UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
SUNOCO, INC. (R&M),

Plaintiff,

-against-

MEMORANDUM, DECISION, & ORDER AFTER BENCH TRIAL
11-CV-2319(JS)(GRB)

175-33 HORACE HARDING REALTY CORP.,

Defendant.
----------X
APPEARANCES
For Plaintiff: Henry Reichner, Esq.
Reed Smith LLP
1717 Arch St., Suite 3100
Philadelphia, PA 19103

Michael Nicholas DiCanio, Esq.
Othiamba N. Lovelace, Esq.
Reed Smith LLP
599 Lexington Ave.
New York, NY 10020

Michael C. Falk, Esq.
Reed Smith LLP
1650 Market St.
Philadelphia, PA 19103

For Defendant: Robert Neuner, Esq.
Kenneth L. Robinson, Esq.
Robinson & Associates, P.C.
35 Roosevelt Ave.
Syosset, NY 11791

SEYBERT, District Judge:

Plaintiff Sunoco, Inc. (R&M) ("Plaintiff" or "Sunoco") commenced this action against defendant 175-33 Horace Harding Reality Corp. ("Defendant" or "HHR") seeking recovery of expenses

incurred in the remediation of soil and groundwater contamination located at 175-33 Horace Harding Expressway, Flushing, New York (the "Property" or the "Site"). In a September 4, 2013 Memorandum and Order, the Court granted Plaintiff summary judgment on its breach of contract claim, but allowed the issue of damages and the New York Navigation Law claims to proceed to trial. Sunoco, Inc. (R&M) v. 175-33 Horace Harding Realty Corp., 969 F. Supp. 2d 297, 309 (E.D.N.Y. 2013). A bench trial was held, and the Court, pursuant to Federal Rule of Civil Procedure 52(a), now issues its findings of fact and conclusions of law. After considering the evidence offered at trial, the arguments of counsel, and the controlling law on the issues presented, the Court finds in favor of Plaintiff.

FINDINGS OF FACT

Based on the evidence presented, the Court makes the following findings of fact pursuant to Federal Rule of Civil Procedure 52(a).[1] These findings of fact are drawn from witness

[1] To the extent that any of the findings of fact may be deemed conclusions of law, they shall also be considered conclusions. Likewise, to the extent that any of the conclusions of law may be deemed findings of fact, they shall be considered findings. See Miller v. Fenton, 474 U.S. 104, 113-14, 106 S. Ct. 445, 451, 88 L. Ed. 2d 405 (1985) (noting the difficulty, at times, of distinguishing findings of fact from conclusions of law).

testimony at trial ("Tr."), the parties' trial exhibits ("Ex."),[2] and undisputed facts submitted by the parties in the Joint Pre-Trial Order ("PTO")[3].

Sunoco owned the Property and operated a retail gasoline service station. (PTO § VI.A.1.) Sometime prior to 1990, Adelmo Cioffi ("Cioffi")--the sole owner of HHR--became a tenant at the Property and continued running the gasoline station. (PTO § VI.C.7; Tr. at 666:15-667:1 (Cioffi).)

In 1990, during a project to replace a number of the Site's underground storage tanks, Sunoco discovered that soil at the Site had been contaminated. (Ex. HH at 26-30.) Therefore, in addition to removing the old underground storage tanks, Sunoco excavated and removed approximately 1100 cubic yards[4] of contaminated soil from the Site. (Ex. HH at 26-30). Sunoco installed new tanks, refilled the Site with clean soil, and resumed operations. (Tr. at 443:11-14 (Senh).) Nonetheless, some residual contamination remained. (Tr. at 482:21-483:16 and 443:24-444:3 (Senh).)

---

[2] In accordance with the Court's convention governing the labeling of trial exhibits, Plaintiff's exhibits are identified numerically, and Defendant's are identified alphabetically.

[3] The parties PTO was submitted on April 15, 2014, and approved by the Court on April 6, 2014. (See PTO, Docket Entry 51.)

[4] 1100 cubic yards equates to roughly thirty-seven tri-axle truckloads. (Tr. at 442:24-443:5 (Senh).)

On November 30, 1998, Sunoco and HHR entered into an Agreement of Sale (the "Sale Agreement") whereby Sunoco agreed to sell and HHR agreed to buy the Property. (PTO § VI.B.2; Ex. 1.) The Sale Agreement provided that prior to the transfer of title, Sunoco would commission a site assessment to determine whether the Site was in compliance with New York State Department of Environmental Conservation ("NYSDEC") regulations. (Ex. 1 ¶ 12(a).) The Sale Agreement further indicated that while Sunoco would be responsible for remediating any pre-existing contamination that exceeded NYSDEC standards (such as any residual exceedances from the 1990 tank removal), HHR would be responsible for remediating any "New Release" of contaminant. (Ex. 1 ¶ 12(e)-(g).) In the event the presence of a New Release is disputed, a neutral third party would be called to intervene:

> BUYER and SELLER will mutually agree on an environmental consultant to make a determination as to the quantity of contamination resulting from the New Release and (i) whether there is a New Release, and if a New Release, (ii) the increase in the cost of remediation due to the New Release.

(Ex. 1 ¶ 12(g).)

Pursuant to the Sale Agreement, Sunoco commissioned a site assessment in 1998. (PTO § VI.B.4; Ex. 98.) Sunoco Environmental Specialist Russell Hammond ("Hammond") contracted with the consulting company Environmental Assessments and Remediates ("EAR"), and oversaw the project. (Tr. at 24:12-25:21

(Hammond).) Hammond explained that EAR installed four monitoring wells (MW1, MW2, MW3, and MW4) on the Property for the purpose of obtaining periodic groundwater samples.[5] (Tr. at 28:11-29:13 (Hammond).) The EAR also sampled the soil at varying depths. (Tr. at 29:21-30:8 (Hammond).) Analysis revealed that the soil retrieved from MW3, and the water retrieved from MW1, MW3, and MW4 all contained levels of contaminant that exceeded NYSDEC regulations. (Ex. 98 at 7-8; Tr. at 29:21-30:8 (Hammond), 32:23-33:11 (Hammond).) Because the parties agreed that Sunoco would be liable for remediating any contamination that predated May 20, 1999, Sunoco began monitoring the contamination at the Site.

In March of 1999, a second round of groundwater testing commissioned by Sunoco revealed similarly elevated levels of the tracer contaminant, MTBE.[6] (Ex. 42 at 5.) Specifically, MW1 revealed a concentration of 210,000 MTBE parts per billion in December 1998 and 5100 parts per billion in March 1999; MW3 revealed a concentration of 1000 MTBE parts per billion in December

[5] Though they obtained an initial soil sample from MW2, EAR could not periodically sample groundwater from M2 as planned. (Tr. at 29:1-4 (Hammond).)

[6] MTBE is an acronym for Methyl Tertiary-Butyl Ether, an organic gasoline additive. Certain chemical properties of MTBE, such as its resistance to degradation, make it a common tracer compound when evaluating subsurface spills. (Tr. at 512:6-15 (Senh).) MTBE is sometimes referred to as a "remediation driver," because it is the compound tested for when evaluating the effects of remediation. (Tr. at 512:16-22 (Senh).)

1998 and 4600 parts per billion in March 1999, and MW4 revealed a concentration of 510 MTBE parts per billion in December 1998 and 9000 parts per billion in March 1999. (Ex. 42 at 5.) Notably, neither the December 1998 nor the March 1999 sampling revealed any evidence of free-phase product in the groundwater. (Ex. 42 at 5; Ex. 98 at 9; Tr. at 30:9-31:3 (Hammond), 134:11-15 (Painter), 444:24-445:24 (Senh).) Free-phase product, also known as liquid phased hydrocarbons ("LPH") or non-aqueous phased liquid ("NAPL"), refers to circumstances in which a monitoring well reveals more than dissolved contaminant; in the case of free-phased product, the concentration of contaminant is so high that a measurable layer of gasoline sits above the groundwater, like oil over vinegar in a salad dressing. (Tr. at 31:4-13 (Hammond), 134:18-23 (Painter).) Thus, a monitoring well that exhibits free-phase product signals a high level of contaminant.

As a result of the December 1998 and March 1999 exceedances, Sunoco and EAR notified the NYSDEC, which required that the Site be regularly monitored. (Tr. at 33:16-24 (Hammond), 135:25-136:6 (Painter).) The NYSDEC completed a spill report and assigned the case spill number 99-09665. (Ex. 250.) Generally, the NYSDEC monitors spill cases to ensure that the contaminated area has been remediated to its satisfaction. Where the NYSDEC concludes that the contamination at a site will improve on its own through natural attenuation, it requires only that the MTBE levels

at the site be monitored. (Tr. at 391:25-393:11 (Kolleeny).) On the other hand, in cases where the contamination is too severe to rely on natural attenuation alone, the NYSDEC requires active remediation. (Tr. at 392:18-393:4 (Kolleeny).) When active remediation is required, the NYSDEC reviews and approves any proposed remediation plans submitted by those responsible. (Tr. at 393:5-11 (Kolleeny).) In this case, the DEC did not require active remediation; it deemed quarterly sampling of the monitoring wells sufficient. (Tr. at 33:12-20 (Hammond), 143:22-144:7 (Painter).)

Notwithstanding the uncovered 1998 and 1999 exceedances and required NYSDEC monitoring of the Property, HHR took possession of the Property on May 20, 1999. (PTO § VI.A.1.) Pursuant to the Sale Agreement, HHR was entitled to conduct its own pre-closing Site inspection, (Ex. 1 ¶ 12(c)), but it elected not to do so, (Tr. at 733:20-25 (Cioffi)).

NYSDEC-sanctioned sampling of the Site continued as expected for roughly the next two years. EAR sampled the monitoring wells on a quarterly basis for the first year, and, because the contamination levels were steady, the NYSDEC approved Sunoco's request to switch to biannual sampling. (Tr. at 35:17-36:15 (Hammond).) The September 28, 2001 sampling, the last sampling in 2001, saw results in-line with the prior samplings. (Ex. 49 at 8.) Like the prior samplings, LPH was not detected in

any of the monitoring wells. (Ex. 49 at 8; Tr. at 120:17-22 (Hammond), 173:11-18 (Painter).) The attenuating and relatively benign contamination uncovered up to this point raised little concern for Sunoco; it had no reason to suspect that the contamination was anything more than residual contamination from the 1990 tank closure. Consequently and pursuant to the Sale Agreement, Sunoco bore the entire cost of the monitoring. (Tr. at 754:4-17 (Cioffi), 141:4-142:23 (Painter).)

In January 2002, sampling of the site yielded considerably worse results than prior samplings. EAR detected LPH in MW3. (Ex. 6 at 2.) MW3 sits on the southern portion of the Site, near fill dispensers five and six. (Ex. 248.) As a result of this discovery, EAR increased its monitoring to quarterly. (Ex. 6 at 2.)

On April 1, 2002, an employee at Global Construction Co. reported to the NYSDEC that a subsurface gasoline supply line had failed a tightness test, and the NYSDEC completed a new spill report. (Ex. EE; Tr. at 727:24-728:7 (Cioffi).) Although the NYSDEC report indicates that the line failed inspection on April 1, 2002, and that "0G" of contaminant was discharged, (Ex. EE), it is ultimately unclear when the line became compromised and how much contaminant was spilled. The "0G" notation on the spill form is sometimes used to denote that the amount spilled was unknown at the time it was reported to the NYSDEC. (Tr. at 166:1-6 (Painter),

390:2-9 (Kolleeny).) Here, because the failed line was underground, it would have been difficult to ascertain, at the time of the line test failure, how much (if any) product had spilled. Though the precise amount of contaminant spilled is unknowable, Cioffi acknowledged that the gas station at the Site had difficulty accounting for the entirety of its inventory during that time. (Tr. at 744:9-18 (Cioffi).)

As a result of the reported line test failure, Crompco, LLC ("Crompco"), a line testing company, tested the subsurface lines at the Site twice within the next two months, and saw mixed results. On April 3, 2002, all the lines passed Crompco's tests. (Ex. 161 at 10-14.) On May 17, 2002, Crompco discovered a leak in a line on the South side of the property, near MW3--where LPH was first detected. (Ex. 161 at 17.)

Meanwhile, contamination at the Site continued to worsen. On April 25, 2002, EAR returned to the Site to continue its monitoring. This time, EAR discovered 0.05 feet of LPH in MW4 and 0.10 feet in MW3. (Ex. 51 at 7.) By May 22, 0.96 feet was measured in MW1, along with 1.07 feet and 1.27 feet in MW3 and MW4, respectively. (Ex. 51 at 7.) Soil samples taken from various areas at the request of the NYSDEC confirmed the declining conditions at the Site. (Tr. at 255:24-256:4 (Painter); Ex. 51 at 13.) By now, the Site required more than simple monitoring. (Ex. 6 at 2-3.) EAR began visiting the Site on a monthly basis to

record LPH levels and bail the LPH into a recovery drum. (Tr. at 174:6-9 (Painter), 246:16-25 (Painter).)

In the Spring of 2004 and in light of the worsened soil and groundwater samples at the Site, the NYSDEC sent a letter to both Sunoco and HHR requesting that they sign a stipulation agreement recognizing their obligation to completely delineate the contamination and submit and carry out a remedial action plan. (Tr. at 394:3-21 (Kolleeny); Ex. 250.) Under the threat of legal action, Sunoco eventually signed the stipulation--without admitting any liability for the contamination. (Ex. 18)

As a result of the NYSDEC's impression, EAR--still under the direction of and funded by Sunoco--began a detailed subsurface investigation. Because EAR was required to delineate the contamination, significant off-site groundwater and soil sampling was required. (Tr. at 183:8-14.) EAR installed two additional monitoring wells across the street to the north of the Property, (Tr. at 183:21-184:1 (Painter); Ex. 71 at 3-4), and collected soil samples at varying depths, (Ex. 99 at 4). EAR released the results of its investigation in a November 2004 Subsurface Investigation Report. (Ex. 99.)

In addition to investigating the extent of the contamination, EAR prepared the Site for active remediation. EAR installed both an air sparge/soil vapor extraction ("SVE") system

and a groundwater excavation and treatment ("GWET") system.[7] The air sparge operates by pumping air into the groundwater, desorbing the contaminants and forcing them into the soil just above the water table, known as the vadose zone. (Tr. at 144:15-20 (Painter).) At that point, the SVE removes the contaminants from that vadose zone. (Tr. at 144:11-20 (Painter).) A GWET system pumps the groundwater from the Site, treats it, and releases the treated water back into the area.[8] (Tr. at 55:12-21 (Hammond).)

---

[7] On September 7, 2004, during installation of the air sparge/SVE system, EAR pierced an old, steel product supply line and spilled roughly two gallons of product. EAR immediately cleaned the spilled area, capped the pierced line, and contacted the NYSDEC. (Tr. at 194:7-196:8 (Painter); Ex FF; Ex. GG.) To the extent Defendant suggests that this incident contributed to the contamination at the Site in any meaningful way, the evidence suggests otherwise. First, LPH began appearing almost two years earlier, in January 2002. (Ex. 6 at 2.) Second, sampling taken less than a month after the incident shows no indication of increased contamination. (Ex. 244.) Third, Cioffi was present when the line was pierced, and even he could not meaningfully challenge at trial Painter's assertion that the entirety of the contaminated soil had been excavated that day. (Tr. at 719:25-720:6 (Cioffi).)

[8] Despite its installation, the GWET system at the Site has never been operated. The GWET system pumps the treated groundwater into the municipal sewer system. (Tr. at 56:20-57:4 (Hammond).) As a consequence, the City of New York (the "City") requires that the property owner agree to indemnify the City for any damage to the sewer system caused by the GWET's operation. (Tr. at 56:20-57:4 (Hammond).) Both Sunoco and the NYSDEC implored HHR to sign the City's indemnification agreement. (Ex. 226; Ex. 227.) Only HHR's signature was required; HHR was not asked to take any additional risk because Sunoco was already contractually bound to indemnify HHR to the extent it became liable to the City as a result of the GWET. (Ex. 1 at 15; Tr. at 739:18-740:16 (Cioffi).) HHR ignored their requests. The

As conditions worsened and active remediation began, Sunoco questioned whether the Site was experiencing an apparently unprovoked exacerbation of the old, residual contamination--for which Sunoco was responsible--or the effects of a New Release--for which HHR was responsible. (See Ex. 1.) Accordingly, pursuant to the Sale Agreement, the parties jointly selected the environmental consulting firm EnviroTrac Ltd. ("EnviroTrac") to determine: "1. whether there were spills, leaks or discharges of petroleum after May 20, 1999, and, if so, 2. what the increase cost of remediation [was] due to any spills, leaks or discharges of petroleum that may have taken place after May 20, 1999." (Ex. 29 at 65.)

In March 2006, Joseph Byrnes, President of EnviroTrac, produced a report entitled "Environmental Forensic Evaluation and Remediation Cost Allocation" (the "EnviroTrac Report"). (Ex. 29.) EnviroTrac determined that multiple New Releases occurred after May 20, 1999, and allocated ninety-five percent of the responsibility for remediating the Site to HHR, and five percent to Sunoco. On summary judgment, this Court concluded that although HHR was liable for some of the remediation costs, a trial was necessary to determine whether EnviroTrac's ninety-five percent

---

inability to run the GWET system significantly hindered the remediation efforts at the site. (Tr. at 191:13-25 (Painter).)

allocation was appropriate. Sunoco, Inc., 969 F. Supp. 2d at 306-07.[9]

EnviroTrac allocated the responsibility between Sunoco and HHR using the "mass-of-contribution" method, which calculates the mass of each spill's contribution to the Site's overall contamination. (Ex. 29 at 23-24; Tr. at 510:24-512:5 (Senh); Ex. 27 at 9.) Specifically, EnviroTrac first looked to the results of the March 1999 sampling--the last sampling before the May 20, 1999 transfer of title. Using conventionally accepted calculations that were unchallenged by HHR, EnviroTrac estimated a contamination plume, and then calculated the mass of the MTBE within that area. (Ex. 29 at 76.) EnviroTrac determined the total mass of the MTBE within the plume to be 1430 grams. Performing the same analysis for the October 2005 sampling--the then most recent sampling--EnviroTrac determined the mass of the MTBE at that time to be 28,082 grams. (Ex. 29 at 79.) Thus, the contamination that predated May 20, 1999 (1430 grams) represents five percent of the total MTBE. Because the pre-existing contamination for which it was responsible constitutes five percent of the total contamination at the Site, Sunoco reasons, it should bear only five percent of the remediation costs.

[9] The Court also left open the question of whether HHR could be considered a "discharger" under the New York Navigation law. Sunoco, Inc., 969 F. Supp. 2d at 306-07.

At trial, Sin Senh ("Senh"), a hydrogeologist at Roux Associates, opined that a significant New Release occurred sometime after May 20, 1999. (Tr. at 7473:17-25 (Senh).) Senh explained that the presence of LPH in the monitoring wells, the April 1, 2002 report to the NYSDEC of a line test failure, and Crompco's May 2002 report of a line leak were all indicia of a New Release. (Tr. at 455:23-458:20 (Senh).) Senh further explained that the LPH appearing in the monitoring wells that began in early 2002 could not have been old contamination that had been trapped in the vadose zone. In 1998, when the monitoring wells were drilled, soil samples were taken at different depths. (Ex. 98 at 134-37.) Though deeper soil samples revealed evidence of residual contamination from the 1990 tank closure, the shallower soil was clean. (Ex. 98 at 134-37.) Senh explained that if the 2002 LPH had been residual contamination that was trapped in the vadose zone, the shallower soil would not have tested clean in 1998. (Tr. at 489:11-21 (Senh).) Senh also explained that the LPH could not have come from changes in the groundwater level. In December 1998, the groundwater level at the Site was below the top of the permeable intake screens on the monitoring wells. (Ex. 246.) Thus, had the LPH been present then, it would have been detected in the monitoring wells during those times of relatively low groundwater levels. (Ex. 246; Tr. at 507:13-508:18 (Senh).) Accordingly, both presented with indicia of a New Release and able

to rule out pre-existing contamination as a cause of the LPH, Senh concluded that a significant New Release of contaminant occurred between September 2001 and January 2002. (Tr. at 473:17-25 (Senh).)

Similarly, Senh agreed with EnviroTrac's allocation of ninety-five percent of the remediation responsibility to HHR. Senh endorsed EnviroTrac's allocating responsibility by calculating the mass of each spill's contribution to the Site's overall contamination. (Tr. at 510:24-512:5 (Senh); Ex. 29 at 23-25; Ex. 27 at 9.) According to Senh, the mass-of-contribution method is appropriate here both because it measures the amount of increased contaminant and because the "ultimate measure of success for a remedial action" is the mass of contaminant removed. (Ex. 27 at 9.) Though Senh's numbers differed slightly due to differences his plume-mapping methodology, he opined that Envirotrac's ultimate allocation was appropriate. (Tr. at 515:6-22 (Senh).) Senh also concurred with EnviroTrac's focus on MTBE, rather than BTEX or some other petroleum tracer. (Tr. at 512:10-513:6 (Senh).)

In retort to the competent, thorough, and persuasive Senh, HHR offered the testimony of Mr. Charles Sosik of Environmental Business Consultants. Sosik did not prepare a written report, and offered no affirmative opinions of his own

during trial.[10] Instead, Sosik offered specious challenges to the EnviroTrac Report and to Senh's testimony that had all been preemptively and convincingly explained away. For example, Sosik suggested that LPH found in the monitoring wells may have occupied a "capillary fringe" within the vadose zone for some time, but he did not address Sehn's explanation that discredited that theory. (Tr. at 803:1-19 (Sosik).) Similarly, Sosik focused on the concentration of BTEX rather than MTBE, because MTBE levels can "spike" for a variety of reasons, and thus distort the sampling. (Tr. at 807:10-808:1 (Sosik).) But again, Sosik ignored the opinions of multiple individuals who testified that MTBE, not BTEX, is considered the key remediation driver. (See Tr. at 512:16-22 (Senh), 284:6-19 (Byrnes).) The Court cannot conclude from Sosik's testimony anything above the unimpressive propositoin that neither the EnviroTrac Report nor Sehn can say with absolute certainty that a New Release occurred.

Between January 2002 and July 2014, Sunoco spent $790,724.89 investigating, monitoring, and remediating the Site.

[10] The Court received Sosik's oral testimony despite his failure to submit an expert report by stipulation of the parties, (Tr. at 773:11-774:5 (Falk)). See FED. R. CIV. P. 26 (requiring experts submit a written report "unless otherwise stipulated"). Their stipulation, however, precluded Sosik from testifying beyond the scope of his Rule 26 initial disclosure. (Tr. at 773:19-22 (Falk).) Because the entirety of Sosik's initial disclosure challenged the EnviroTrac report, Sosik was therefore precluded from offering any affirmative opinions.

(Ex. 242; Ex. 133; Ex. 134; Ex. 190; Tr. at 58:4-60:17 (Hammond).) Sunoco further estimates that remediating the site to the satisfaction of the NYSDEC will cost another $500,000.00. (Tr. at 549:16-550:8 (Senh).)

CONCLUSIONS OF LAW

I. Sunoco's Breach of Contract Claim

As discussed in its September 4, 2013 Order, the Court has already concluded that Defendant is liable to Plaintiff for breach of contract; calculation of damages is the only open issue. Sunoco, Inc., 969 F. Supp. 2d at 309.

Under New York contract law,[11] once the fact of damage is established, the non-breaching party need only provide a "stable foundation for a reasonable estimate [of damages]." Freund v. Washington Square Press, Inc., 314 N.E.2d 419, 421, 357 N.Y.S.2d 857, 861, 34 N.Y.2d 379 (1974); Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., 487 F.3d 89, 112 (2d Cir. 2007) ("New York courts have significant flexibility in estimating general damages once the fact of liability is established.").

Plaintiff is entitled to damages in an amount that restores it to the position it would occupy had the Sale Agreement not been breached. Indo Craft, Inc. v. Bank of Barodoa, 47 F.3d

[11] New York law applies because the Agreement concerned the sale of real property in New York. Summary judgment on liability was based on the application of New York law.

490, 498 (2d Cir. 1995). The Sale Agreement requires HHR to assume the remediation costs, responsibility, and liability attributable to a New Release: "BUYER will assume the additional cost, responsibility and liability of 'Post Base Line Data' contamination." (Ex. 1 ¶ 12(g).)[12] The mass-of-contribution method undertaken by EnviroTrac and confirmed by Senh calculates, as a percentage, just that. Plaintiff has adduced sufficient, persuasive, and unrebutted evidence for the Court to conclude that ninety-five percent of the remediation costs it has so far incurred was necessitated by a New Release of contaminants, and those costs therefore fall on the shoulders of HHR.

Admittedly, the percentage of total MTBE present at the Site is an imperfect proxy for allocating remediation costs. The Court doubts, for example, that the cost of remediating the first gram of MTBE is equal to the cost of remediating the thousandth such that a dollar-to-MTBE measure ratio will remain steady, or that different remediation methods are equally cost-effective. However, Defendant left these roads of argument unexplored at trial, so the Court will not take them. Similarly, slight differences between Envirotrac's estimate and Senh's give the Court no pause. Both are grounded in the same methodology and

[12] "Post Base Line Data" contamination is that contamination "due to the BUYER's activity and not as a result of SELLER's activity." (Ex. 1 ¶ 12(e).)

produce results so consistently similar that the any difference is negligible.

In sum, the Court concludes that Plaintiff is entitled to recover ninety-five percent of the costs it has incurred in connection with monitoring and remediating the contamination at the Site. Invoices document that, as of July 2014, Plaintiff has incurred $790,724.89, and Sunoco is therefore entitled to judgment in the amount of $751,188.65, plus interest.[13] Plaintiff is also entitled to ninety-five percent of any since incurred and future remediation costs.

II. Sunoco's Declaratory Judgment Claim

Sunoco also seeks a declaratory judgment declaring HHR liable for ninety-five percent and itself liable for five percent of all future remediation costs and declaring HHR responsible for remediating the Site going forward. Because Plaintiff's declaratory judgment claim asks the Court to adjudicate the same

[13] N.Y. C.P.L.R. § 5001; Adams v. Lindblad Travel, Inc., 730 F.2d 89, 93 (2d Cir. 1984) ("Under the law of New York . . . prejudgment interest is normally recoverable as a matter of right in an action at law for breach of contract."). Given that various issues not developed here--such as different payment dates, credit arrangements between Sunoco and EAR, and different compounding methods--will affect the interest calculation, the Court declines to undergo these apparently complex calculations without supplemental submissions from the parties. As a result, Plaintiff shall submit a proposed formula for the calculation of prejudgment interest within thirty (30) days of the date of this Memorandum, Decision, & Order. Any opposing submissions are due thirty (30) days thereafter.

rights that have already been adjudicated in connection with Plaintiff's breach of contract claim, a declaratory judgment is unnecessary.

"In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). Generally, a court presented with whether to issue a declaratory judgment should consider "(1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; and (2) whether a judgment would finalize the controversy and offer relief from uncertainty." Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 411 F.3d 384, 389 (2d Cir. 2005).

Where the rights sought to be determined in the declaratory judgment action are the same as the rights that will be determined in a pendant breach of contract action, the declaratory judgment action serves no "useful purpose." See, e.g., Intellectual Capital Partner v. Institutional Credit Partners LLC, No. 08-CV-10580, 2009 WL 1974392, at *6 (S.D.N.Y. July 8, 2009) ("[D]eclaratory relief would serve no useful purpose as the legal issues will be resolved by litigation of the breach of contract claim.") (Chin, J.); Sofi Classic S.A. de C.V. v. Hurowitz, 444 F.

Supp. 2d 231, 249 (S.D.N.Y. 2006) ("Plaintiffs' declaratory judgment claim seeks resolution of legal issues that will, of necessity, be resolved in the course of the litigation of the other causes of action. Therefore, the claim is duplicative in that it seeks no relief that is not implicitly sought in the other causes of action."). Because the declaratory judgment sought would adjudicate the same rights as have been adjudicated in the breach of contract action, the requested declaratory judgment lacks any "useful purpose," and the Court declines to enter it.

Contrary to Sunoco's assertion, Sunoco does not require a declaratory judgment to recoup any future remediation costs. Sunoco's right to future remediation costs has been adjudicated in the breach of contract action, and the Court already has expressed its willingness to receive submissions in the event of a future dispute as to then-incurred remediation costs.

To the extent that Sunoco's submissions request a declaratory judgment absolving it of future responsibility for the remediation at the Site vis-à-vis the NYSDEC, the Court declines to adjudicate the rights of the NYSDEC in this action.

II. New York Navigation Law Claims

Both parties have also asserted claims under the New York Navigation Law, which generally prohibits the discharge of petroleum. N.Y. NAV. LAW. § 173 et. seq. As discussed below, the Court finds in favor of Plaintiff with respect to those claims.

Section 176 of the New York Navigation Law provides that "[a]ny person discharging petroleum in the manner prohibited by section one hundred seventy-three of this article shall immediately undertake to contain such discharge." N.Y. NAV. LAW § 176(1). The term discharge means "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters." N.Y. NAV. LAW § 172(8). A discharger, therefore, "includes a party who is in a position to halt [a] discharge, to effect an immediate cleanup or to prevent the discharge in the first place." State v. Avery-Hall Corp., 279 A.D. 199, 201, 719 N.Y.S.2d 735, 736, (3d Dep't 2001) (internal quotation marks and citation omitted) (alteration in original); see also Emerson Enters., LLC v. Kenneth Crosby N.Y., LLC, 781 F. Supp. 2d 166, 178-79 (W.D.N.Y. 2011) (noting that the broad definition of "discharge" under the New York Navigation Law reflects the legislature's intent that the law be construed liberally).

Section 181 of the statute allows one who has incurred remediation costs to recover against the discharger:

> Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought directly against the person who has discharged the

> petroleum, provided, however, that damages recoverable by any injured person in such a direct claim based on the strict liability imposed by this section shall be limited to the damages authorized by this section.

N.Y. NAV. LAW § 181(5); see also Emerson Enters., LLC, 781 F. Supp. 2d 166, 179 (W.D.N.Y. 2011); FCA Assocs. v. Texaco, Inc., No. 03-CV-6083, 2008 WL 314511, at *5 (W.D.N.Y. Feb. 4, 2008). Here, the Court has been presented with sufficient evidence to conclude that HHR is a "discharger" under the New York Navigation Law. Specifically, Senh thoroughly and persuasively testified that given the various indicia of a New Release, combined with sufficient evidence to rule out the theory that conditions worsened due to residual contamination, a New Release of contaminant occurred between September 2001 and January 2002. During that time, the Site was under HHR's control. Sunoco has paid significant remediation costs as a result of the discharge for which HHR is responsible, and HHR is therefore liable under the New York Navigation Law.[14]

Just as the Court has found that the EnviroTrac Report provides an appropriate allocation of remediation costs in the breach of contract action, it likewise finds that the EnviroTrac

[14] As the Court finds for Plaintiff under the Navigation Law, it rejects Defendant's Navigation Law counterclaim. To the extent that Defendant's counterclaim arises from alleged facts different from Plaintiff's claim, the counterclaim is independently rejected because Defendant has not incurred any remediation costs at the Site. (Tr. at 754:4-17 (Cioffi).)

Report provides an appropriate allocation of costs in this New York Navigation Law action. In other words, the Court concludes that HHR is a discharger of ninety-five percent of the contamination at the Site, and it must bear that proportion of the remediation costs. Unlike the damages to which it is entitled for its breach of contract claim, however, Sunoco is only entitled to recover the appropriate portion of those costs incurred since May 11, 2005. See, e.g., Bologna v. Kerr-McGee Corp., 95 F. Supp. 2d 197, 204 (S.D.N.Y. 2000) ("[A] six-year statute of limitations applies to Navigation Law claims for reimbursement of cleanup costs."); Oliver Chevrolet Inc. v. Mobil Oil Corp., 249 a.D.2d 793, 795, 671 N.Y.S.2d 850, 852 (3d Dep't 1998). Plaintiff has submitted proof that it has incurred $707,514.78 in remediation costs since May 11, 2005. (Ex. 242.) Thus, Plaintiff may recover, $672,139.04, plus reasonable attorneys' fees under its New York Navigation Law Claim. See Strand v. Neglia, 232 A.D.2d 907, 909, 649 N.Y.S.2d 729, 731, (3d Dep't 1996) (finding attorneys' fees recoverable in under the New York Navigation Law); 2800 Hylan Blvd. v. Motiva Enterprises, LLC, No. 09-CV-5065, 2011 WL 11672773, at *9 (S.D.N.Y. Sept. 28, 2011) (same).

CONCLUSION

For the foregoing reasons, the Court finds for Plaintiff on both its breach of contract claim and its New York Navigation Law claim. Defendant has failed to establish liability of Plaintiff on its New York Navigation Law counterclaim, so that claim is hereby DISMISSED.

Regarding Plaintiff's breach of contract claim, the Court finds Defendant liable to Plaintiff for ninety-five percent of the costs incurred and necessary to remediate contamination at 175-33 Horace Harding Expressway to the satisfaction of the NYSDEC. Plaintiff is therefore entitled to $751,188.65 in reimbursement for costs incurred as of July 2014, together with ninety-five percent of costs incurred since then. Disputes regarding the verity or calculation of these future costs shall be submitted to this Court. Plaintiff is entitled to prejudgment interest, and may submit a proposed formula for the calculation thereof within thirty (30) days of the date of this Memorandum, Decision, & Order. Any opposing submissions are due thirty (30) days thereafter.

Regarding Plaintiff's New York Navigation Law claim, Plaintiff may recover, alternative to its contract damages, $672,139.04. Pursuant to the New York Navigation Law, Plaintiff may petition the Court for an award of reasonable attorneys' fees within thirty (30) days of the date of this Memorandum, Decision,

& Order. Any opposing submissions are due thirty (30) days thereafter.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: May 27, 2015
Central Islip, New York