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**United States District Court**  
For the Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CHARTIS SPECIALTY INSURANCE  
COMPANY, *et al.*,

No. C-13-1527 EMC

Plaintiffs,

v.

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT’S  
MOTION TO DISMISS**

UNITED STATES OF AMERICA,

**(Docket No. 51)**

Defendant.

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**I. INTRODUCTION**

Pending before the Court is Defendant’s motion to dismiss various claims from Plaintiff’s first amended complaint. Whittaker Corporation and its insurer Chartis Specialty Insurance Co. bring this suit under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), alleging that Defendant United States is responsible for environmental contamination at a site for which Plaintiffs have been paying the costs of remediation. Both Plaintiffs bring claims under § 107(a) of CERCLA seeking to recover all past, present, and future remediation costs. Chartis additionally brings claims under CERCLA § 112(c) which provides a cause of action for persons who have subrogation rights as a result of paying claimants for the costs of remediation efforts. Defendant seeks to dismiss Chartis’ claim under § 107(a), arguing that insurance companies must bring their claims under the section governing subrogation rights. Defendant also seeks to dismiss Chartis’ § 112(c) claim, arguing that Plaintiffs have failed to state a cause of action under § 112(c), and that any such claim is time barred in any case. Finally, Defendant argues that Plaintiffs’ allegation that the United States is jointly and severally liable must

1 be dismissed because as another potentially responsible party, Whittaker can recover only a  
2 proportional share of remediation costs from the United States.

3 **II. FACTUAL & PROCEDURAL BACKGROUND**

4 This CERCLA action arises out of environmental clean up efforts at a property located at  
5 2751 San Juan Road in Hollister, California (“the Site”). First Amended Complaint (“FAC”) ¶ 2  
6 (Docket No. 42). The Site covers approximately 94 acres, and was operated as a dairy farm until  
7 1957. FAC ¶¶ 13-14. In 1957, the Site was purchased by Horex Company, Inc., who is not a party  
8 to this action. FAC ¶ 14. Horex owned the Site from 1957 to 1980, and used it for manufacturing  
9 and testing military munitions under contracts with the United States. FAC ¶ 16. In 1980, Plaintiff  
10 Whittaker purchased the Site and Horex’s ordnance manufacturing business. FAC ¶ 17. Whittaker  
11 continued to perform work for the United States, manufacturing and testing a variety of munitions  
12 for use in the country’s defense, including bombs, demolition materials, cartridge- and propellant-  
13 related devices, torpedo components, guided missile warhead/explosive components, space vehicle  
14 launchers, rocket ammunition, and the Minuteman II missile. FAC ¶ 17. During Whittaker’s  
15 ownership of the site from 1980 to 1994, “a substantial percentage” of Whittaker’s manufacturing  
16 was performed under contract with the United States. FAC ¶ 18.

17 Whittaker also operated an ordnance manufacturing facility similar to the one at the Site in  
18 Santa Clarita, California (the “Bermite Site”). FAC ¶ 19. This site had previously been operated by  
19 Bermite Powder Company, who had manufactured and tested munitions for the United States at that  
20 location from 1942 until 1967, when Whittaker purchased Bermite. FAC ¶ 20-21. In 1987,  
21 Whittaker transferred the work under government munitions contracts from the Bermite Site to the  
22 Site that is at issue in this action. FAC ¶ 23. A California federal court has found the United States  
23 liable under CERCLA for the release of hazardous substances to the environment at the Bermite  
24 Site. FAC ¶ 24.

25 Plaintiffs make various allegations regarding the United States’ involvement in the  
26 manufacturing of munitions at the Site. FAC ¶¶ 25-43. Plaintiffs allege that the United States, in its  
27 contracts with Whittaker and its predecessors, provided detailed specifications for the manufacturing  
28 of munitions, including requiring the use of certain hazardous materials, and requiring certain

1 procedures for handling and disposing of those materials. *Id.* Though the details of these  
2 allegations are not relevant to the analysis on this motion, they form the basis for Plaintiff’s  
3 contention that the United States was an owner and arranger of the Site within the meaning of  
4 CERCLA, and that it is thus liable for the clean up of hazardous materials at the Site. FAC ¶¶ 25-  
5 43, 74-81. The United States does not contest its liability on this motion.

6 On October 3, 1991, the California Department of Health Services notified the California  
7 Regional Water Quality Control Board–Central Coast Region (the “Board”) that elevated levels of  
8 trichloroethylene (“TCE”) had been detected in the groundwater underlying the Site. FAC ¶ 45. In  
9 response, the Board issued Abatement Order No. 93-88 in August of 1993, requiring Whittaker to  
10 prepare and submit technical and monitoring reports in accordance with California Water Code §  
11 13267. In 1997, perchlorate was detected in groundwater samples both on and off the Site. FAC ¶  
12 47.

13 In July 1999, a new abatement order required Whittaker to conduct a comprehensive  
14 environmental investigation of the Site. FAC ¶ 48. This investigation revealed elevated  
15 concentrations of various hazardous materials in the soil and groundwater in and around the site,  
16 including perchlorate, TCE, and hexavalent chromium. FAC ¶ 49. Since 1993, more than 20 on-  
17 and off-Site investigations and risk assessments have been completed, and more than 140 monitoring  
18 wells have been installed. FAC ¶ 50. Pilot remediation tests and interim cleanup actions have been  
19 conducted, including soil excavation and an installation of a small groundwater treatment system.<sup>1</sup>  
20 *Id.* Pursuant to the most recent Board order, issued on July 31, 2009, an on-Site groundwater  
21 containment and treatment system has been initiated to contain groundwater contamination on the  
22 Site. FAC ¶ 51. Remediation plans for on-Site source areas and off-Site groundwater contamination  
23 are under development. *Id.*

24 The Board is currently overseeing remediation of soil and groundwater at the Site. FAC ¶  
25 44. Remediation efforts are aimed at addressing soil and groundwater contamination stemming from  
26 historical operations at the Site. *Id.* The Board has approved an interim remediation action plan for  
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28 <sup>1</sup> The complaint does not explicitly state who performed these tests and clean up activities,  
but from context it would appear that it was Plaintiffs and various contractors that they retained.

1 addressing on-Site contamination, but no final remediation action plan has yet been submitted or  
2 approved for either on- or off-Site contamination. FAC ¶ 52. None of the Board’s orders has  
3 released Whittaker or Chartis from CERCLA liability. FAC ¶ 53.

4 In 1999, Whittaker purchased a Pollution Legal Liability Select/Cleanup Cost Cap Policy  
5 (“the Policy”) from American International Specialty Lines Insurance Company, now known as  
6 Chartis Specialty Insurance Company. FAC ¶ 53. The Policy has effective dates of July 14, 1999 to  
7 July 14, 2019 and provides pollution legal liability coverage, subject to certain self-insured  
8 retentions, policy limits, and maintenance deductibles. FAC ¶¶ 53-54. The Site is one of the  
9 locations covered by the Policy. FAC ¶ 55. The Policy contains the following subrogation  
10 provision:

11 **Subrogation** — In the event of any payment under this Policy, the  
12 Company shall be subrogated to all the Insured’s rights of recovery  
13 therefor [sic] against any person or organization and the Insured shall  
14 execute and deliver instruments and papers and do whatever else is  
15 necessary to secure such rights including without limitation,  
assignment of the Insured’s rights against any person or organization  
who caused Pollution Conditions or a Pollution Release on account of  
which the Company made any payment under this Policy . . . .

16 FAC ¶ 56. As a result of this clause, Plaintiffs allege that Chartis is contractually subrogated to  
17 claims pursuant to which Whittaker is, or may be, entitled to seek recovery of costs from the United  
18 States based on the United States’ responsibility for owning facilities at the Site and arranging for  
19 the disposal or treatment of hazardous materials at the Site. FAC ¶ 57.

20 To date, Whittaker has incurred millions of dollars of necessary response costs to respond to  
21 the environmental contamination at the Site resulting from the release of hazardous materials. FAC  
22 ¶ 58. Additionally, Chartis has incurred more than \$30 million for claims related to Site payments  
23 made directly to remediation contractors. FAC ¶ 59. Chartis made these payments directly to the  
24 contractors rather than reimbursing Whittaker after Whittaker paid the contractors. *Id.* Under the  
25 Policy, Chartis has exposure for certain future cleanup costs that Whittaker will be obligated to pay.  
26 *Id.* These funds expended by Whittaker and Chartis were for actions necessary to prevent damage to  
27 the public health or welfare, including removing and remediating hazardous substances; monitoring  
28 and evaluating releases or threats of releases of hazardous substances; providing alternative water

1 supplies; investigating, monitoring, and testing contaminated sites; and planning and implementing  
2 response actions. FAC ¶ 60. These actions have taken place under the oversight of the State of  
3 California through the Board, in accordance with governing regulations. FAC ¶ 62.

4 Plaintiffs' complaint brings three causes of action against the United States. First, Whittaker  
5 and Chartis bring a claim under § 107(a)(4)(B) of CERCLA, which provides that parties who are  
6 liable for hazardous materials clean up under CERCLA shall be liable for "any other necessary costs  
7 of response incurred by any other person consistent with the national contingency plan." 42 U.S.C.  
8 § 9607(a)(4)(B). Plaintiffs argue that the United States is liable for remediation costs as an owner  
9 and arranger within the meaning of CERCLA. FAC ¶¶ 74-81. As noted above, the United States  
10 does not contest in this motion that it is liable for remediation costs at the Site under CERCLA.  
11 Plaintiffs argue that they are entitled to seek the cost of remediation efforts as they are persons who  
12 have incurred necessary costs of response. FAC ¶¶ 82-88. Plaintiffs allege that the United States "is  
13 strictly, and jointly and severally, liable, or is otherwise liable as provided by applicable law, to  
14 Chartis and Whittaker for cost recovery for all necessary costs incurred by Chartis and Whittaker, in  
15 the past and in the future, in connection with the Site." FAC ¶ 86. Whittaker brings the § 107 claim  
16 directly, and Chartis brings the claim both "on behalf of itself and as Whittaker's contractual  
17 subrogee." FAC ¶ 87.

18 The second cause of action is brought by Chartis alone, and seeks to recover from the United  
19 States under § 112(c)(2) of CERCLA. That section provides:

20 **Subrogation rights; actions maintainable . . .**

21 Any person . . . who pays compensation pursuant to this chapter to any  
22 claimant for damages or costs resulting from a release of a hazardous  
23 substance shall be subrogated to all rights, claims, and causes of action  
for such damages and costs of removal that the claimant has under this  
chapter or any other law.

24 42 U.S.C. § 9612(c)(2). Plaintiffs allege that Whittaker is a "claimant" within the meaning of  
25 CERCLA because it has made a written demand to the United States for payment of response costs  
26 in a sum certain. FAC ¶ 94. As discussed below, the United States disputes whether Whittaker is  
27 properly considered a claimant under this section and whether it has submitted any timely claim to  
28 the United States. The United States does not, however, dispute the complaint's allegation that

1 Chartis has paid compensation to Whittaker in the form of response costs paid to Whittaker or  
2 directly to remediation contractors. FAC ¶ 95. Chartis also alleges that it has paid response costs  
3 within the three year period prior to the filing of the instant lawsuit, and that it will continue to pay  
4 for future response costs at the Site. FAC ¶ 96.

5 Plaintiffs also bring a third cause of action for declaratory judgement on liability for future  
6 response costs at the Site. FAC ¶¶ 101-03.

### 7 III. DISCUSSION

8 Under Rule 12(b)(6), a party may move to dismiss based on the failure to state a claim upon  
9 which relief may be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss based on Rule 12(b)(6)  
10 challenges the legal sufficiency of the claims alleged. *See Parks Sch. Of Bus. Symington*, 51 F.3d  
11 1480, 1484 (9th Cir. 1995). In considering such a motion, a court must take all allegations of  
12 material fact as true and construe them in the light most favorable to the nonmoving party, although  
13 “conclusory allegations of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6)  
14 dismissal.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). While “a complaint need not  
15 contain detailed factual allegations . . . it must plead ‘enough facts to state a claim to relief that is  
16 plausible on its face.’” *Id.* “A claim has facial plausibility when the plaintiff pleads factual content  
17 that allows the court to draw the reasonable inference that the defendant is liable for the misconduct  
18 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp v. Twombly*, 550 U.S.  
19 544, 556 (2007). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for  
20 more than sheer possibility that a defendant acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quoting  
21 *Twombly*, 550 U.S. at 556).

#### 22 A. CERCLA Background and Statutory Scheme

23 CERCLA, originally enacted in 1980, is designed “to provide for liability, compensation,  
24 cleanup, and emergency response for hazardous substances released into the environment and the  
25 cleanup of inactive hazardous waste disposal sites.” *Carson Harbor Vill. v. Cnty. of Los Angeles*,  
26 433 F.3d 1260, 1265 (9th Cir. 2006) (citation and quotation omitted). CERCLA has three main  
27 goals: “to promote the timely cleanup of hazardous waste sites, ensure that polluters were held  
28 responsible for the cleanup efforts, and encourage settlement through specified contribution

1 protection.” *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). To  
2 effectuate these goals, the statute “grants the President broad power to command government  
3 agencies and private parties to clean up hazardous waste sites.” *Key Tronic Corp. v. United States*,  
4 511 U.S. 809, 814 (1994). The Environmental Protection Agency (“EPA”), to whom the President  
5 has delegated his powers under the statute, may clean up contaminated sites itself, and may also  
6 compel potentially responsible parties (“PRPs”) to engage in clean up efforts, or pay for clean up  
7 efforts conducted by the EPA. *Chubb*, 710 F.3d at 956; 42 U.S.C. § 9604(a).

8 As part of a comprehensive statutory framework, the statute imposes strict liability for the  
9 costs of environmental clean up on four categories of potentially responsible parties (PRPs).<sup>2</sup> *United*  
10 *States v. Atl. Research Corp.*, 551 U.S. 128, 131 (2007); 42 U.S.C. § 9607(a)(1)-(4). Anyone who  
11 falls within one of the categories of PRPs is liable even if that person did not contribute to the  
12 environmental contamination. *Chubb*, 710 F.3d at 957. Liability under CERCLA is generally joint  
13 and several, such that a PRP may be held responsible for the entire cost of clean up, even when other  
14 parties contributed to the contamination. *Id.* CERCLA provides three mechanisms for the  
15 government or private parties to bring suit to compel a PRP to pay remediation costs: “(1)

16  
17 <sup>2</sup> The categories of PRPs are:

- 18 (1) the owner and operator of a vessel or a facility,
- 19 (2) any person who at the time of disposal of any hazardous  
20 substance owned or operated any facility at which such  
hazardous substances were disposed of,
- 21 (3) any person who by contract, agreement, or otherwise arranged  
22 for disposal or treatment, or arranged with a transporter for  
transport for disposal or treatment, of hazardous substances  
23 owned or possessed by such person, by any other party or  
entity, at any facility or incineration vessel owned or operated  
24 by another party or entity and containing such hazardous  
substances, and
- 25 (4) any person who accepts or accepted any hazardous substances  
26 for transport to disposal or treatment facilities, incineration  
vessels or sites selected by such person, from which there is a  
27 release, or a threatened release which causes the incurrence of  
response costs, of a hazardous substance.

28 42 U.S.C. § 9607(a)(1)-(4).

1 cost-recovery actions under section 107(a), (2) contribution actions under section 113(f)(1), and (3)  
2 subrogation actions under section 112(c)(2).” *Id.*

3 For the purposes of the instant motion, there does not appear to be any dispute that both  
4 Whittaker and the United States are PRPs. Under the currently operative complaint, both Whittaker  
5 and Chartis bring claims for cost recovery under § 107(a), and Chartis brings an additional  
6 subrogation claim under § 112(c)(2).

7 B. Chartis’ Claims Under CERCLA § 107(a)

8 In the first cause of action, Chartis brings claims under § 107(a) “on behalf of itself and as  
9 Whittaker’s contractual subrogee.” FAC ¶ 87. Section 107(a) provides that PRPs are liable for,  
10 *inter alia*,

- 11 (A) all costs of removal or remedial action incurred by the United  
12 States Government or a State or an Indian tribe not inconsistent  
with the national contingency plan;
- 13 (B) any other necessary costs of response incurred by any other  
14 person consistent with the national contingency plan; . . .

15 42 U.S.C. § 9607(a)(4)(A)-(B). Plaintiffs here seek to recover necessary costs associated with clean  
16 up efforts at the Site under § 107(a)(4)(B). As discussed below, the question of whether Chartis may  
17 properly bring a claim under § 107(a) turns on the question of when a party can be said to have  
18 “incurred” the necessary costs of remediation.

19 The United States argues that Chartis’ claim under § 107(a) must be dismissed because an  
20 insurer may only recover sums paid on behalf of its insured only through § 112(c)(2) subrogation  
21 claims, and not through § 107(a) claims for cost recovery. Though the United States points to  
22 several district court opinions supporting its position, its argument rests primarily on the recent  
23 Ninth Circuit decision in *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946 (9th Cir.  
24 2013).<sup>3</sup>

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28 <sup>3</sup> At the time of the hearing on this motion, a request for *en banc* review was pending in  
*Chubb*. The Ninth Circuit has since denied the request. *See* Docket No. 67.



1 In *Chubb*, an insurance company for the current owner of a contaminated site brought suit  
2 against other PRPs under CERCLA sections 107(a) and 112(c). 710 F.3d at 952-53. The insurance  
3 company had reimbursed its insured for \$2.4 million in expenses in connection with remediation  
4 efforts the insured had undertaken at the contaminated site. *Id.* at 953. The court held that the  
5 insurance company could not bring suit to recover costs under § 107(a) because it had not itself  
6 “incurred” the costs of remediation. *Id.* at 962. The court noted that the statute does not define the  
7 term “incur,” and thus looked to the ordinary meaning of the term, which the court gave as “[t]o  
8 acquire or come into, ‘[t]o become liable or subject to as a result of one’s action,’ to ‘bring upon  
9 oneself.’” *Id.* at 961 (quoting Am. Heritage Dictionary (4th ed. 2000)). The court held that

10 Applying these definitions, section 107(a) plainly applies to a person  
11 who, through his or her own actions, becomes statutorily liable for, or  
12 is subject to, the costs related to the cleanup of hazardous substances  
13 or the permanent remediation of a release or threatened release of  
14 hazardous substances into the environment in a manner consistent with  
15 the [national contingency plan]. Here, Chubb only alleges that [its  
16 insured] Taube–Koret, by virtue of its ownership of the San Antonio  
17 Road properties, became statutorily liable under CERCLA for the  
18 response costs related to the cleanup of the contaminated soil on those  
19 properties. Chubb does not dispute that the [complaint] lacks any  
20 allegation that Chubb, by any independent action of its own or by  
21 ownership of Taube–Koret’s property, became liable for those  
22 response costs under CERCLA. Chubb only alleges that by virtue of  
23 reimbursing Taube–Koret under its Policy, it became subrogated to  
24 Taube–Koret’s right to pursue a section 107(a) claim. But a subrogee  
25 – simply by stepping into the shoes of the insured via a reimbursement  
26 – cannot be liable for response costs under CERCLA, and thus cannot  
27 itself incur response costs.

28 *Id.* at 961-62. The court thus held that an insurer who had not itself incurred remediation costs was  
limited to bringing suit under the subrogation provision in § 112(c). *Id.* at 971.

Under this rule, it is clear that the portion of Chartis’ § 107(a) claim that is based on  
subrogated claims (where Chartis is seeking funds that it reimbursed to Whittaker) must be  
dismissed.<sup>4</sup> Chartis seeks to distinguish *Chubb* in that here Chartis has paid some of the costs of  
remediation directly to the relevant contractors, rather than simply reimbursing Whittaker for costs  
Whittaker incurred. *Chubb* did not directly address the question of an insurer who directly pays the

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<sup>4</sup> Chartis does not argue to the contrary, but notes that it asserted a claim under § 107(a) as  
Whittaker’s subrogee only to preserve the point for appeal. Chartis’ Opp. at 2 n.7.

1 costs of remediation rather than simply reimbursing its insured, and different parts of the opinion  
2 contain contradictory indications regarding whether an insurer who does so would be limited to  
3 bringing suit under § 112(c).

4         The rule articulated in *Chubb*, that § 107(a) is limited to “a person who, through his or her  
5 own actions, becomes statutorily liable for, or is subject to, the costs related to the cleanup of  
6 hazardous substances” clearly suggests that Chartis may not bring a § 107(a) claim here, as it is not  
7 itself statutorily liable as a PRP, but only contractually liable to PRP Whittaker. This result is  
8 consistent with § 107(e)(1), which provides that liability under CERCLA may not be transferred by  
9 means of an indemnification agreement. 42 U.S.C. § 9607(e)(1). The court in *Chubb* noted that it  
10 would be “fundamentally unfair” to allow insurance companies “a broad subrogation right under  
11 section 107(a) or 112(c)” because insurers “thus would reap the benefits of [their insureds’] rights  
12 without remaining liable under CERCLA for any future violation or continuing remediation.” *Id.* at  
13 971.

14         Similarly, the *Chubb* court’s discussion of the relationship between different parts of the  
15 statute and the policy reasons in favor of limiting insurers to § 112(c) actions supports the  
16 government’s position on this motion. The court expressed concern that “permitting insurers to sue  
17 under section 107(a) would render CERCLA’s subrogation provision under section 112(c)  
18 ‘nugatory.’” *Chubb*, 710 F.3d at 965. The court noted that the subrogation rights provided under §  
19 112(c) were narrower and subject to certain requirements not applicable to § 107(a) actions, such  
20 that if insurers were permitted to bring actions under either provision, they would inevitably bring  
21 claims under § 107(a) and render § 112(c), and the limits on subrogation rights associated therewith,  
22 meaningless. *Id.*

23         On the one hand, this argument would seem to apply with slightly less force in this case:  
24 allowing insurers who have paid remediation expenses directly to pursue § 107(a) actions would not  
25 render § 112(c) a nullity because insurers who have only reimbursed their insured would still be  
26 required to bring their claims under § 112(c). On the other hand, allowing insurers who pay  
27 remediation costs directly to bring suit under § 107(a) would likely undermine the role § 112(c) in  
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1 the statutory scheme by allowing insurers to go around the limits in that section simply by paying  
2 costs directly.

3         It is true that there is some language in *Chubb* that suggests that an insurer in Chartis'  
4 position might be permitted to bring a § 107(a) claim, largely in connection with the court's  
5 discussion distinguishing earlier district court cases. For example, the court distinguishes *Karras v.*  
6 *Teledyne Indus., Inc.*, 191 F. Supp. 2d 1162 (S.D. Cal. 2002), where the court had found that the  
7 plaintiffs – Trusts who had been carrying out remediation efforts – had incurred costs such that they  
8 were able to bring an action for contribution under § 113 of CERCLA. In distinguishing *Karras*, the  
9 *Chubb* court stated:

10                 In *Karras*, the district court held that the plaintiff Trusts incurred  
11 response costs necessary to maintain a contribution action under  
12 section 113 because it contractually assumed the duty to clean up the  
13 polluted site and performed the actual cleanup. *In contrast, Chubb did*  
14 *not engage in any of the remediation activities itself, and the Policy it*  
*issued Taube–Koret was not executed for the purpose of cleaning up a*  
*polluted site.* Rather, the Policy insures Taube–Koret against the risk  
of liability and provides for environmental cleanup costs it could  
potentially incur on its property.

15 *Chubb*, 710 F.3d at 964 (internal citations omitted) (emphasis added). Based on this language,  
16 Chartis argues that the instant case is more like *Karras* than *Chubb* for two reasons: Chartis has  
17 directly paid for remediation efforts, and the insurance policies here were executed for the purpose  
18 of cleaning up a polluted site. To evaluate this argument, it is necessary to take a closer look at  
19 *Karras*, and a similar case from the Seventh Circuit on which Chartis relies, *Bernstein v. Bankert*,  
20 702 F.3d 964 (7th Cir. 2012).

21         Chartis argues that *Karras* and *Bernstein* recognize that insurance companies who directly  
22 pay for clean up costs may bring direct cost actions under § 107(a). Docket No. 53 at 12-14. As an  
23 initial matter, neither *Karras* nor *Bernstein* involved insurance companies. The plaintiffs in both  
24 were rather trustees of trusts created to fund and perform remediation work at specific sites pursuant  
25 to consent orders between PRPs and government agencies. *Bernstein*, 702 F.3d at 970; *Karras*, 191  
26 F. Supp. 2d at 1164. In both cases, the courts found that the trusts had incurred costs within the  
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1 meaning of CERCLA and thus permitted them to bring claims.<sup>5</sup> *Bernstein*, 702 F.3d at 978 (“Of  
2 course, the Trustees also incurred necessary costs of response consistent with the national  
3 contingency plan. They did not simply reimburse the EPA for a removal action it had already  
4 performed; they funded and executed the removal action themselves.”); *Karras*, 191 F. Supp. 2d at  
5 1170 (“The plaintiffs assumed the duty to perform clean-up pursuant to the Trust Agreements, have  
6 performed actual cleanup on the Chatham site and seek an equitable portion of their response  
7 costs.”).

8 Chartis’ analogy to *Karras* and *Bernstein* is unconvincing because an insurance company  
9 who indemnifies a PRP (either through reimbursement or by directly paying remediation costs) is  
10 not in the same position as a trust set up by PRPs pursuant to a consent order for the purpose of  
11 funding and carrying out remediation efforts at a site. Significantly, the court in *Karras* found that  
12 the trusts themselves were “undeniably PRPs.” 191 F. Supp. 2d at 1169.

13 The Court recognizes that, unlike the grantors, the Trusts elected their  
14 PRP status by contract. However, the statute does not foreclose  
15 entities from attaining PRP status by contract. Indeed, CERCLA does  
16 not preclude voluntary associations from pursuing section 113  
17 contribution action as PRPs. The Court is also cognizant of its duty to  
18 liberally interpret CERCLA to advance clean-up efforts. Plaintiffs  
19 acknowledge their PRP status in the complaint, which states that  
20 plaintiffs “bring this action on behalf of the Grantors” and seeks mere  
21 contribution, rather than joint and several cost recovery, as would be  
22 available to non-PRP plaintiffs. Thus, the trusts stand in the shoes of  
23 PRPs *because they have undertaken the liability for clean-up of the  
24 Chatham site.*

25 *Id.* at 1169-70 (internal citations omitted) (emphasis added). Here, Chartis did not undertake the  
26 liability for clean up. Moreover, while it may have paid some of the remediation costs directly, the

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<sup>5</sup> The plaintiffs in *Karras* brought claims not under § 107(a) but under § 113, which allows claims for contribution. 191 F.Supp. 2d at 1164. The plaintiffs in *Bernstein* brought claims under both § 107(a) and § 113. 702 F.3d at 971. Though the *Bernstein* court found that the plaintiffs had incurred costs within the meaning of § 107(a), the court ultimately held that the plaintiff’s § 107(a) claims should not proceed because their claims should have been brought solely under § 113 for reasons that are not relevant to the analysis here. *Id.* at 980.

1 complaint does not allege that Chartis has had any significant role in directing remediation efforts  
2 beyond writing checks.<sup>6</sup> Chartis is not a PRP like the trust in *Karras*.

3 *Bernstein* is similarly distinguishable. While that case does not address the question of  
4 whether the plaintiff trustees are PRPs, the trust in that case, like in *Karras*, was created as part of a  
5 consent agreement between the EPA and various PRPs, and appears to have been the primary entity  
6 directing clean up efforts after its creation. *Id.* at 970-71. The court there found that the plaintiffs  
7 had incurred costs in remediating contamination because they did not simply reimburse the EPA, but  
8 “funded and executed the removal action themselves.” 702 F.3d at 978. Chartis’ involvement in  
9 this case, even if it did directly pay some contractors, is simply not analogous to a trust that is  
10 responsible for managing all clean up efforts at a site.

11 Chartis also relies on the recent Supreme Court case *United States v. Atlantic Research*  
12 *Corporation*, 551 U.S. 128 (2007), arguing that the Court’s reading of the phrase “any other person”  
13 in § 107(a) clearly indicates that Chartis should be able to bring a claim under that provision. The  
14 Court in *Atlantic Research* considered the question of whether PRPs could bring suit against other  
15 PRPs under § 107(a), or whether they were limited to bringing actions for contribution under § 113.  
16 *Id.* at 131. The Court noted that § 107(a)(4)(B) provided for recovery of “any other necessary costs  
17 of response incurred by any other person consistent with the national contingency plan,” and held  
18 that looking to the plain meaning phrase “any other person,” this section clearly “authorizes  
19 cost-recovery actions by any private party, including PRPs.”<sup>7</sup> *Id.* at 136. Chartis thus argues that  
20 under *Atlantic Research*, it should be able to bring a § 107(a) claim because it falls within this  
21 literal, expansive understanding of “any other person.” The court in *Chubb*, however, considered  
22 and rejected this argument. The Ninth Circuit noted that they key term in § 107(a) there, as here, is  
23 not “any other person” but “incur.” 710 F.3d at 963.

24 Chubb argues that the Court’s reading of “any other person” under  
25 section 107(a) supports its position that insurance companies, too,

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26 <sup>6</sup> Chartis’ opposition states that it “consulted regarding the remediation,” but it is not clear  
27 what this entails. Chartis’ Opp. at 13.

28 <sup>7</sup> The Court read the “other” in this phrase to be in reference to entities listed in §  
107(a)(4)(A): the United States Government, states, and Indian tribes.

1 should be included as a party under that provision. However, the  
2 Court’s interpretation of “any other person” under 107(a) is limited to  
“a private party that *has itself incurred cleanup costs.*”

3 *Id.* (citing *Atlantic Research*, 551 U.S. at 139) (emphasis in *Chubb*).<sup>8</sup>

4 In addition to *Chubb*, the United States cites to several district court opinions that it argues  
5 directly address the question of whether an insurer may ever bring suit under § 107(a). Docket No.  
6 54 at 2-3. *California Dep’t of Toxic Substances Control v. City of Chico, Cal.*, which the court in  
7 *Chubb* cited with approval, rejected an insurance company’s attempt to bring a claim under § 107(a).  
8 297 F. Supp. 2d 1227, 1232 (E.D. Cal. 2004). There, the court held:

9 Put directly, Century has not incurred any response costs; rather, it has  
10 indemnified Noret for Noret’s response costs. Its involvement with  
the Central Plume Site is exclusively in its capacity as Noret’s insurer.  
11 Century was obligated by the law governing insurance contracts to  
incur the costs related to the site investigation. Neither CERCLA, nor  
12 any other law concerning environmental remediation, determined its  
obligation to Noret.

13 *Id.*<sup>9</sup> Though it is not entirely clear from the decision in *City of Chico* whether the insurer paid  
14 remediation costs directly or reimbursed its insured, there is some suggestion that it may have paid  
15 costs directly. *Id.* (noting that the insurance company argued that “regardless of the source of its  
16 obligation to incur costs relating to the site remediation the fact remains that Century, and not Noret,  
17 has incurred such costs, and it therefore has the superior right under CERCLA to seek recovery of

18 \_\_\_\_\_  
19 <sup>8</sup> Chartis also argues that it should not be compelled to bring its claims under § 112(c) for  
20 remediation costs it has paid directly because the plain meaning of that section presupposes that the  
party bringing a § 112(c) claim has reimbursed a PRP. Section 112(c)(2) provides that:

21 Any person . . . who pays compensation pursuant to this chapter to any  
22 claimant for damages or costs resulting from a release of a hazardous  
substance shall be subrogated to all rights, claims, and causes of action  
23 for such damages and costs of removal that the claimant has under this  
chapter or any other law.

24 42 U.S.C. § 9612(c)(2). Chartis’ argument on this front is not entirely devoid of merit. Though this  
25 section could be read in such a way that an insurer “pays compensation to” its insured when it  
26 directly pays contractors whom the insured would otherwise have had to pay for remediation efforts,  
this arguably stretches the plain meaning of the text. As discussed below, however, in light of  
*Chubb* and the other cases cited by the parties, this Court finds that *Chubb* is controlling on this  
issue.

27 <sup>9</sup> Some of the other rationales the court gives for its ruling are based on cases that have since  
28 been overruled by *Atlantic Research*, but this does not affect the court’s finding that the insurance  
company had not “incurred” any costs within the meaning of § 107(a).

1 those costs.”) (internal alterations omitted). Similarly, a court in this District held in *Am. Int’l*  
2 *Specialty Lines Ins. Co. v. United States* (“*AISLIC*”), that “Plaintiff is seeking to recover sums it paid  
3 on behalf of its insured; therefore, it may recover under CERCLA only through a subrogation  
4 action.” C 04-01591 CRB, 2005 WL 680159, \*4 (N.D. Cal. Mar. 24, 2005).<sup>10</sup> The decision in  
5 *AISLIC* does not expressly discuss whether the insurance company paid remediation costs directly  
6 but that is implied as the sums were paid “on behalf of” the insured. *Id.* While these cases do not  
7 explicitly address the question of whether an insurer who has made direct remediation payments  
8 may bring a claim under § 107(a), they suggest that a broader understanding of the rule articulated in  
9 *Chubb* is the more accurate one.<sup>11</sup>

10 The government’s position is also supported by the fact that the doctrine of subrogation does  
11 not generally distinguish between an insurer’s direct payments on behalf of its insured and  
12 reimbursement payments to an insured. The court in *Chubb* contains an initial discussion of  
13 subrogation rights generally that suggest that the existence of subrogation rights does not depend on  
14 whether the insurer pays an insured’s loss directly, or through reimbursement. 710 F.3d at 957 (“As  
15

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16 <sup>10</sup> The court in *AISLIC* went on to hold that the insurance company’s contribution claim  
17 under § 112 should be dismissed as unripe because it had not satisfied the “make-whole rule” which  
18 requires an insurance company to make its insured whole before pursuing subrogated claims. 2005  
19 WL 680159, \*4. Chartis argues that *AISLIC* is no longer good law because the Court of Federal  
20 Claims, to which the case was transferred, later found that the parties had contracted around the  
21 make-whole rule, and that the insurance company’s claims were thus ripe. *Am. Int’l Specialty Lines*  
*Ins. Co. v. United States*, 05-1020 C, 2008 WL 1990859 (Fed. Cl. Jan. 31, 2008). The Court of  
22 Federal Claims, however, did not address the question of whether the insurance company could  
23 bring CERCLA claims under sections other than § 112, so to the degree that it overruled the district  
24 court’s decision, it did not do so with respect to the holding that is relevant to the analysis of §  
25 107(a).

26 <sup>11</sup>After the hearing in this case, the United States submitted a notice of recent decision in  
27 *Appleton Papers Inc. v. George A. Whiting Paper Co.*, Case No. 08-C-16 (E.D. Wis. June 25, 2013).  
28 Docket No. 60. This case, which cites *Chubb*, rejected the argument that a party that was only  
contractually liable for clean up costs could bring a claim under § 107(a), even though that party had  
paid response costs directly. Plaintiffs object to this submission as impermissible under Local Rule  
7-3(d), which provides that parties may submit notices of recent decisions “[b]efore the noticed  
hearing date.” Local Rule 7-3(d)(2). While the holding in *Appleton Papers* does seem to provide  
some support for this Court’s conclusion that Chartis may not bring a claim under § 107(a), it also  
appears distinguishable in that the court in that case had previously found that the entity the plaintiff  
was indemnifying was not entitled to pursue a claim under § 107(a) for reasons that are not entirely  
clear in the order. In any case, this Court finds that nothing in *Appleton Papers* changes the analysis  
in this section, and thus does not rely on this case in reaching its conclusion. Plaintiffs’ objection  
about the propriety of the submission is thus overruled as moot.

1 the party who pays the insured’s loss, the insurer (the subrogee) ‘stands in the shoes’ of the insured  
2 (the subrogor), and succeeds to the insured’s rights and remedies.”). Though *Chubb* ultimately  
3 found that the statutory subrogation provision in CERCLA displaces common law subrogation, the  
4 fact that the doctrine of subrogation historically has not distinguished between direct and  
5 reimbursement payments by insurers provides some support for the government’s position.

6 Accordingly, the Ninth Circuit’s discussion of subrogation rights in *In re Hamada* is  
7 instructive on the issue of subrogation rights generally:

8 In general terms, subrogation is the substitution of one party in place  
9 of another with reference to a lawful claim, demand or right. It is a  
10 derivative right, *acquired by satisfaction of the loss or claim that a*  
11 *third party has against another*. Subrogation places the party paying  
12 the loss or claim (the “subrogee”) in the shoes of the person who  
13 suffered the loss (“the subrogor”). Thus, when the doctrine of  
14 subrogation applies, the subrogee succeeds to the legal rights and  
15 claims of the subrogor with respect to the loss or claim.

16 There are various types of subrogation, most commonly categorized as  
17 “conventional” or “contractual” subrogation, “legal” or “equitable”  
18 subrogation, and statutory subrogation. “Conventional” or  
19 “contractual” subrogation rights arise from an express or implied  
20 agreement between the subrogor and subrogee. “Equitable  
21 subrogation is a legal fiction, which permits a party *who satisfies*  
22 *another’s obligation* to recover from the party ‘primarily liable’ for  
23 the extinguished obligation.” The right of “legal” or “equitable”  
24 subrogation arose as a “creature of equity” and “is enforced solely for  
25 the purpose of accomplishing the ends of substantial justice.”  
26 Statutory subrogation, as one might expect, occurs by virtue of a right  
27 created by statute.

19 291 F.3d 645, 649 (9th Cir. 2002) (emphasis added) (internal citations omitted).

20 Finally, the subrogation clause in the insurance policy between Whittaker and Chartis is  
21 broadly written and comports with the common law understanding of subrogation rights. The Policy  
22 contains the following subrogation provision:

23 **Subrogation** – In the event of any payment under this Policy, the  
24 Company shall be subrogated to all the Insured’s rights of recovery  
25 therefor [sic] against any person or organization and the Insured shall  
26 execute and deliver instruments and papers and do whatever else is  
27 necessary to secure such rights including without limitation,  
28 assignment of the Insured’s rights against any person or organization  
who caused Pollution Conditions or a Pollution Release on account of  
which the Company made any payment under this Policy . . . .



1 FAC ¶ 56. This clause gives Chartis subrogation rights for “any payment under this Policy,” and  
2 does not distinguish between payments to the insured and payments to third parties to satisfy the  
3 insured’s obligations.

4 Having considered the cases cited by the parties, the Court finds Plaintiff’s attempts to  
5 distinguish *Chubb* unpersuasive, and finds that its holding applies here. Though the decision in  
6 *Chubb* has some language suggesting that the rule it articulates is dependant on the fact that the  
7 insurer in that case had merely reimbursed the insured, the court’s core holding is that an insurer has  
8 not “incurred” costs within the meaning of § 107(a) because it is not liable under CERCLA for  
9 remediation costs. Under this rule, the holding in *Chubb* applies with equal force to insurers who  
10 pay costs directly. Further, the general understanding of subrogation rights does not appear to  
11 distinguish between direct payments to third parties and payments to reimburse an insured, and this  
12 Court can see no reason why such a distinction should be read into the treatment of subrogation  
13 rights under CERCLA.

14 This Court accordingly **GRANTS** Defendant’s motion to dismiss Chartis’ § 107(a) claims.

15 C. Chartis’ Claims Under CERCLA § 112

16 In addition to its direct and subrogated claims under § 107(a), Chartis brings claims pursuant  
17 to its subrogation rights under § 112(c). That provision provides:

18 Any person . . . who pays compensation pursuant to this chapter to any  
19 claimant for damages or costs resulting from a release of a hazardous  
20 substance shall be subrogated to all rights, claims, and causes of action  
for such damages and costs of removal that the claimant has under this  
chapter or any other law.

21 42 U.S.C. § 9612(c)(2). Claims under § 112(c) are subject to a different limitations period than  
22 claims under § 107(a). 42 U.S.C. § 9613(g) (three year limitations period for claims based on  
23 subrogated rights). The United States argues that Chartis’ § 112(c) claim must be dismissed because  
24 Whittaker is not a “claimant” within the meaning of that section, and because this claim is barred by  
25 the statute of limitations.

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1           1.       Failure to State a Claim

2           The United States argues that Chartis has failed to state a claim under § 112(c) because it has  
3 failed to sufficiently allege that Whittaker is a “claimant” within the meaning of that section. The  
4 United States relies entirely on *Chubb* in support of its argument.

5           As the court in *Chubb* noted, CERCLA defines “claimant” as “any person who presents a  
6 claim for compensation under this chapter,” and “claim” as “a demand in writing for a sum certain.”  
7 42 U.S.C. § 9601(4)-(5). Though this definition does not specify to whom a claim must be made,  
8 the court in *Chubb*, looking to the statutory scheme and Ninth Circuit precedent, held that “a  
9 claimant is a person who demands reimbursement of environmental cleanup costs from (i) the  
10 Superfund or (ii) a potentially liable party.” 710 F.3d at 959. As there was no allegation that the  
11 insured in *Chubb* had made any demand on the defendants, the court found that the insured was not  
12 a “claimant” within the meaning of § 112(c), and that the insurance company thus could not bring a  
13 subrogation suit under that provision.

14           Chartis contends that in this case, Whittaker has made two claims against the United States  
15 within the meaning of the statute: one in the form of its original complaint, which was filed on  
16 December 10, 2012 and did not include a § 112(c) claim, and the other in a March 28, 2013 letter  
17 from Whittaker to the United States. Chartis’ Opp. at 15-16. The fundamental dispute between the  
18 parties is whether *Chubb* requires that Whittaker have already submitted a claim to the United States  
19 before the time that Chartis made payments to or on behalf of Whittaker for the remediation.

20           The United States’ position – that Whittaker must have submitted the claim prior to any  
21 payments made by Chartis – finds some support in the text of § 112(c). That section provides  
22 subrogation rights to any person “who pays compensation pursuant to this chapter to any claimant.”  
23 42 U.S.C. § 112(c)(2). This language could be read to require that the party receiving payment be a  
24 “claimant” at the time payment is received.

25           While the court in *Chubb* had no occasion to consider the timing of any claim requirement  
26 because the insured in that case had made no claim at any point, the court’s discussion of the policy  
27 rationale for the rule:

28

1 Requiring PRPs to *first seek claims from the Superfund or other PRPs,*  
2 *instead of resorting to insurance money,* ensures that PRPs are  
3 identified and held accountable for cleanups. PRPs are in a better  
4 position to locate and identify other PRPs because they are more  
5 knowledgeable about the polluting site and engage in the cleanups  
6 themselves, rather than insurance companies who are detached from  
7 the property and are not involved in the remediation activities. This  
8 furthers CERCLA’s goal of making polluters pay for cleanup costs.  
9 Making polluters pay, in turn, frees up, not reduces, the available  
10 insurance money for remediation. Additionally, requiring the insured  
11 to pursue a claim before a subrogation right vests under section 112(c)  
12 would not be unduly burdensome or have a slowing effect on cleanups  
13 of polluted sites. Insurance companies may write their policies in a  
14 way as to require reasonable cooperation from their insureds. In the  
15 Policy at issue, for example, Taube–Koret already had a duty “to  
16 cooperate and otherwise offer [Chubb] reasonable assistance in the  
17 defense, investigation or settlement of a claim.”

18 710 F.3d at 970 (emphasis added). Arguably, the policy concerns *Chubb* highlights suggest it would  
19 be preferable for an insured to first make a demand of other PRPs before seeking compensation from  
20 insurance. On the other hand, in the next paragraph, *Chubb* notes that “requiring the insured to  
21 *make a claim before an insurer can pursue a section 112(c) claim* does not give a “free pass” to  
22 actual polluters.” *Id.* (emphasis added). This phrasing suggests that the insured need only make a  
23 claim prior to the insurer pursuing a § 112(c) action, not prior to receiving any payment from the  
24 insurer.

25 In light of the policy concerns behind CERCLA, the Court finds the government’s reading of  
26 § 112 overly harsh and not compelled by the holding in *Chubb*. If this Court were to adopt the  
27 government’s proposed rule and require a PRP expending funds for clean up efforts to submit a  
28 claim to other PRPs prior to any payments by the insurance company, subrogation claims could  
forever be barred as to funds expended by insurance companies before their insureds submitted  
claims to other PRPs. This would incentivize insurance companies to delay expending funds until  
they could be sure that the insured had submitted claims to all other PRPs. Such a delay could be  
significant, especially where the identity of the other PRPs is not initially known. Such a rule could  
have the effect of delaying the flow of money for clean up efforts, and thus delay clean up of  
contaminated sites for a significant period of time. It would also allow PRPs to escape liability for  
their full share of costs where their identities were discovered after clean up efforts were underway  
and related insurance payments had been made. Such a result is not required by either the text of §

1 112(c) or the holding in *Chubb* and would be contrary to CERCLA’s goal of promoting the timely  
2 clean up of hazardous waste sites. Furthermore, requiring a claim be made before an insurer can  
3 bring a § 112(c) action would still encourage prompt action by PRPs against other PRPs.

4 This Court thus finds that Whittaker is a “claimant” within the meaning of § 112(c) because  
5 it submitted a claim to the United States requesting contribution prior to Chartis’ assertion of §  
6 112(c) claims in the instant suit.

7 2. Statute of Limitations

8 The United States argues that in any case, Chartis’ claims are barred by the statute of  
9 limitations. Under CERCLA, “[n]o action based on rights subrogated pursuant to this section by  
10 reason of payment of a claim may be commenced under this subchapter more than 3 years after the  
11 date of payment of such claim.” 42 U.S.C. § 9613(g)(4) (§ 113(g)(4)). The amended complaint  
12 alleges that Chartis has incurred at least some response costs within the last three years (and that it  
13 will continue to incur costs), it is not clear how much of these costs are inside the three year  
14 window. FAC ¶ 96. The parties dispute when the limitations period begins to run. In their briefs  
15 and at the hearing, the parties discussed five different possibilities: (1) when the claim has been fully  
16 paid; (2) when the insured makes a claim to the defendant; (3) each time the insurer makes a  
17 payment; (4) when the insurer makes its first payment on the claim; or (5) when the insurer becomes  
18 liable for the payment. *See* Mot. at 13-15; Reply at 7-9. Chartis argues that the statute begins to run  
19 either from the date the claim is fully paid, or, in the alternative, from the date of each payment  
20 made by the insurer. Few cases cite to this section of CERCLA, and none squarely addresses the  
21 question of when the limitations period begins to run.

22 The government points to *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.* (“*Chubb II*”), in  
23 which the court dismissed the insurer’s § 112(c) claims with leave to amend because the complaint  
24 failed to allege when the insured made its claims or when the insurer paid the claims. C 09-4485 JF  
25 (PVT), 2010 WL 2573386, \*6-7 (N.D. Cal. June 23, 2010). If anything, however, this case  
26 undermines the government’s argument that the statute of limitations begins to run when the insurer  
27 becomes liable for payments, as the court notes that “if [the insurer] *paid* [the insured’s] claims  
28 before September 23, 2006, the subrogation claim is time-barred.” *Id.* at \*6. This case is not

1 helpful, however, in parsing between the remaining alternative readings of § 113(g)(4), however, as  
2 the insurer in that case appears to have made one lump sum payment to its insured. *Id.* at \*2, \*6;  
3 *Chubb*, 710 F.3d at 955. The court thus had no occasion to consider in a case involving multiple  
4 payments whether the statute begins to run at the date of first payment, the date of last payment, or  
5 from the date of each payment separately made, as there was only one date of payment in that case.

6         The government’s argument that the limitations period begins to run from the date that the  
7 insurer becomes liable for the costs is not consistent with the plain language of § 113(g)(4), which  
8 states that no action may be brought “more than 3 years after *the date of payment of such claim.*”  
9 The cases the government cites for the argument that “a cause of action usually accrues and the  
10 statute of limitations commences to run when the wrongful act or omission results in damages,” do  
11 not arise under CERCLA, nor do they concern insurers seeking to recover from third parties for  
12 payments made on behalf of their insureds. *Maldonado v. Harris*, 370 F.3d 945, 955 (9th Cir. 2004)  
13 (causes of action under § 1983 accrue when the plaintiff knows or has reason to know of the injury  
14 that is the basis of the action); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 257 (1980) (statute of  
15 limitations on Title VII claim begins to run when professor is denied tenure, not at the end of short  
16 term contract following the denial); *Louisiana-Pac. Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1580-81  
17 (9th Cir. 1994) (discussing Washington law on statute of limitations governing products liability  
18 actions).

19         Chartis also argues that a rule that the statute of limitations begins to run when the insurer  
20 makes its first payment on a claim is in tension with the “make whole rule,” and puts insurers who  
21 pay claims over a long period of time at risk of being shut out of court. For example, in *City of*  
22 *Chico*, the court dismissed the insurance company’s § 112(c) claims as unripe because the insurance  
23 company had not yet fully compensated its insured for remediation costs. 297 F. Supp. 2d at 1236-  
24 37. The court noted that “[f]ederal common law requires that, absent an agreement to the contrary,  
25 an insurance company may not enforce a right to subrogation until the insured has been fully  
26 compensated, that is, has been made whole.” *Id.* at 1236. Though parties may contract around this  
27 rule, see *Barnes v. Indep. Auto. Dealers Ass’n of California Health & Welfare Benefit Plan*, 64 F.3d  
28 1389, 1394 (9th Cir. 1995), and it is not at issue in this case, the make whole rule weighs against

1 interpreting the limitations period in § 113(g)(4) to run from the initial payment made by the  
2 insurance company. Such an interpretation, requiring an insurer to bring suit within three years of  
3 making the first payment on a claim, would shut insurers out of court where they were making  
4 payments on a complex, multi-year claim and had not contracted around the make whole rule. It  
5 also would encourage the filing of early and multiple suits to collect on a series of payments, not an  
6 unlikely event since clean up efforts often take years.

7         On the other hand, Chartis points to a number of cases interpreting limitations periods in  
8 cases involving ongoing payments made in the course of long-term remediation efforts. Though  
9 none of them analyze the limitations period under CERCLA, they hold that the statute of limitations  
10 on an insurer's cause of action runs anew from each payment it makes to its insured.  
11 *Sherwin-Williams Co. v. ARTRA Grp., Inc.*, 125 F. Supp. 2d 739, 757 (D. Md. 2001) (under  
12 Maryland law, statute of limitations for contract indemnification ran separately for each payment the  
13 insurance company made in the course of multi-year clean up of contaminated property); *State Of*  
14 *New York v. Speonk Fuel, Inc.*, 307 A.D.2d 59, 61, 762 N.Y.S.2d 674, 676 (2003) (rejecting  
15 arguments that statute of limitations began to run on cause of action for common law indemnity  
16 either at the time of the first payment, or at the time of the last payment, and holding that a cause of  
17 action accrues "each time the Fund makes a payment for cleanup and removal costs" and that the  
18 plaintiff could thus recover only for payments made within the limitations period) *aff'd sub nom.*  
19 *State v. Speonk Fuel Inc.*, 3 N.Y.3d 720, 819 N.E.2d 991 (2004); *In re Methyl Tertiary Butyl Ether*  
20 *(MTBE) Products Liab. Litig.*, MASTER FILE1:00-1898, 2007 WL 1601491 (S.D.N.Y. June 4,  
21 2007) ("Each payment of remediation costs for which a petroleum discharger is responsible incurs a  
22 new loss for a plaintiff, creating a new indemnity claim with its own new statute of limitations (it  
23 does not, however, reset the clock on an already-expired indemnity claim)."), *reconsideration*  
24 *granted on other grounds sub nom. In re Methyl Tertiary Butyl Ether ("MTBE") Products Liab.*  
25 *Litig.*, 1:00-1989, 2007 WL 2936214 (S.D.N.Y. Oct. 4, 2007); *Soo Line R. Co. v. Tang Indus., Inc.*,  
26 998 F. Supp. 889, 898 (N.D. Ill. 1998) (statute of limitations under Illinois Joint Contribution  
27 Tortfeasor act barred recovery of payments made prior to two year limitations period, but not of  
28 payments made within two year period). The government correctly points out that each of these

1 cases relies on provisions of law that are inapplicable here. Nonetheless, together they suggest that  
2 in cases involving multiple payments made over the course of long-term remediation efforts, courts  
3 often find that each payment gives rise to its own cause of action, and that the limitations period thus  
4 runs from each separate payment for that payment, rather than from either the first or last payment  
5 made. Such a rule would be entirely consistent with the text of § 113(g)(4) which states that no  
6 action shall commence “more than 3 years after the date of payment of such claim.”

7 For the first time at the hearing, Chartis suggested that consistent with the interpretation of §  
8 112(c) discussed above, the statute of limitations should be interpreted to run beginning at the date  
9 that the insured makes a claim against other PRPs (rather than when the insurer makes payment). As  
10 the insurer’s subrogation rights under § 112(c) do not vest until such a claim has been made, a  
11 contrary rule would present the danger of claims being barred by the statute of limitations before the  
12 insurer’s right to bring them even vests. Where an insurer makes payments more than three years  
13 before its insured makes a claim to the other PRP, for example, the initial payments would be barred  
14 by the statute of limitations even though the insurance company could not have brought suit under §  
15 112(c) prior to the date its insured made the claim. However, a construction of § 113(g)(4) which  
16 provides that the limitations period accrues upon the insurer’s payment, together with the  
17 requirement under § 112(c) that claims first be made against other PRPs, would have the salutary  
18 effect of encouraging the prompt presentation of claims to other PRPs and prevents stale subrogation  
19 claims by insurers.

20 Accordingly, this Court finds that the statute of limitations on Chartis’ § 112(c) claims runs  
21 separately for each payment made in the course of remediation efforts. Since Chartis alleges that it  
22 has made some such payments within the last three years, its claims are not entirely barred by the  
23 statute of limitations. The United States’ motion, however, is **GRANTED** as to all payments made  
24 by Chartis more than three years prior to April 23, 2013, the date Chartis filed its amended

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1 complaint and asserted § 112(c) claims for the first time. The government’s motion to dismiss  
2 Chartis’ § 112(c) claim is otherwise **DENIED**.<sup>12</sup>

3 D. Claims for Joint and Several Liability

4 In the complaint, Plaintiffs allege that the United States “is strictly, and jointly and severally,  
5 liable, or is otherwise liable as provided by applicable law, to Chartis and Whittaker” under §  
6 107(a).<sup>13</sup> FAC ¶ 86. The United States moves to dismiss Plaintiffs’ request to hold the United  
7 States jointly and severally liable, arguing that as a PRP, Whittaker can only recover contribution in  
8 proportion to fault. The United States further argues that as Whittaker’s insurer, Chartis is entitled  
9 to rights no greater than Whittaker’s, and that it thus is also barred from seeking to recover from the  
10 United States anything more than costs in excess of Whittaker’s proportional share.

11 1. Propriety of 12(b)(6) Motion

12 As an initial matter, Plaintiffs dispute whether a Rule 12(b)(6) motion to dismiss is the  
13 appropriate vehicle for the United States’ request, as the unavailability of joint and several liability  
14 would not mean that Plaintiffs had failed to state a claim for relief under § 107(a). Plaintiffs argue  
15 that Rule 12(b)(6) is “available to dismiss *claims*, not *allegations*,” and that the government’s  
16 motion to dismiss allegations of joint and several liability should be denied. Whittaker Opp. at 3  
17 (emphasis in original). Plaintiffs cite no case holding that Rule 12(b)(6) is not available to dismiss  
18 allegations that a defendant is jointly and severally liable, nor do they make any argument about  
19 what the proper procedural vehicle for such a request would be.

20 The United States points to *Whittlestone, Inc. v. Handi-Craft Co.*, in which the court held  
21 that Rule 12(f) “does not authorize a district court to strike a claim for damages on the ground that  
22 such damages are precluded as a matter of law.” 618 F.3d 970, 971 (9th Cir. 2010). In that case, the  
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24 <sup>12</sup> In its motion, the United States argues that to the degree that Chartis’ claims under §  
25 107(a) and § 112(c) are completely dismissed, Chartis’ claim for declaratory relief must also be  
26 dismissed. Chartis does not dispute this point. *See City of Chico*, 297 F. Supp. 2d at 1236 n.10  
27 (dismissing claim for declaratory relief when the plaintiff’s other CERCLA claims were dismissed).  
As this Court is denying the government’s motion as to some of Chartis’ claims, however, the  
motion to dismiss Chartis’ claim for declaratory relief is likewise **DENIED**.

28 <sup>13</sup> The complaint does not mention joint and several liability under Chartis’ § 112(c) claim.  
FAC ¶¶ 90-100.



1 district court had dismissed the plaintiff’s claims for lost profits and consequential damages under  
2 Rule 12(f) because it found that the contract between the parties clearly excluded recovery of such  
3 damages. *Id.* at 973. As the request to strike damages did not fall within one of the categories of  
4 material that may be struck under Rule 12(f),<sup>14</sup> the court found that the defendant’s “12(f) motion  
5 was really an attempt to have certain portions of Whittlestone’s complaint dismissed or to obtain  
6 summary judgment against Whittlestone as to those portions of the suit-actions better suited for a  
7 Rule 12(b)(6) motion or a Rule 56 motion, not a Rule 12(f) motion.” *Id.* at 974.

8 Citing *Whittlestone*, the court in *Davis v. Capitol Records*, dismissed a request for punitive  
9 damages under Rule 12(b)(6) when such damages were not available in connection with the claims  
10 the plaintiff was bringing. LLC, 12-CV-1602 YGR, 2013 WL 1701746, \*7 (N.D. Cal. Apr. 18,  
11 2013). The Court noted that the “Ninth Circuit has made plain that a court cannot strike certain  
12 damages under Rule 12(f) based upon an argument that they are precluded by law, but has endorsed  
13 dismissing them under Rule 12(b)(6) when appropriate.” *Id.* at \*7 n.3. While this Court could find  
14 no case applying *Whittlestone* to dismiss a request for joint and several liability, the rationale in that  
15 case clearly indicates that such a request is proper under Rule 12(b)(6).

16 2. Availability of Joint and Several Liability

17 The parties dispute whether, in the wake *Atlantic Research*’s holding that PRPs may pursue  
18 claims against other PRPs under § 107(a), a PRP bringing such a claim may still seek to impose joint  
19 and several liability as is generally permitted under § 107(a). The United States argues that *Atlantic*  
20 *Research* does not disturb the prior rule that PRPs may seek only contribution from other PRPs,  
21 regardless of the fact that they may now do so under § 107(a) as well as § 113. Plaintiffs argue that  
22 *Atlantic Research* declined to limit a PRP bringing suit under § 107(a) to seeking several damages  
23 limited to the amount in excess of that PRP’s proportionate share of costs, and that *Atlantic*  
24 *Research* identified the procedural mechanism for addressing concerns about the fair apportionment  
25 of costs.

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28 <sup>14</sup> Rule 12(f) provides that a “court may strike from a pleading an insufficient defense or any  
redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f).

1 Prior to *Atlantic Research*, a number of circuits, including the Ninth Circuit, had held that a  
2 PRP bringing suit against another PRP could only seek contribution under § 113, and could not  
3 bring a claim for full recovery of costs under § 107(a). *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543  
4 U.S. 157, 169 (2004) (collecting cases); *Pinal Creek Grp. v. Newmont Min. Corp.*, 118 F.3d 1298,  
5 1301-06 (9th Cir. 1997).<sup>15</sup> The Ninth Circuit, while it did not prohibit PRPs from bringing suit  
6 under § 107(a), held that in suits brought by PRPs, § 107(a) had to be read together with § 113,  
7 which provides for actions for contribution between PRPs:

8 Because a claim asserted by a PRP under § 107 requires the  
9 application of § 113, a PRP is limited to a contribution claim governed  
10 by the joint operation of §§ 107 and 113. Therefore, we hold that,  
11 under CERCLA, a PRP does not have a claim for the recovery of the  
12 totality of its cleanup costs against other PRPs, and a PRP cannot  
13 assert a claim against other PRPs for joint and several liability.

14 *Pinal Creek*, 118 F.3d at 1306. Courts holding that § 107(a) was unavailable to PRPs, or limiting its  
15 scope, expressed concern that PRPs bringing suit against other PRPs could use § 107(a) to evade the  
16 shorter statute of limitations and equitable apportionment of § 113 actions. *See Atlantic Research*,  
17 551 U.S. at 137-38 (recognizing such concerns).

18 As discussed above, however, *Atlantic Research* held that PRPs could bring suit against  
19 other PRPs under § 107(a). *Id.* at 141. The Court explicitly addressed concerns that allowing such  
20 actions would allow PRPs to skirt the equitable apportionment provisions in § 113. *Id.* at 140-41.  
21 The Court assumed, without so holding, that § 107(a) provides for joint and several liability. *Id.* at  
22 140 n.7. The Court nevertheless rejected arguments that it was inequitable to allow PRPs to pursue  
23 § 107(a) actions. *Id.* at 140. Noting that § 107(a) and § 113 still applied under different  
24 circumstances and that PRPs would thus often not have a choice between the two, the Court held  
25 that:

26 For similar reasons, a PRP could not avoid § 113(f)'s equitable  
27 distribution of reimbursement costs among PRPs by instead choosing  
28 to impose joint and several liability on another PRP in an action under  
§ 107(a). The choice of remedies simply does not exist. In any event,

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<sup>15</sup> Some circuits, however, reconsidered this position prior to *Atlantic Research* when the Supreme Court limited § 113 actions in *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004). *See Atlantic Research*, 551 U.S. at 133-34.

1 a defendant PRP in such a § 107(a) suit could blunt any inequitable  
2 distribution of costs by filing a § 113(f) counterclaim. 459 F.3d, at  
3 835; *see also Consolidated Edison, supra*, at 100, n. 9 (collecting  
4 cases). Resolution of a § 113(f) counterclaim would necessitate the  
5 equitable apportionment of costs among the liable parties, including  
6 the PRP that filed the § 107(a) action. 42 U.S.C. § 9613(f)(1) (“In  
7 resolving contribution claims, the court may allocate response costs  
8 among liable parties using such equitable factors as the court  
9 determines are appropriate”).

6 *Id.* Plaintiffs argue that such a § 113 counterclaim is the proper vehicle for ensuring equitable  
7 distribution, not dismissing their request for joint and several liability. Whittaker Opp. at 5  
8 (“Further, because other avenues are available to a Defendant to ‘blunt any inequitable distribution  
9 of costs,’ the current state of the law is that such a claim remains permissible, while procedurally it  
10 may never come to bear.”).

11 This reading of *Atlantic Research* is supported by the Ninth Circuit’s decision in *Kotrous v.*  
12 *Goss-Jewett Co. of N. Cal.*, 523 F.3d 924 (9th Cir. 2008). In that case, the plaintiff had brought  
13 claims for cost recovery under § 107(a) and for contribution under § 113(f). The court recognized  
14 that *Atlantic Research* had overruled the Ninth Circuit’s decision in *Pinal Creek*:

15 In *Atlantic Research*, the Supreme Court held that § 107(a) provides  
16 “so-called potentially responsible parties (PRPs) . . . with a cause of  
17 action to recover costs from other PRPs,” *id.* at 2334, whereas § 113  
18 provides an action for contribution. In so holding, the Court  
19 undermined *Pinal Creek*’s holding that § 107 entitles PRPs to seek  
20 only contribution, not cost recovery, from other PRPs. To the extent,  
21 therefore, that *Pinal Creek* conflicts with *Atlantic Research*, we  
22 conclude that *Pinal Creek* has been overruled.

20 *Id.* at 926-27. The court found that

21 Under *Atlantic Research*, a PRP . . . that incurs costs voluntarily,  
22 without having been subject to an action under § 106 or § 107, may  
23 bring a suit for recovery of its costs under § 107(a); a party in such a  
24 position does not need a right to implied contribution under § 107.  
25 Any of the defendants sued by such a PRP may seek contribution  
26 under § 113(f) because they now will have been subject to an action  
27 under § 107.

25 *Id.* at 933. Though no party in *Kotrous* appears to have made the argument that PRPs bringing suit  
26 under § 107(a) are precluded from seeking to impose joint and several liability, this argument is  
27 clearly precluded by the court’s holding.

1 The United States points to a *City of Chico*, which noted that PRPs were limited to  
2 recovering contribution from other PRPs. 297 F. Supp. 2d at 1234. This case, however, pre-dates  
3 *Atlantic Research* and assumes, contrary to the Court’s holding in that case, that an insured PRP  
4 cannot bring a claim for cost recovery under § 107(a). *Id.* (citing *Pinal Creek*, 118 F.3d 1298).<sup>16</sup>  
5 The United States cites also *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 617  
6 (2009). That case, however, did not deal with a suit brought by one PRP against another, but by a  
7 suit by the EPA against several PRPs to recover remediation costs the agency had incurred. *Id.* In  
8 that case, the Court considered whether the evidence presented to the district court was sufficient to  
9 apportion liability between the PRPs rather than holding them jointly and severally liable, and found  
10 that it was. *Id.* The case is thus unhelpful in assessing whether one PRP may seek to hold another  
11 jointly and severally liable.

12 The United States objects that requiring it to bring a counterclaim under § 113(f) is unfair  
13 because it allows Plaintiffs to shift the burden of proving apportionment of blame to the defendant.  
14 While the government may be disadvantaged by such burden shifting, such a scenario was explicitly  
15 contemplated by the courts in *Atlantic Research* and *Kotrous*.<sup>17</sup> The United States also expresses  
16 concern that this scheme will be unavailing against Chartis, because Chartis will argue that it is an  
17 innocent party not subject to a § 113 action. As this Court is dismissing Chartis’ claims under §  
18 107(a), however, this argument is moot.

19 As the holdings in *Atlantic Research* and *Kotrous* indicate that PRPs may bring claims  
20 seeking to impose joint and several liability under other PRPs under § 107(a), this Court **DENIES**  
21 the government’s motion to dismiss Plaintiff’s request for joint and several liability. This does not,  
22 of course, prevent the United States from bringing a counterclaim for contribution under § 113(f).

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24 <sup>16</sup> Though the United States points to two district courts that have followed *City of Chico* in  
25 this District, those cases do not discuss the holding that PRPs are limited to recovering in  
26 contribution and may not impose joint and several liability. *AISLIC*, 2005 WL 680159, at \*3-4;  
*Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 788 F. Supp. 2d 1017, 1023 (N.D. Cal. 2011) *aff’d*,  
710 F.3d 946 (9th Cir. 2013).

27 <sup>17</sup> The parties also dispute whether Whittaker has taken an inconsistent position in another  
28 case about the availability of joint and several liability in actions by PRPs under § 107(a), and attach  
filings from that case in support of their position. Since neither party explains, however, why this  
would be relevant to the instant motion, this Court disregards these arguments and submissions.

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**IV. CONCLUSION**

For the foregoing reasons the United States' motion to dismiss is **GRANTED** as to Chartis' § 107(a) claim, and as to the portion of the § 112(c) claim that is based on payments made by Chartis more than three years prior to April 23, 2013. The motion to dismiss is otherwise **DENIED**.

This order disposes of Docket No. 51.

IT IS SO ORDERED.

Dated: July 19, 2013

  
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EDWARD M. CHEN  
United States District Judge