________
Date

715 834-9624   f - 715 836-8785
hagerjl@wrres.com__________________________
Phone Number, Fax Number & E-mail Address

Whirlpool Corporation
Print Name of Company/Client

Pamala L. Phillipi, Legal Assistant
Print Name and Title of Person Signing

Pamala L. Phillipi
Signature

3/20/02
Date

Phone 616-923-3008
Fax 616-923-3919
Email Pamala _L_Phillipi@email.whirlpool.com
Phone Number, Fax Number & E-mail Address

APPENDIX B

LIST OF NON-PREMIUM RESPONDENTS AND PREMIUM RESPONDENTS TO THE 2002 ADMINISTRATIVE ORDER BY CONSENT

NON-PREMIUM RESPONDENTS
ALCOA
Anderson Development
ArvinMeritor, Inc.
AT&T (Lucent Technologies)
Batesville Casket Company
Beazer East (Koppers)
Bemis Company, Inc.
Bridgestone/Firestone, Inc.
Chemical Marketing Corp. (Chemart)
Detrex Corporation
Ford Motor Company
Freightliner Corporation
General Electric w/RCA
General Motors Corporation
HC Industries
Honeywell, Inc.
Jeffboat, Inc.
Jenn-Air, Div. of Maytag
Jones Chemical
The Kendall Company
Kimberly-Clark Company
Liberty Solvents & Chemical
Lilly Industries Coating, Inc. (Valspar Corp.)
Ludlow Corporation
McDonnell Douglas Corp. (Boeing)

Mobil Oil
Pratt & Lambert, Inc.
Radio Materials Corp.
RCA w/General Electric
S.C. Johnson (Lenk Company; Drackett)
Stolle Corporation
Union Carbide Corporation
Waste Research & Reclamation
Whirlpool Corporation

PREMIUM RESPONDENTS
Ahlstrom Filtration, Inc.
Alco Ind., Inc. (Synthane-Taylor)
Allen Bradley Company
American Nat'l Can Company (REXAM)
American Recovery Company
A.O. Smith Corp.
Ashland, Inc.
Brulin & Company
Buckbee Mears Co.
Carlisle Tire & Rubber
Champion Int'l (Champ Pkg)
Champion Int'l (St. Regis)
Champion Intl. Corp. (Hoerner Waldorf)
Chase Packaging Corp. (International paper)
Chemical Waste Management
Chevron Corp. (Bruning Paint) (Kewanee)
Cincinnati Varnish (Foy-Johnston)
Cloudsley Co. (PrintPack)
Commercial Sewer Cleaning
Cooper Industries
Cummins Engine Co.
Egyptian Lacquer Mfg.
Electro-Spec, Inc.
Emhart Industries, Inc.

Ericsson, Inc.
Farm Credit Services
Fed'l. Bureau of Prisons
Freudenberg-NOK
Frost Paint & Oil
GenCorp., Inc. (General Tire)
H.B. Fuller
Halstead Industries (Mueller Industries)
Herff Jones (Carnation Co.)
Hill-Rom Company
IWD
James River II (Crown Zellerbach)
Kurfees Coating (Louisville Varnish)
KCL Corporation
King Adhesive
Knauf Fiber Glass
Magnetic Peripherals, Inc.
Marathon Oil Company & Rock Island Refining Corp
Marathon Pipeline Company
Marcus Paint
Marisol, Inc.
McLaughlin Gormley King Co.
Moormann Bros. Mfg.
Nat'l Railroad Passenger (Amtrak)
North American Philips Corp.
Onan Corporation
PPG and Porter Paint Co./Courtaulds
R.R. Donnelley
Red Spot Paint & Varnish Co.
Reliance Electric Company
Rexnord Holdings, Inc.
Robbie Mfg., Inc.
Rockwell International
Sequa Corp.
Sherwin Williams Company

Signet Systems (Eaton)
Smith Cabinet
Standard Paint (David Wade)
Superior Oil Company
TRW, Inc.
The Timken Co.
U.S. Dept. of the Navy
U.S. Gypsum
Unisys Corp.
United Technologies (Essex; Inmont)
United Technologies (Alma Plastics)
Valhi, Inc. & Impex
Vermillion
Wabash Products
Warner Gear Division (Borg-Warner)
Westinghouse & ThermoKing (Ingersoll-Rand; Viacom)
Whittaker Corp. (Dayton Coatings)
Wickes Mfg.
White Consolidated Industries
World Color Press
Wyandotte Paint Co. (AKZO Coatings)

APPENDIX C

MISSTATEMENTS OF FACT AND LAW IN THE PETITION

Pursuant to Supreme Court Rule 15(2), Respondents respectfully note the following additional misstatements of fact and law in the Petition.

Page	Misstatement
Pet. 3	Sub-sections of CERCLA § 107(a)(1)-(3) relevant to the Bankerts have been incorrectly omitted from the Petition. They have been added in the brief in opposition at 1. The Bankerts are owners and operators of Third Site and arranged for disposal of hazardous substances within the meaning of §107(a)(1)-(3). *See* Complaint; Pet. at 24, ¶¶ F, G. Petitioners admit that "[t]he majority of Third Site is owned by the Bankert Defendants." Pet. at 15. *See also* Pet. at 16.
Pet. 9	There was no simplistic consensus among the circuits. *See ITT Indus., Inc. v. BorgWarner, Inc.*, 506 F.3d 452 (6th Cir. 2007) (affirming dismissal of a contribution claim under CERCLA § 113 because the AOC with EPA was not a resolution of plaintiff's liability); *Niagara-Mohawk Power Corp. v.*

Chevron U.S.A., Inc., 596 F.3d 112, 127 n.17 (2d Cir. 2010) (leaving open the question where there is no effective release from CERCLA liability in the settlement). *Accord W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc*. 559 F.3d 85 (2d Cir. 2009) (allowing a cost recovery action following a state consent order because it did not resolve CERCLA liability).

Pet. 9	The choice as to the meaning of "resolved its liability" is not as stated.
Pet. 11	The Seventh Circuit did not simply reference CERCLA § 107(a)(4)(B); the applicable provisions referenced are subsections (a)(1)-(4)(B). *See* Pet. App. at 11a -14a.
Pet. 13	There are no "two consent decrees" and EPA's reservation of rights was not limited to filing suit "if the PRPs in this case did not comply with the consent orders." The reservation was absolute, whether or not the PRPs are complying with the AOCs until a covenant is issued on notice of completion. 1999 AOC, §§ XI, XII, XIII(a) at 23-25, Plaintiffs-Appellants' Appendix at 127-29; 2002 AOC, §§ XI, XII, XIII(a) at 25-26, Plaintiffs-Appellants' Appendix at 196-97.

Pet. 17	Finley Creek flows into Eagle Creek which, after traveling about ten miles, flows into Eagle Creek Reservoir. The White River is downstream of the reservoir.
Pet. 17	The 1996 Unilateral Administrative Order (the 1996 UAO) issued by EPA did not name the Bankerts as "Site Generators". Patricia Bankert, Boone Properties, and the Estate of Jonathan Bankert were named as "owners" of Third Site. 1996 UAO, Sec. IV at 3 and Attachment A, Plaintiffs-Appellants' Appendix at 84, 96.
Pet. 17-21	The Petition notes that Bankerts were respondents on the 1996 UAO. However, the Petition then uses that same term "respondents" as though it had the same meaning as to the 1999 and 2002 AOCs. It does not. The Bankerts were not respondents on and did not participate in either the 1999 AOC or the 2002 AOC.
Pet. 22	The implementation of the removal action called for in the 1999 AOC had been completed as of the date of the final judgment in the District Court. The implementation of the removal action called for in the 2002 AOC had not been completed as of the date of the

final judgment in the District Court and is still ongoing.

Pet. 30	The statement that the PRPs promised to perform removal actions "and the EPA promised not to sue concerning those actions" is not correct. As to the 2002 AOC, EPA has not promised not to sue until it issues a notice of completion and it has not done so because the removal action is ongoing.
Pet. 31	The emphasis added to the phrase "entry of a judicially approved settlement" is misleading—there was no judicially approved settlement in the instant case.
Pet. 32	The statement that contribution claims arising from judicially approved settlements is somehow affected by the Amended Opinion is mistaken. The Amended Opinion says nothing about when the statute of limitations runs as to judicially approved settlements. That was an argument addressed to the Original Opinion because of its reliance on CERCLA § 122 and is moot as to the Amended Opinion which is limited to the AOCs before the Court.

Pet. 34	The first full paragraph of that page misstates the Seventh Circuit's Amended Opinion. The Amended Opinion is limited to the old form of AOCs and notes that EPA has changed its form of AOC to provide a covenant not to sue immediately upon signing and that nothing in the Amended Opinion affects that kind of AOC. Pet. App. at 45a.
Pet. 38	The purported summary of this Court's holding in *Atlantic Research* is misleading. According to Petitioners, in *Atlantic Research*, this Court ruled that CERCLA § 107(a) and CERCLA § 113(f) "are not available simultaneously and indicated that a party eligible for contribution cannot seek the same expenses under Section 107(a)." Pet. at 38 (citing *United States v. Atl. Research Corp.*, 551 U.S. 128, 139 (2007)). That was because this Court held that a party seeking reimbursement of costs incurred by other parties had to proceed in contribution. *Id.* Respondents in the instant case are not seeking reimbursement of costs paid by other parties, but only to recover the costs incurred by the Trust. Pet. App. at 22a, 29a. Additionally, this Court also noted the possibility of some overlap. *See id.* at 139 n.6.

Pet. 39	The Petition misstates the district court's decision in *Chitayat v. Vanderbilt Associates* as "holding that party was not entitled to recover costs under Section 107(a) for expenses it incurred pursuant to a CERCLA consent order". What the court said was:

> As the Consent Order requires Chitayat to 'reimburse' the DEC for the DEC's response costs, as opposed to requiring him to expend funds for remediation, Chitayat cannot recover from the defendants pursuant to § 107(a) the amounts he expended pursuant to the Consent Order.

Chitayat v. Vanderbilt Assocs., 702 F.Supp.2d 69, 77 (E.D.N.Y. 2010).

Pet. 42	The citation to the article by Daniel P. McInerny is misleading. The article does not question the correctness of the Seventh Circuit's resolution of the ELA claims in the instant case. It only questions language in the Original Opinion as to the likely effect of an amendment to Indiana law on future claims and is not germane to this case.