WILLIAM S. FARMER (State Bar No. 46694)
ROBERT S. LAWRENCE (State Bar No. 207099)
COLLETTE ERICKSON FARMER & O'NEILL LLP
235 Pine Street, Suite 1300
San Francisco, California 94104
Telephone: (415) 788-4646
Fax No.: (415) 788-6929

Attorneys for Defendant
OPTICAL COATING LABORATORY, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, Plaintiff, v. WEST COAST WELDERS SUPPLY CO., INC., et al.; Defendants. AND RELATED CROSS-CLAIMS	Case No. C 04-02835 MJJ **DEFENDANT OPTICAL COATING LABORATORY, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS THIRD AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: June 7, 2005 Time: 9:30 a.m. Courtroom: 11 Judge: Hon. Martin J. Jenkins

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on June 7, 2005, at 9:30 a.m., or as soon thereafter as the matter may be heard in the above-entitled court, located at 450 Golden Gate Avenue, San Francisco, California 94102, defendant Optical Coating Laboratory, Inc., will move this court, pursuant to FRCP 12 (b)(6), to dismiss the action brought by plaintiff Union Pacific Railroad Company for failure to state a claim upon which relief can be granted, based on the grounds that plaintiff lacks standing to assert a claim under 42 U.S.C. § 9607 and no action for contribution lies under 42 U.S.C. § 9607. Defendant will also concurrently request that the court decline to exercise supplemental jurisdiction over the state court causes of action under 28 U.S.C. § 1367(c)(3), and dismiss this entire action.

TABLE OF CONTENTS

COLLETTE ERICKSON FARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

TABLE OF AUTHORITIES

Cases

COLLETTE ERICKSON
ARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

Statutes

COLLETTE ERICKSON FARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

Other Authorities

COLLETTE ERICKSON FARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

MEMORANDUM OF POINTS AND AUTHORITIES

I. ISSUES

Whether a potentially responsible party, as defined by the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") may maintain an action for contribution against other potentially responsible parties under 42 U.S.C § 9607 when it is barred from seeking such contribution under 42 U.S.C. § 9613 by virtue of the United States Supreme Court's holding in *Cooper Industries, Inc. v. Aviall Services, Inc*. 125 S.Ct. 577 (2004).

II. FACTS

Plaintiff Union Pacific Railroad Company ("Union Pacific") is the owner of certain real property located at 99 Frances Street in Santa Rosa, California. (TAC, ¶ 19).[1] Since 1988, this property, along with the adjacent parcel of land located at 1143 Briggs Avenue in Santa Rosa, has been subject to multiple cleanup and abatement orders issued by the North Coast Regional Water Quality Control Board ("RWQCB"), due to the discovery of elevated levels of certain chemicals, metals, and other substances in the soil and groundwater at these sites. (*Id.*, ¶¶ 21, 36, 37).[2] The cleanup and abatement orders name all of the parties to this action – with the notable exception of defendant Optical Coating Laboratory, Inc. ("OCLI") – as responsible parties, and require them to cleanup and abate the discharge and threatened discharge by specified remediation methods, including but not limited to groundwater monitoring and extraction. (*Id.*, ¶¶ 36, 37).[3]

The procedural background of this case is relatively straightforward, with one important twist, as follows: On July 14, 2004, plaintiff Union Pacific filed its initial Complaint in this

---

[1] Throughout this memorandum defendant cites to relevant portions of plaintiff's Third Amended Complaint in the format "TAC, ¶ __." The same format is used for any references to the First Amended Complaint ("FAC"), and Second Amended Complaint ("SAC").

[2] These sites have been found to be contaminated with gasoline, polychlorinated biphenyls ("PCBs"), lead, and the following volatile organic compounds ("VOCs"): benzene, dichlorobenzene, ethyl chloride, dichloroethane, dichloroethene, dichloroethylene, ethylbenzene, ethylene dichloride, methylene chloride, tetrachloroethylene, toluene, tricholoroethene ("TCE"), trichlorotrifuoroethane, vinyl chloride, and xylenes. (TAC, ¶ 21).

[3] Cleanup and abatement order 94-43, relating to 99 Frances Street, names as responsible parties the following: plaintiff; West Coast Welders Supply; and West Coast Metals, Inc. Cleanup and abatement order 92-17, relating to 1143 Briggs Avenue, names as responsible parties the following: Richard L. Bradley; West Coast Scrap Producers; Donald Kesler and Ethel Kesler; Irving Kesler and Phyllis Kesler; Pacific Junk Company, Inc.; Jack Gardner; William Whitman; and West Coast Metals, Inc.

COLLETTE ERICKSON FARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

matter, alleging that various of the defendants had contributed to the contamination of 99 Frances Street and 1143 Briggs Avenue by virtue of the operations they had previously conducted at these sites, and seeking contribution from these defendants for cleanup costs pursuant to 42 U.S.C. § 9613. (*See* Complaint). On September 9, 2004, plaintiff filed its First Amended Complaint, adding Irving Kesler and the Estate of Donald Kesler as defendants. (*See* FAC). On November 23, 2004, plaintiff filed its Second Amended Complaint, adding OCLI as a defendant based on allegations that OCLI had arranged for the disposal of unidentified chemicals at either 99 Frances Street or 1143 Briggs Avenue. (*See* SAC). On December 13, 2004, before OCLI had responded to the Second Amended Complaint, the United States Supreme Court issued its ruling in *Cooper Industries, Inc. v. Aviall Services, Inc.* 125 S.Ct. 577 (2004), which held, in short, that a private party who has not been sued under CERCLA § 106 or § 107(a) may not maintain an action for contribution under § 113(f)(1).[4] Given the undisputed fact that Union Pacific has not been sued under CERCLA § 106 or § 107(a), the Court's ruling in *Cooper Industries* invalidated Union Pacific's attempt to obtain contribution under CERCLA § 113. Pursuant to stipulation among the parties, on January 7, 2005, Union Pacific filed its Third Amended Complaint, dropping its § 113 claim and instead purporting to state a cause of action for contribution under § 107(a)(4) of CERCLA alone. OCLI herein moves to dismiss plaintiff's CERCLA claims and dismiss this entire action for failure to state a claim upon which relief may be granted.

III. ARGUMENT

A. CERCLA Background

In 1980, Congress enacted CERCLA to confront the serious environmental and health problems stemming from contamination of property by hazardous substances. *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). In furtherance of this goal, CERCLA provides two primary methods for effecting the cleanup of contaminated properties. First, the federal government may undertake response actions itself pursuant to § 104. The federal government may then seek to

[4] Sections 106, 107 and 113 of CERCLA are codified at 42 U.S.C §§ 9606, 9607, and 9613, respectively. Throughout this brief we refer, for the most part, to sections of CERCLA rather than the U.S. Code.

COLLETTE ERICKSON ARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

recoup its response costs by bringing suit against the parties responsible for the contamination under §107 (a)(4)(a). Second, the federal government may compel private parties to clean up contaminated sites themselves, either by initiating a civil action under § 106(a), or by issuing an administrative cleanup order. Under either scenario, the parties who contributed to the release or threatened release of a hazardous substance – commonly referred to as "potentially responsible parties" or PRPs – may be subject to joint and several liability for all the costs associated with the cleanup. *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994).

Section 107(a) cost recovery actions are also available to States, Indian tribes, and certain "other" persons who have incurred response costs "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(1)-(4)(b). The question as to what was intended by the term "other" has long been resolved by the circuit courts as referring only to persons who are not potentially responsible parties – i.e., only to those persons who neither own nor contaminated the property which was cleaned up. *See, e.g., In re Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997); *Rempke of Ind., Inc. v. Cummings Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994).

With respect to potentially responsible parties, CERCLA originally contained no right to contribution among or between these parties. Nevertheless, in the 1980s, a number of district courts held that § 107(a) could be read to imply a common law right of contribution which could be exercised by the target of a government action under either § 106 or § 107, which would permit joinder of other potentially responsible parties. *See, e.g., New York v. Shore Realty Corp.*, 648 F. Supp. 255 (E.D.N.Y 1986); *Mola Dev. Corp. v. United States*, 1985 U.S. Dist. LEXIS 22674 (C.D. Cal. 1985). With the enactment of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 101 *et seq.*, 100 Stat. 1613 (1986), Congress codified this implied right of contribution by amending CERCLA to expressly recognize a right of contribution among PRPs under § 113(f)(1). *See Browning-Ferris Indus., supra.* One principal objective of the new contribution section was to "clarify and confirm the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable

COLLETTE ERICKSON ARMER & O'NEILL LLP LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

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." S.Rep. No. 11, 99th Cong., 1st Sess. 44 (1985), reprinted in 2 Legislative History of Superfund Amendments and Reauthorization Act of 1986, Sp. Print 101-120 (101st Cong., 2d Sess.)(1990).

In the years following the enactment of SARA, courts held that the express language in § 113 providing for a right of contribution implied an intent to limit PRPs to claims for contribution, and to preclude action between PRPs for direct recovery under § 107. *See, e.g., N.J. Turnpike Auth. v. PPG Indus., Inc.* 197 F.3d 96, 104 (3d Cir. 1999)("the Turnpike is a PRP . . . and its action against other PRPs is properly characterized as a section 113 action."); *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 415 (4th Cir. 1999)("As a general rule any claim for damages made by a potentially responsible person – even a claim ostensibly made under § 107 – is considered a contribution claim under § 113"); *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998)("A party that is itself liable may recover only those costs exceeding its pro rata share of the entire cleanup expenditure, i.e., contribution under § 113(f)(1)."); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 350 (6th Cir. 1998) ("Claims by PRPs . . . seeking costs from other PRPs are necessarily actions for contribution . . . governed by . . . § 113(f)."); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997)("Because all PRPs are liable under the statute, a claim by one PRP against another PRP necessarily is for contribution."); *Redwing Carriers, supra*, 94. F.3d at 1496 ("Redwing is a responsible party under CERCLA, and therefore, its claims against other allegedly responsible parties are claims for contribution."); *United States v. Colorado & E.R.R.*, 50 F.3d 1530, 1536 (10th Cir. 1995)(holding any claim for apportionment of cleanup costs between PRPs is a claim for contribution); *Browning-Ferris, supra*, 33 F.3d at 101 (holding plaintiffs who by their own admission were liable parties, were in effect asserting an action for contribution under § 113); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994)(holding that an action by one PRP against other jointly and severally liable parties is governed by § 113(f)).

COLLETTE ERICKSON FARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

B. Overview of the Supreme Court's Decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*

On January 9, 2004,[5] the United States Supreme Court granted certiorari in the case *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577 (2004), to decide whether a private party who has not been the subject of an underlying civil suit pursuant to CERCLA §§ 106 or 107(a) may bring an action seeking contribution pursuant to CERCLA § 113(f)(1) to recover costs spent voluntarily to clean up properties contaminated by hazardous substances.

The facts of the case, briefly, are as follows: Cooper Industries owned and operated four contaminated aircraft engine maintenance sites in Texas until 1981, when it sold the sites to Aviall Services. Aviall operated the sites for a number of years, until it discovered that both it and Cooper had contaminated the sites with petroleum and other hazardous substances. Aviall notified the Texas Natural Resource Conservation Commission of the contamination, and was directed to clean up the sites under threat of an enforcement action. Neither the Commission nor the EPA took judicial or administrative measures to compel the cleanup. Beginning in 1984, Aviall cleaned up the properties under the State's supervision, and in 1997 Aviall filed suit against Cooper in federal court seeking to recover its cleanup costs. *Id. at 582.*

Although the suit originally included separate claims for cost recovery under § 107(a) and contribution under § 113(f)(1), it was subsequently amended to include a "combined" § 107/§ 113 claim. The District Court took this consolidated claim to mean that Aviall was not relying on § 107 as an independent cause of action, but only to the extent necessary to maintain a viable § 113 contribution claim. *Id.* at 584. The Fifth Circuit similarly concluded that Aviall no longer was advancing a freestanding § 107 claim, and when the case went up en banc, the court concluded that it was unnecessary to decide whether Aviall had waived its § 107 claim, because it held that Aviall could rely instead on § 113. In the absence of both briefing and a decision by the lower courts on the application of § 107 to the case, the Supreme Court declined to address the question of whether a PRP may maintain an action against another PRP under § 107. *Id.* at 585. The decision of the Court issued on December 13, 2004, holding that "§ 113(f)(1)

[5] I.e., some seven months before Union Pacific filed suit in the instant case.

COLLETTE ERICKSON FARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

authorizes contribution claims only during or following a civil action under § 106 or § 107(a), and it is undisputed that Aviall has never been subject to such an action. Aviall therefore has no § 113(f)(1) claim." *Id.* at 584.

C. Union Pacific is a Potentially Responsible Party under CERCLA

Plaintiff's status as a PRP is largely conceded by its averments in the Third Amended Complaint. Union Pacific admits that it is the current owner of the property at issue in this matter, located at 99 Frances Street in Santa Rosa, California (TAC, ¶ 19), and further admits that it is the successor to Northwestern Pacific Railroad Company's rights (and impliedly, responsibilities) under leases pertaining to the property which date back to at least 1967 (TAC, ¶ 20). Current ownership of the contaminated property, and ownership of the property when the alleged contaminating activities occurred, make Union Pacific a PRP under CERCLA §§ 107(a)(1) – (2). *See, e.g., Carson Harbor Village, Ltd. V. Unocal Corp.*, 287 F.Supp.2d 1118 (C.D.Cal. 2003) ("As the current owner of the property, Carson Harbor is a presumptive PRP."); *Castaic Lake Water Agency v. Whittaker Corp.*, 272 F.Supp.2d 1053, 1069 ("CERCLA . . . imposes liability on the current owner of a facility."); *United States v. The Atchison, Topeka & Santa Fe Railway Co.*, 203 U.S.Dist. LEXIS 23130 (E.D.Cal. 2003)("The Railroads are strictly liable for the hazardous substances originating from the "Railroad parcel" that in part caused the need for CERCLA response of the Site. No third-party defense is available to the Railroads under 42 U.S.C. § 9607(b) by virtue of their lease with B&B."); *Kaufman &. Broad-South Bay v. UNYSIS Corp.*, 868 F.Supp. 1212, 1216 (N.D.Cal. 1994)("[A] current owner of a site, is a presumptively liable party under CERCLA."). Union Pacific cannot maintain a defense under § 107(b) because the pollution at the site was not caused by an act of God or war, and the alleged acts that caused the contamination resulted from a contractual relationship between plaintiff and various of the defendants, as the parties shared lease agreements. *See* 42 U.S.C. §§ 9601(35)(A), 9607(b); TAC, ¶¶ 21-32. Nor does plaintiff qualify for an exception to contractual relationship liability because Union Pacific (or its predecessor in interest) owned the site throughout the period when the contaminating releases took place.

COLLETTE ERICKSON FARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

D. Under Binding Ninth Circuit Precedent, Union Pacific, As A Potentially Responsible Party, Is Barred From Bringing a § 107 Claim

Faced with the Supreme Court's ruling in *Cooper Industries* that a similarly situated plaintiff may not bring a § 113 claim for contribution, and Ninth Circuit precedent that a potentially responsible party may not bring a § 107 claim for cost recovery, *see Pinal Creek, supra*,[6] Union Pacific attempts to assert an independent cause of action under § 107 for contribution. No circuit court has recognized such a cause of action, and district courts in this circuit have limited potentially responsible parties to bringing claims exclusively under § 113. *See, e.g., Kaufman and Broad-South Bay v. Unisys Corp.*, 868 F.Supp. 1212, 1215 (N.D.Cal. 1994)("[A]ny and all responsible parties, even those who have expended response costs voluntarily, are confined to bringing contribution actions under § 9613(f)."). In those instances where potentially responsible parties sought cost recovery under § 107, the Ninth Circuit has treated them as § 113 claims for contribution. *See In re Dant & Russell, Inc.*, 951 F.2d 246 (9th Cir. 1991); *see also City of Fresno v. NL Industries, Inc.*, 1995 U.S.Dist. LEXIS 15534 (E.D.Cal. 1995)(noting that the Ninth Circuit construes a § 107 claim between PRPs as a § 113(f)(1) claim). More recently, the Ninth Circuit unequivocally held that "a PRP may not bring a CERCLA § 107 cost recovery action, and instead may only bring a claim for contribution under CERCLA § 113(f)." *Fireman's Fund Ins. Co. v. City of Lodi,* 302 F.3d 928, 947 (9th Cir. 2002)(emphasis added); *see also State of California v. Neville Chemical Co.*, 358 F.3d 661, 672 (9th Cir. 2004)("Suits for *contribution*, however, are entirely distinct under the statute from suits for *recovery of costs*. The former is governed by 42 U.S.C. § 9613(f)(1).").

Existing Ninth Circuit precedent hearkens back to the court's decision in *The Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), in which the court held that "a PRP does not have a claim for the recovery of the totality of its cleanup costs against other PRPs, and a PRP cannot assert a claim against other PRPs for joint and several liability." *Id.* at 1306.

[6] *See also Carson Harbor Village, supra,* 287 F.Supp.2d at 153 ("the Ninth Circuit has held that a potentially responsible party ("PRP") may not seek indemnification for cleanup costs under § 9607(a)."); *California Dept. of Toxic Substances Control v. City of Chico*, 297 F.Supp.2d 1227 (E.D.Cal. 2004)("In this Circuit, a PRP cannot bring a § 9607(a) action to hold other PRPs jointly and severally liable.").

COLLETTE ERICKSON FARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

Rather, "because all PRPs are liable under the statute, a claim by one PRP against another PRP necessarily is for contribution." *Id.* at 1301. In discussing the nature of CERCLA contribution actions, "*Pinal Creek* held that the enactment of § 113 in 1986 did not replace the implicit right to contribution many courts had recognized in § 107(a); rather, § 113 determines the 'contours' of § 107, so that a claim for contribution requires the 'joint operation' of both sections." *Western Properties Service Corp. v. Shell Oil Co.*, 358 F.3d 678, 685 (9th Cir. 2004)(emphasis added). Specifically, the *Pinal Creek* court stated that:

> Together, §§ 107 and 113 provide and regulate a PRP's right to claim contribution from other PRPs. The contours and mechanics of this right are now governed by § 113. Put another way, while § 107 created the right of contribution, the "machinery" of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107.

Pinal Creek, supra, at 1301-1302. The court concluded that "because a claim asserted by a PRP under § 107 requires the application § 113, a PRP is limited to a contribution claim governed by the joint operation of §§ 107 and 113." *Id.* at 1306 (emphasis added).

In the case at bar, Union Pacific does not have a viable § 113 claim, and cannot bring such a claim under the Supreme Court's recent ruling in *Cooper Industries*. Indeed, Union Pacific admitted as much when it withdrew its § 113 claim. Without a viable § 113 claim, Union Pacific is in the position of relying solely on § 107 as a basis for its contribution action – which undeniably runs afoul of controlling Ninth Circuit precedent holding that contribution actions require the "joint operation of §§ 107 and 113." *Pinal Creek, supra*, at 1306; *Western Properties, supra*, at 685. In this instance, there can be no joint operation of the two sections, no application of § 113 to Union Pacific's § 107 claim, because the Supreme Court's decision in *Cooper Industries* stripped Union Pacific of its standing to bring a § 113 claim. Simply put, *Cooper Industries* defined how the 'machinery' of § 113 operates, as well as the 'contours' under which a plaintiff may assert a § 113 claim; Union Pacific's claims are alien to that machinery, and fall outside of those contours. Union Pacific's current attempt to revive its contribution claim by characterizing its action under § 107 as being for "contribution" rather than for "cost recovery" is simply a facile attempt to evade the application of the Supreme Court's ruling in *Cooper*

COLLETTE ERICKSON
FARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

Industries, and ignores the holdings in *Pinal Creek* and *Western Properties* that a claim for contribution by a PRP "requires the 'joint operation' of both sections." *Pinal Creek, supra*, at 1306; *Western Properties, supra*, at 685; *see also California Dept. of Toxic Substance Control v. Interstate Non-Ferrous Corp.*, 298 F.Supp.2d 930 (E.D.Cal. 2003)("a PRP is limited to a contribution action governed by the joint operation of §§ 107 and 113."). Moreover, it ignores the fact that contribution claims in this circuit are properly only brought by suing under § 113. *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 947 (9th Cir. 2002)("a PRP may not bring a CERCLA § 107 cost recovery action, and instead may only bring a claim for contribution under CERCLA § 113(f)."); *City of Emeryville v. Elementis Pigments, Inc.*, 2001 U.S. Dist. LEXIS 4712 (N.D. Cal. 2001)("When a plaintiff is also a party that can be held liable under CERCLA . . . a plaintiff may only sue for contribution under Section 9613"). Union Pacific's CERCLA claim fails as a matter of law, because there can be no action for contribution when Union Pacific does not have standing to bring a § 113 claim.[7]

E. Union Pacific's Position Would Render § 113 Superfluous

The Ninth Circuit has held that "CERCLA § 107 and CERCLA § 113 provide different remedies: a defendant in a § 107 cost-recovery action may be *jointly and severally liable* for the total response cost incurred to cleanup a site, whereas a defendant in a § 113(f) contribution action is *liable only for his or her pro rata share* of the total response costs incurred to cleanup a site." *Fireman's Fund Ins. Co., supra*, 302 F.3d at 945 (emphasis in original). Apart from that not-insignificant distinction, § 107 also provides for strict liability and has a six year statute of limitations, while § 113 requires that causation be proven and has a three year statute of limitations. *See* 42 U.S.C. § 9607(g)(2), 42 U.S.C § 9613(g)(3); *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2nd Cir. 1999)("In contrast to § 113(f)(1), which apportions liability based on equitable considerations and has a three-year statute of limitations . . . § 107(a) has a six-year statute of limitations."); *United States v. Colorado & E.R.R.*, 50 F.3d 1530, 1535 (10th Cir.

[7] This also is in accordance with the rule in other circuits that a § 113 action is, and was intended to be, the sole means of bringing a contribution claim. *See, e.g., In re Reading*, 115 F.3d 1111 (3d Cir. 1997)("The fact, however, that a direct action may be brought under § 107 (a) does not open the door for a PRP to bring an action for contribution under the same section.")

COLLETTE ERICKSON FARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

1995)("§ 107 imposes strict liability on PRPs for costs associated with hazardous waste cleanup and site remediation."); *Farmland Indus. v. Morrison-Quirk Grain*, 987 F.2d 1335, 1339 (8th Cir. 1993)(Under §107, "liability, therefore, is not dependant on any showing of causation or fault.").

As numerous circuit courts have stated in various forms, "[a]llowing a potentially responsible person to choose between section 107 (with a six-year statute of limitations and joint and several liability) and section 113 (with a three-year statute of limitations and apportioned liability based upon equitable considerations) would render section 113 a nullity. Potentially responsible persons would quickly abandon section 113 in favor of the substantially more generous provisions of section 107." *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997); *see also Colorado & E.R.R., supra*, 50 F.3d at 1536 ("were PRPs such as Farmland allowed to recover expenditures incurred in cleanup and remediation from other PRPs under § 107's strict liability scheme, § 113(f) would be rendered meaningless."); *Bedford Affiliates, supra*, 156 F.3d at 424 ("Were we to permit a potentially responsible person to elect recovery under either § 107(a) or § 113(f)(1), § 113(f)(1) would be rendered meaningless.").

It is of course black letter law that a court should interpret a statute, if possible, so as to minimize discord among related provisions. *See, e.g., In re Catapult Entertainment*, 165 F.3d 747, 751 (9th Cir. 1999); *see also* 2A Norman J. Singer, Sutherland Statutory Construction § 46.06 (5th ed. 1992) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."). In the case at bar, Union Pacific sues under § 107 for "contribution," yet that section of the statute imposes joint and several liability, calls for strict liability, doubles the relevant statute of limitations, and is silent as to how actions for contribution are to be regulated. As recognized by the Ninth Circuit, when Congress enacted § 113 in 1986, it created the "machinery" which "governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107." *See Pinal Creek, supra*, 118 F.3d at 1301. Union Pacific here would have the court proceed as if § 113 were never enacted and could be ignored, when in fact

COLLETTE ERICKSON
FARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

§ 113 explicitly governs how contribution actions are to proceed and creates the mechanism for apportioning liability among responsible parties. *Id.* at 1302. Union Pacific may not simply file an action for contribution under § 107 and proceed as though § 113 had no effect, since that would be to render § 113 superfluous.

Other circuit courts, when faced with attempts by potentially responsible parties to bring suit under § 107, have declined to interpret § 107 so broadly that § 113 would become a nullity. *See, e.g., Bedford Affiliates, supra*, 156 F.3d at 424 ("Without a clear congressional command otherwise, we will not construe a statute in any way that makes some of its provision surplussage.")[8]; *New Castle*, *supra*, 111 F.3d at 1122-23 ("We will not read section 107 so broadly that section 113 ceases to have any meaningful application."); *see also Colorado & E.R.R., supra*, 50 F.3d at 1536 ("if potentially responsible persons were permitted to recover from other potentially responsible persons under section 107, section 113 would be rendered meaningless."). With the creation of § 113 in 1986, Congress affirmatively acted to displace pre-SARA caselaw. *See E.I. Du Pont De Nemours v. United States*, 297 F.Supp.2d 740, 747 (D.N.J. 2004). Union Pacific may not now attempt to rely on pre-SARA caselaw allowing contribution under § 107, since today, only caselaw interpreting § 113 is relevant to determining the boundaries of a contribution action. *Id.*[9] Under that caselaw, Union Pacific may not assert a claim for contribution under § 113, *see Cooper Industries, supra*, and thus may not assert a claim for contribution at all. To hold otherwise would be to render § 113 meaningless.

IV. IN THE ABSENCE OF FEDERAL JURISDICTION, ALL STATE LAW CLAIMS SHOULD BE DISMISSED

Union Pacific's CERCLA causes of action are the only federal claims pled in the Third Amended Complaint, and thus are the sole source of this court's original federal question jurisdiction under 28 U.S.C. § 1331. Union Pacific did not invoke diversity jurisdiction under 28

[8] The *Bedford Affiliates* court stated further that "the language of CERCLA suggests Congress planned that an innocent party be able to sue for full recovery of its costs, i.e., indemnity under § 107(a), while a party that is itself liable may recover only those costs exceeding its pro rata share of the entire cleanup expenditure, i.e., contribution under § 113(f)(1)." *Id.*

[9] Our research has uncovered no post-SARA decision in this circuit which would allow a potentially responsible party to seek contribution under § 107.

COLLETTE ERICKSON FARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

U.S.C. § 1332 and could not have done so, because plaintiff Union Pacific and defendant OCLI are both Delaware corporations. (TAC ¶¶ 4, 10). Supplemental jurisdiction over the state law claims involved in this action has been invoked pursuant to 28 U.S.C. § 1367. (TAC, ¶ 1).

The supplemental jurisdiction statute provides that a district court "may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3)(2004). The Supreme Court has instructed that the exercise of supplemental jurisdiction should be rare when all federal claims have been dismissed before trial. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966). More recently, the Supreme Court has stated that "in the usual case in which all federal law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). While discretion to decline to exercise supplemental jurisdiction over state law claims is triggered by the presence of one of the conditions in § 1367(c), it is informed by the *Gibbs* values of "economy, convenience, fairness, and comity." *See, e.g. Gibb, supra.* When all federal claims are eliminated before trial, "retaining jurisdiction only over complex questions of state law becomes, in some circumstances, especially inappropriate." *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1181 (9th Cir. 2003).

The *Gibbs* admonition is particularly pertinent here, where a court without diversity jurisdiction is being asked to decide claims based wholly and exclusively on state law, having dismissed the federal cause of action. State courts are the proper *fora* for those claims, and the federal courts are generally directed to stay out of the fray unless there is a reason for them to jump in – that is, unless "values of judicial economy, convenience, fairness, and comity" would be served thereby. *See Carnegie-Mellon, supra,* at 350. In the case at bar, none of these factors argue for maintaining supplemental jurisdiction over this matter. Although the initial complaint was filed on July 14, 2004, the majority of the time since then has passed with plaintiff amending its complaint to add new parties and, more recently, its new purported cause of action under CERCLA § 107 (while withdrawing its § 113 claim). Virtually no discovery has been propounded, no depositions have been taken, and there have been no hearings on any issue. The

COLLETTE ERICKSON
FARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

only thing of substance that has been accomplished was the recent, unsuccessful attempt at mediation on March 24, 2005, which resulted in further, currently-unresolved discussions about setting up another mediation in late June, 2005. The remaining causes of action are state law claims for contribution and indemnity based on California's Health & Safety Code §§ 25300 et seq., and common law claims for nuisance, trespass, express indemnity, equitable indemnity, and declaratory relief. There is no reasonable basis for this court to retain supplemental jurisdiction over the remaining causes of action in this case where federal jurisdiction, under the current iteration of the complaint (i.e., the TAC), was predicated on what can only generously be characterized as a novel attempt to state federal question jurisdiction, and perhaps more fairly should be called a futile attempt to find federal question jurisdiction where it was apparent none existed. Given that Union Pacific has no inchoate right to proceed in federal court on claims which only implicate state law, and the concomitant interest that California has in having state law claims adjudicated in its own courts, this court should decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(3).

As further, independent grounds for declining to retain jurisdiction over this matter, the court should be aware that there is a related case in state court, captioned *Carla Clark, et al. v. The City of Santa Rosa, et al.,* Sonoma County Case No. 227896, which has been pending since 2001. The *Clark* plaintiffs allege, in brief, that the contamination of groundwater at Union Pacific's property at 99 Frances Street has resulted in the contamination their wells and caused certain physical injuries. Both Union Pacific and OCLI are named as defendants in that action. Union Pacific could easily have brought its state law claims against all the instant defendants *Clark* via a cross-complaint, but chose not to do so for presumably strategic reasons. One of the central allegations in the *Clark* case, as here, is whether or not OCLI improperly disposed of contaminants at 99 Frances Street. If for no other reason, fairness dictates that OCLI should not be put in the position of trying the same factual issue twice, once in state court and once in federal court, simply because Union Pacific favors its chances in federal court. Such duplication of effort would neither be economical, nor convenient, nor fair.

COLLETTE ERICKSON FARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646

V. CONCLUSION

For the foregoing reasons, defendant OCLI requests that this Honorable Court grant its motion to dismiss plaintiff Union Pacific's CERCLA claims for failure to state a claim pursuant to FRCP 12 (b)(6), and further requests that this Court decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(3), and dismiss the entire action.

DATED: April 28, 2005

Respectfully submitted,

COLLETTE ERICKSON FARMER & O'NEILL LLP

/s/ Robert S. Lawrence
Robert S. Lawrence
Attorneys for Defendant
OPTICAL COATING LABORATORY, INC.

COLLETTE ERICKSON FARMER & O'NEILL LLP
ATTORNEYS AT LAW
235 PINE ST., SUITE 1300
SAN FRANCISCO, CA 94104
(415) 788-4646