UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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THE BROOKLYN UNION GAS COMPANY,

Plaintiff,

-against-

EXXON MOBIL CORPORATION,
UNITED STATES OF AMERICA,
PARAGON OIL INC./TEXACO, INC.,
BAYSIDE FUEL OIL DEPOT CO.,
IRON MOUNTAIN, INC.,
CITY OF NEW YORK,
MOTIVA ENTERPRISES LLC,
BUCKEYE PARTNERS, L.P.,
SUNOCO, INC. (R&M),
CHEVRON U.S.A. INC.,
19 KENT ACQUISITION LLC,
NORTH 12TH ASSOCIATES LLC,
35 KENT AVE LLC,
NEW 10TH STREET LLC, and
PATTI 3 LLC,

Defendants.
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REPORT AND RECOMMENDATION

17-CV-0045 (MKB) (ST)

TISCIONE, United States Magistrate Judge:

On January 4, 2016, Plaintiff The Brooklyn Union Gas Co. d/b/a National Grid NY ("National Grid", "Plaintiff") brought this action against Defendants Exxon Mobil Corporation ("Exxon"); the United States of America ("United States" or "U.S."); Texaco, Inc. ("Texaco"); Bayside Fuel Oil Depot Co. ("Bayside"); Iron Mountain, Inc. ("Iron Mountain"); City of New York; Motiva Enterprises LLC ("Motiva"); Buckeye Partners, L.P. ("Buckeye"); Sunoco, Inc. (R&M) ("Sunoco"); Chevron U.S.A. Inc. ("Chevron"); 19 Kent Acquisition LLC ("19 Kent"); North 12th Associates LLC ("North 12"); 35 Kent Ave LLC ("35 Kent"); New 10th Street LLC ("New 10"); and Patti 3 LLC ("Patti 3") (collectively "Defendants") for cost recovery arising out

of the disposal, release, and/or threatened release of hazardous substances into the environment at current and historical facilities owned and/or operated by Defendants adjacent to the Bushwick Inlet and the East River in Brooklyn, New York (the "Bushwick Site" or the "Site"). Dkt. No. 1 at 2[1] ("Compl." or the "Complaint"). National Grid filed an Amended Complaint on April 11, 2017. Dkt. No. 75 ("Am. Compl."). The Amended Complaint asserts causes of action under Section 107(a) (for recovery of response costs, "CERCLA 107") and Section 113(f)(3)(B) (for contribution, "CERCLA 113") of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* ("CERCLA"), 42 U.S.C. §§ 9607(a), 9613 (f)(3)(B), the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and the New York Navigation Law, N.Y. Nav. Law §§ 170 – 197. Am. Compl. ¶¶ 20-21. On May 25, 2017, Defendants moved to dismiss the CERCLA claims and the dependent Declaratory Judgment Act claim in the Amended Complaint. Dkt. No. 109 at 33 ("Mot. to Dismiss Mem."); *see also* Dkt. No 111 ("Patti 3 Supp. Mem."); Dkt. No. 106-1 at 6 ("U.S. Supp. Mem."); Dkt. No 115 ("Motiva Supp. Mem."). On April 5, 2018, the Honorable Margo K. Brodie referred Defendants' Motion to Dismiss to me for a report and recommendation. For the reasons described below, I respectfully recommend that Defendants' motion to dismiss the Amended Complaint be granted for the CERCLA 113 claim with prejudice. I also recommend granting Defendants' motion with respect to the CERCLA 107 claim and the dependent Declaratory Judgment claim with leave to amend.

[1] Pages are ECF pages unless otherwise indicated.

I. BACKGROUND[2]

National Grid seeks to recover for past and future costs relating to the environmental investigation, remediation, and monitoring of the Bushwick Site, the swath of Brooklyn adjacent to the East River and the Bushwick Inlet. Am. Compl. ¶¶ 1, 21, 46. This land was the site of multiple industrial activities from the mid-1800s until as late as 2014. *Id.* ¶¶ 25, 113. These industrial activities included a facility operated by Defendant United States that extracted toluol from oil and gas operations (*id.* ¶¶ 87-90), an oil refinery and cannery owned and operated by Defendant Exxon (*id.* ¶¶ 68-86), petroleum storage facilities owned and operated by Defendant Texaco and also owned by Defendant Motiva (*id.* ¶¶ 91-92, 112-115), petroleum storage and distribution facilities owned and operated by Defendant Bayside (*id.* ¶¶ 93-105), a storage facility operated by Defendant Iron Mountain (*id.* ¶¶ 106-108), a petroleum bulk storage facility owned and operated by Defendant City of New York (*id.* ¶¶ 109-111), an oil pipeline owned and operated by Defendant Buckeye (*id.* ¶¶ 116-120), petroleum bulk storage and transportation operated by Defendant Sunoco (*id.* ¶¶ 121-123), an oil truck repair shop and oil truck parking facility owned and operated by Defendant Chevron (*id.* ¶¶ 124-126), and a manufactured gas plant ("MGP") operated by Defendant Exxon (*id.* ¶¶ 2, 127-135). Land and facilities at the Site have changed hands since the 1800s, but all Defendants have either owned or operated land or facilities on site. *Id.* ¶¶ 46-67.

Plaintiff alleges that, as a result of these industrial operations, the above-recited Defendants have discharged and released numerous solid wastes and hazardous substances at the Site, some of which came into contact with, or became entrained with, gasoline and other

[2] Generally, a court's review on a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure "is limited to the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated…by reference." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007); *accord Wilson v. Kellogg Co.*, 628 F. App'x 59, 60 (2d Cir. 2016) (summary order).

petroleum products released at the Site. *Id.* ¶¶ 3-14. Other defendants are listed as being owners of "parcel[s] of land on the Site that [are] contaminated with hazardous substances. *Id.* ¶¶ 15-19 (naming 19 Kent, North 12, 35 Kent, New 10, and Patti 3).

In 2007, National Grid and the New York State Department of Environmental Conservation ("NYSDEC") entered into an agreement ("Administrative Order on Consent" or "AOC") allowing for the investigation and potential remediation of numerous MGPs, and in August 2007, National Grid and NYSDEC entered into a Modification of the AOC that added certain sites, including parts of the Bushwick Site, to the scope of the agreement. *Id.* ¶¶ 136-138; Dkt. No 110-2 ("Feb. 2007 AOC"); Dkt. No 110-3 ("Modification") (collectively the "AOC").[3] Specifically, the Modification added the Williamsburg MGP and the Wythe Avenue Holder Station sites, both listed as being part of the Bushwick Site in the Amended Complaint. Modification at 4; Am. Compl. ¶¶ 47, 50.

National Grid worked with NYSDEC to develop an Interim Remedial Measure ("IRM") plan for the Williamsburg MGP site. Am. Compl. ¶ 139. Plaintiff alleges that "Prior to NYSDEC's approval of a final Remedial Design/Remedial Action Work Plan, National Grid exercised its right to terminate the Williamsburg MGP from the AOC." *Id.* ¶ 140.

On January 4, 2017, National Grid filed its initial Complaint commencing the instant action. Compl. Following pre-motion conferences held on February 16, and March 21, 2017, National Grid filed an Amended Complaint. Am. Compl. at 1. Defendants now seek to dismiss the CERCLA claims in the Amended Complaint for failure to state a claim under Rule 12(b)(6). Mot. to Dismiss Mem. at 6 (citing Fed. R. Civ. P. 12(b)(6)); *see also* Patti 3 Supp. Mem.; U.S.

[3] Both agreements are incorporated into the Amended Complaint by reference. Am. Compl. ¶¶ 136, 138; *see, e.g.*, *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) (documents are incorporated by reference into the complaint where "complaint explicitly refers to and relies upon…the documents").

Supp. Mem.; Motiva Supp. Mem. Defendants argue that National Grid's CERCLA 113 claim is time barred[4] and that Plaintiff's CERCLA 107 claim is precluded because the CERCLA 113 claim was available to Plaintiff instead. Mot. to Dismiss Mem. at 7.

II. DISCUSSION

A. Legal Standards

Upon a motion to dismiss, a court must determine whether a complaint states a legally cognizable claim by making allegations that, if true, would show that the plaintiff is entitled to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570); *Sarmiento v. United States*, 678 F.3d 147, 152 (2d Cir. 2012). Rule 8 of the Federal Rules of Civil Procedure does not require detailed factual allegations, but "[a] pleading that offers 'labels and conclusions' or 'formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557). A complaint may plausibly entitle a plaintiff to relief when there is "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

There are "[t]wo working principles" that guide analysis of a motion to dismiss: "First, the court must accept all factual allegations as true and draw all reasonable inferences in favor of the non-moving party," and "[s]econd, only a complaint that states a plausible claim for relief

[4] "Where the dates in a complaint show that an action is barred by a statute of limitations, a defendant may raise the affirmative defense …. as a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted." *Ghartey v. St. John's Queens Hosp.*, 869 F.2d 160, 162 (2d Cir. 1989).

survives a motion to dismiss, and this determination is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Snyder v. Perry*, No. 14-cv-2090 (CBA)(RER), 2015 WL 1262591, at *4 (E.D.N.Y. Feb. 4, 2015) (quoting *Iqbal*, 556 U.S. at 678, 679), *adopted in part by*, 2015 WL 1262591 (E.D.N.Y. Mar. 18, 2015).

B. Documents Considered

In deciding on a motion to dismiss for failure to state a claim, a court's "consideration is generally limited to the facts as presented within the four corners of the complaint, to documents attached to the complaint, or to documents incorporated within the complaint by reference." *Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir. 2002). "In addition, this Court recognizes a narrow exception allowing a court to consider 'a document upon which [the complaint] ***solely*** relies and which is ***integral to the complaint.***'" *Williams v. Time Warner Inc.*, 440 F. App'x 7, 9 (2d Cir. 2011) (emphasis in original) (quoting *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007)). Finally, a court can take judicial notice of "a fact that is not subject to reasonable dispute" if "it … can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

Defendants attach almost 700 pages of exhibits to their Motion to Dismiss and Reply (*see* Dkt. Nos. 110-3 to -14; Dkt. No 114-2 to -3), arguing that the factual information in those exhibits is proper for a 12(b)(6) motion. Dkt. No. 113 ("Def.'s Reply") at 17-19. This Court will consider the attached February 2007 AOC and Modification because those were incorporated into the Amended Complaint by reference. Am. Compl. ¶¶ 136, 138; *see, e.g., Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) (documents are incorporated by reference into the complaint where "complaint explicitly refers to and relies upon…the documents").

Defendants argue that this Court can take judicial notice of the remaining information in the exhibits. Def.'s Reply at 13. But "[i]n the motion to dismiss context, however, a court should generally take judicial notice 'to determine what statements [the documents] contain… not for the truth of the matters asserted.'" *Schubert v. City of Rye*, 775 F. Supp. 2d 689, 698 (S.D.N.Y. 2011) (quoting *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir.1991)); *see also Moukengeschaie v. Eltman, Eltman & Cooper, P.C.*, No. 14-CV-7539 (MKB), 2016 WL 1274541, at *13 n.13 (E.D.N.Y. Mar. 31, 2016) ("[O]n a motion to dismiss, the court may only take judicial notice 'to establish the existence of the [statements in the document], not for the truth of the facts asserted' therein" (quoting *Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006)). Thus, this Court cannot accept for their truth statements made by National Grid or NYSDEC in the attached website printouts, correspondences, and state court complaint. *See, e.g.*, Mot. to Dismiss Mem. at 13 ("According to National Grid's website, as of May 25, 2017, site restoration was underway for the NAPL recovery well component of the IRM."); Def.'s Reply at 16-17 ("[A] February 16, 2017 email from a NYSDEC attorney to National Grid's attorney, stat[es] the Department's unequivocal view that the conditions required for the termination of a site from the 2007 Order and Settlement 'have never been met….'"). It is not possible to assert that these documents contain statements "from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2); *see, e.g., Acquest Holdings, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 217 F. Supp. 3d 678, 684 n.1 (W.D.N.Y. 2016) ("It is not apparent that the Police Report contains facts that are common knowledge or derived from an unimpeachable source."). Furthermore, no reasonable notice was provided to Plaintiff for the Court to convert the Motion to Dismiss to one for summary judgment and consider the extraneous factual information in the attached exhibits. Fed. R. Civ. P. 12(d) ("All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.").

Thus, the Court will not consider any Defendant exhibits beyond the February 2007 AOC and Modification (collectively, the "AOC") for this Report and Recommendation.

C. CERCLA Claims Should be Dismissed

CERCLA is a comprehensive federal statute "designed to encourage prompt and effective cleanup of hazardous waste sites." *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 120 (2d Cir. 2010). It "empowers the federal government and the states to initiate comprehensive cleanups and to seek recovery of expenses associated with those cleanups." *Id.* Under CERCLA, "property owners are strictly liable for the hazardous materials on their property, regardless of whether or not they deposited them there." *Id.* Those owners are then "allow[ed] to seek reimbursement of their cleanup costs from others in the chain of title or from certain polluters—the so-called potentially responsible parties ('PRP's)." *Id.*

CERCLA 107 "authorizes the United States, a state, or 'any other person' to seek reimbursement for all removal or remedial costs associated with the hazardous materials on the property." *Id.* at 120–21 (citing 42 U.S.C. § 9607(a)). CERCLA 113 "provides a right of contribution [against third parties] to PRPs that have settled their CERCLA liability with a state or the United States through … an administrative … settlement." *Id.* at 121 (citing 42 U.S.C. § 9613(f)(3)(B)). CERCLA also protects those PRPs who have settled with the government from "claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2). This scheme was created to ensure "swift and effective response to hazardous waste sites" (*Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir.1991)), by encouraging the government and "and potentially responsible parties to launch clean-up efforts first, then recover the costs from other responsible parties later—through settlements, consent

decrees and, if need be, judgments." *RSR Corp. v. Commercial Metals Co.*, 496 F.3d 552, 555 (6th Cir. 2007).

a. CERCLA 113 Claim is Time Barred

CERCLA 113 allows "[a] person who has resolved its liability to… a State for some or all of a response action or for some or all of the costs of such action in an administrative …settlement" to "seek contribution from any person who is not a party to [the] settlement." 42 U.S.C.A. § 9613(f)(3)(B). CERCLA also imposes a 3-year statute of limitations ("SOL") "after…entry of a…settlement with respect to such costs or damages." 42 U.S.C.A. § 9613(g)(3)(B); *see Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) ("Section 113(g)(3)…provides …[a] 3–year limitations period[] for contribution actions …beginning at the date of [administrative or judicially approved] settlement, § 113(g)(3)(B)."); *New York v. Solvent Chem. Co.*, 664 F.3d 22, 26 (2d Cir. 2011) ("[T]here is a short statute of limitations for a CERCLA contribution claim …[under] 42 U.S.C. § 9613(g)(3) …three year[s from] …entry of administrative order….").

Defendants argue that the AOC resolved National Grid's liability to NYSDEC when it was executed in 2007, providing Plaintiff with an immediate right to contribution under CERCLA 113. Mot. to Dismiss Mem. at 23-26. Consequently, Defendants contend, the statute of limitations for the AOC was triggered in 2007 and expired 3 years later in 2010, barring Plaintiff's CERCLA 113 claim. *Id.* at 26. Plaintiff counters that the AOC never resolved its liability with NYSDEC because National Grid terminated the AOC, under the AOC's Termination Clause, before completing its performance. Dkt. No. 112 ("Pl.'s Opp'n") at 17-18. Plaintiff also alleges that, since no liability was resolved, the statute of limitations for the CERCLA 113 was not triggered and the claim is thus not time barred. *Id.* at 19.

i. AOC Resolution of Liability Language[5]

There are several relevant clauses in the AOC related to National Grid's lability. The AOC is entitled "Order on Consent and Administrative Settlement." Feb. 2007 AOC at 1 (Title). The Order explicitly states that it "constitutes an administrative settlement within the meaning of CERCLA …§ 113(f)(3)(B)" and that it "resolves Respondent's liability to the State under …CERCLA …to the extent set forth herein." Feb. 2007 AOC at 1 (Whereas para. 1.C). In particular, the agreement has a Resolution Clause that states in relevant part:

> Respondent ***shall be deemed to have resolved its liability to the State*** for purposes of contribution protection provided by CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2) for 'matters addressed' pursuant to and in accordance with this Order & Settlement Agreement. 'Matters addressed' in this Order & Settlement Agreement shall mean all response actions taken by Respondent to implement this Order & Settlement Agreement for the Sites and all response costs incurred and to be incurred by any person or party in connection with the work performed under this Order & Settlement Agreement, which costs have been paid by Respondent…. Furthermore, to the extent authorized under CERCLA § 113(f)(3)(B), 42 U.S.C. Section 9613(f)(3)(B), by entering into this administrative settlement of liability, if any, for some or all of the response action and/or for some or all of the costs of such action, ***Respondent is entitled to seek contribution under CERCLA*** from any person except those who are entitled to contribution protection under CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2).

Id. at 21-22 (Section XIV.I).[6]

The AOC specifies that the agreement does not constitute "an admission or finding of liability, fault, wrongdoing, or violation of any law, regulation, permit, order, requirement, or standard of care of any kind whatsoever." *Id.* at 4 (Whereas para. 6.B).

[5] The Modification primarily adds more MGP sites to the Order and does not disturb the relevant liability language in the February 2007 AOC. *See* Modification at 2 (Whereas para. 4A).
[6] Emphasis is added unless otherwise specified.

The AOC has a conditional Release and Covenant Not to Sue ("Covenant Not to Sue"), specifying:

> ***Upon…the Department's***[7] ***approval*** of either the RD/RA Work Plan final report or an IRM Work Plan ***final report*** evidencing that no further remedial action (other than site management activities) is required to meet the goals of the Remedial Program for a Site, …***such acceptance shall constitute a release and covenant not to sue with respect to the Site*** for each and every claim, demand, remedy, or action whatsoever against Respondent… which the Department has or may have …pursuant to any other provision of State or Federal statutory or common law, including but not limited to § 107(a) of CERCLA, 42 U.S.C. § 9607(a), involving or relating to investigative or remedial activities relative to or arising from the disposal of hazardous wastes…at the Site….

Id. at 8-9 (Section II.G). There is also a Reopening clause within the Covenant:

> [P]rovided, however, that the Department specifically reserves all of its rights concerning, and any such release and covenant not to sue shall not extend to any further investigation or remediation the Department deems necessary due to newly discovered environmental conditions on-Site or off-Site which are related to the disposal of hazardous wastes at the Site and which indicate that the Remedial Program is not protective of public health and/or the environment.

Id. at 9 (Section II.G). The release also specifies that "[n]othing herein shall be construed as barring, diminishing, adjudicating, or in any way affecting any legal or equitable rights or claims, actions, suits, causes of action, or demands whatsoever that…Respondent may have against anyone other than the Department, including but not limited to rights of contribution under § 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B)…." *Id.*

Finally, the AOC contains a Termination Clause:

> This Order & Settlement Agreement ***will terminate with respect to a Site*** upon the earlier of the following events:

[7] "Department" is the NYSDEC. Feb. 2007 AOC at 1 (Whereas para. 1.A)

> 1. Respondent's election to terminate with respect to a Site …so long as such election is made prior to the Department's approval of the RD/RA Work Plan for that Site. …[P]rovided, however, that if there are one or more Work Plan(s) with respect to such Site for which a final report has not been approved at the time of Respondent's notification of its election to terminate … Respondent shall promptly complete the activities required by such previously approved Work Plan(s)consistent with the schedules contained therein.…; or
>
> 2. the Department's written determination that Respondent has completed all phases of the Remedial Program (including site management) for all the Sites….

Id. at 18 (Section XIII.A). However, the Termination Clause also explains that "neither this Order & Settlement Agreement nor its termination shall affect any liability of Respondent may have for remediation of the Site and/or for payment of State Costs, including implementation of removal and remedial actions, interest, enforcement, and any and all other response costs as defined under CERCLA." *Id.* (Section XIII.C).

ii. Split in Authority Regarding Resolution of Liability

There appears to be a consensus amongst the Circuits that a case-by-case analysis of the AOC's terms is required to determine whether an AOC sufficiently resolves liability to establish a CERCLA 113 claim. *See Niagara Mohawk*, 596 F.3d at 125 (looking at particular AOC language to determine whether the order "released NiMo from CERCLA liability"); *Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108, 1125 (9th Cir. 2017) ("Whether this test is met depends on a case-by-case analysis of a particular agreement's terms."); *Bernstein v. Bankert*, 733 F.3d 190, 213 (7th Cir. 2013) ("Whether or not liability is resolved through a settlement simply is not the sort of question which can or should be decided by universal rule."); *Fla. Power Corp. v. FirstEnergy Corp.*, 810 F.3d 996, 1001 (6th Cir. 2015) ("To determine whether the agreement resolves a PRP's liability, we look to the specific terms of the agreement."). The Circuits do not

agree, however, on the effect of an AOC where release in liability is conditional on performance. Specifically, there is no consensus about whether the conditional language means that (1) liability is only resolved when the AOC conditions have been met, or (2) that liability is either resolved or not resolved at execution of the AOC and subsequent performance is irrelevant.

The Second Circuit has not directly addressed at what point in time an administrative settlement with conditional release provisions resolves a person's liability. Although Defendants cite *Niagara Mohawk* for the holding that "resolution of liability [i]s effective upon the execution of the Consent Order" (Mot. to Dismiss Mem. at 23-24), this particular point was not squarely before that Court. *See Niagara Mohawk*, 596 F.3d at 126. In contrast to the present action, the Second Circuit in *Niagara Mohawk* was simply trying to decide whether a consent order ***ever*** resolved a plaintiff's liability, not ***when***. *See id.* at 127 ("The 2003 Consent Order between NiMo and the DEC qualifies as 'an administrative or judicially approved settlement' under § 113(f)(3)(B); NiMo is entitled to seek contribution under CERCLA."). Thus, this Court must turn to persuasive authority to decide whether and when the AOC resolved National Grid's liability to the NYSDEC.

There appear to be two schools of thought on how to treat an AOC where release from liability is conditioned on performance, as is the case here. For some courts, especially where the AOC has strong language conditioning liability on completed performance, the AOC can only resolve liability at the time the required performance is actually completed. For this wait-and-see approach, if performance is never completed, the liability is never resolved and a CERCLA 113 claim is never available.[8] This approach was adopted by one district court case in

[8] This approach does not necessarily eliminate the possibility that an AOC can resolve liability at the time of execution. If the AOC resolution language is sufficiently certain, it can be deemed to have resolved liability immediately. *See Bernstein v. Bankert*, 733 F.3d 190, 213 (7th Cir. 2013) ("Of course, if the EPA had included an immediately effective promise not to sue as consideration for entering into the agreement, the situation would be

this Circuit as well as by the Seventh Circuit. *DMJ Assocs., L.L.C. v. Capasso*, 181 F. Supp. 3d 162, 168 (E.D.N.Y. 2016) (no contribution claim under CERCLA 113 when "th[e] termination [of the AOC] occurred before the parties could fulfill all of their obligations set forth in the AOC"); *Bernstein*, 733 F.3d at 204 ("By the terms of the AOC, when the Non–Premium Respondents completed performance of their obligations under the 1999 AOC ….[they] had 'resolved [their] liability to the United States….' through an administrative settlement, thus satisfying the prerequisites for a contribution action pursuant to 42 U.S.C. § 9613(f)(3)(B).").

Other courts, for example the Ninth and Sixth Circuits, have decided that an AOC either resolves or does not resolve liability immediately upon execution of the agreement based on the language of the AOC, without considering post-execution performance. *See Asarco*, 866 F.3d at 1126; *Fla. Power Corp.*, 810 F.3d at 1008. Courts with this immediate determination approach still differ on when language is so conditional as to defeat resolution. *Compare Asarco*, 866 F.3d at 1124 ("Nor do we agree—as the court held in *Bernstein*—that a release from liability conditioned on completed performance defeats 'resolution.'" (citing *Bernstein*, 733 F.3d 190)) *with Fla. Power Corp.*, 810 F.3d at 1008 ("In other words… [with] 'a conditional promise to release from liability if and when performance was completed' …. the effect … is no resolution of liability." (quoting *Bernstein*, 733 F.3d at 213)). Nevertheless, the general approach of the Ninth and Sixth Circuits to determine the resolution of liability as of the date of settlement appears to align better with CERCLA's statutory scheme and its underlying policies.

First, the wait-and-see approach allows a CERCLA 113 claim to potentially arise after performance is completed. This is anomalous with the CERCLA SOL provision, which is

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different.").

triggered, by its own terms, at the date of ***entry*** of a settlement. *See* 42 U.S.C. § 9613(g)(3)(B) (imposing a 3-year statute of limitations "after…***entry*** of a…settlement"); *HLP Properties, LLC v. Consol. Edison Co. of New York*, No. 14 CIV. 01383 LGS, 2014 WL 6604741, at *6 (S.D.N.Y. Nov. 21, 2014) ("Where there is an administrative settlement resolving CERCLA liability, the statute of limitations is triggered on the date the settlement is entered into."). "Thus, under the Seventh Circuit's [wait-and-see] approach, a party's contribution action could accrue ***after*** the statute of limitations had already expired." *Asarco*, 866 F.3d at 1125 n.8. Consequently, this approach results in internal inconsistencies within the statute.

A number of courts have recognized the importance of having consistency between the accrual date of a CERCLA 113 claim and the triggering of the SOL. *Chitayat v. Vanderbilt Assocs.*, 702 F. Supp. 2d 69, 83 (E.D.N.Y. 2010) ("Such a conclusion comports with the rule under federal common law that it is the discovery of the injury which triggers the statute of limitations. Here, Chitayat would have discovered his 'injury' no later than the date he entered into the Consent Order."); *Cooper Indus.*, 543 U.S. at 167 (analyzing contribution claims in the context of "the whole of § 113"); *RSR Corp.*, 496 F.3d at 558 ("And even if the covenant regarding future response costs did not take effect until the remedial action was complete, the statute of limitations for contribution actions runs from the 'entry' of the settlement, 42 U.S.C. § 9613(g)(3)(B), not from the date that each provision of that settlement takes effect."); *Fla. Power Corp.*, 810 F.3d at 1001 ("[T]o trigger the statute of limitations, an agreement must constitute an 'administrative or judicially approved settlement' within the meaning of § 113(f)(3)(B)."). This consistency is especially relevant in this case because Plaintiff appears to be claiming contribution under CERCLA 113 while simultaneously arguing that the SOL has not been

triggered for that claim. Pl.'s Opp'n at 17-18. This type of anomalous situation, if possible, should be avoided.

Second, the immediate determination approach promotes certainty and finality. Providing clarity as to a party's liability at the time they enter an agreement incentivizes the use of such settlements, "encourage[ing] prompt and effective cleanup of hazardous waste sites." *Niagara Mohawk*, 596 F.3d at 120; *cf. Asarco*, 866 F.3d at 1119 ("Granting a settling party a right to contribution from non-settling PRPs provides a strong incentive to settle and initiate cleanup."). Furthermore, the immediate determination approach helps third parties to timely assess their potential liability for contribution actions, leading to early resolution (or definitive foreclosure) of such claims. *See RSR Corp.*, 496 F.3d 552, 559 ("Early contribution actions 'ha[ve] the effect of bringing all … responsible parties to the bargaining table at an early date.'" (quoting H.R. Rep. No. 253, pt. I, at 80)); *id.* ("The principal purpose of limitations periods in th[e contributions] setting is to ensure that the responsible parties get to the bargaining-and clean-up-table sooner rather than later."). Again, this is particularly relevant here, where almost nine years had passed after the execution of the AOC before Plaintiff brought contribution claims against third parties.

I thus recommend analyzing the AOC in this case based on the parties' intent at the time of execution, without considering post settlement performance. *See Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 768 (6th Cir. 2014) ("In determining whether the ASAOC resolves some of Appellants' liability, we interpret the settlement agreement as a contract according to state-law [contract] principles.").

iii. AOC Resolved Plaintiff's Liability and Triggered SOL

The intent of the parties to the AOC can be determined from the language of the agreement. *Nichols v. Nichols*, 306 N.Y. 490, 496 (1954) ("The first and best rule of construction of every contract, … is that, when the terms of a written contract are clear and unambiguous, the intent of the parties must be found therein."). The AOC language indicates that National Grid and NYSDEC intended to immediately resolve their CERCLA 113 liability upon execution.

The AOC title contains the words "administrative settlement," mirroring the language of CERCLA 113. *See Fla. Power Corp.*, 810 F.3d at 1004 ("We explained that this provision expressed the parties' intent to resolve some of the plaintiffs' liability because the parties expressly designated the agreement as an 'administrative settlement….'" (citing *Hobart Corp.*, 758 F.3d at 769)). In fact, the AOC states that it "constitutes an administrative settlement within the meaning of CERCLA… § 113(f)(3)(B)." Feb. 2007 AOC at 1 (Whereas para. 1.C). Furthermore, the AOC states, ***in the present tense*** that it "resolves Respondent's liability to the State under…CERCLA… to the extent set forth herein." Feb. 2007 AOC at 1 (Whereas para. 1.C). The Resolution Clause reiterates this sentiment: "Respondent shall be deemed to ***have resolved*** its liability to the State for purposes of contribution protection provided by CERCLA" and "Respondent ***is entitled*** to seek contribution under CERCLA." *Id.* at 21-22 (Section XIV.I). This language provides strong indication that the parties intended the AOC to immediately resolve National Grid's liability for purposes of CERCLA. *See Chitayat*, 702 F. Supp. 2d at 80–81 (finding CERCLA 113 claim to exist where, *inter alia*, "Chitayat's Consent Order with the DEC …specifically refer[s] to the resolution of Chitayat's CERCLA liability"); *HLP Properties*, 2014 WL 6604741, at *5 (same holding where "the [Agreement] expressly releases the BCA Plaintiffs from liability under CERCLA"); *Hobart Corp.*, 758 F.3d at 769 (parties intended to

resolve their liability where "[n]ot only d[id] th[e AOC]… explicitly state that Appellants have resolved their liability, but it also cite[d] the specific section of CERCLA at issue").

Other aspects of the AOC do not negate this intent. The fact that National Grid does not admit liability in the AOC is inconclusive. Feb. 2007 AOC at 4 (Whereas para. 6.B). "Congress' intent in enacting § 113(f)(3)(B) was to encourage prompt settlements that establish PRPs' cleanup obligations with certainty and finality." *Asarco*, 866 F.3d at 1125. "A PRP's refusal to concede liability does not frustrate this objective so long as the PRP commits to taking action." *Id.* In fact, "requiring a PRP to concede liability may discourage PRPs from entering into settlements because doing so could open the PRP to additional legal exposure." *Id.*

The fact that the AOC's Covenant Not to Sue is conditioned "[u]pon… the Department's approval… of [a] final report" is also not dispositive. Feb. 2007 AOC at 8. First, the effect of this covenant is explicitly limited by the AOC: "[n]othing herein shall be construed as barring, diminishing, adjudicating, or in any way affecting any legal or equitable rights or claims, actions, suits, causes of action, or demands whatsoever that…Respondent may have against anyone other than the Department, including but not limited to rights of contribution under § 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B)…." *Id.* at 9 (Section II.G). Second, despite conditioning the release on future performance, the AOC otherwise indicates that National Grid intended to make an immediate promise to perform future remediation by signing the agreement. *See, e.g.*, *id.* at 21-22 (Section XIV.I) ("Matters addressed' in this Order & Settlement Agreement shall mean … all response costs incurred ***and to be incurred*** …, which costs have been paid by Respondent…."). "A promise of future performance in an agreement [in exchange for a covenant not to sue] suffices to constitute resolution of liability" even where the agreement "include[s] a covenant not to sue conditioned on a Certification of Completion." *Asarco*, 866

F.3d at 1124 (citing *RSR Corp.*, 496 F.3d 552); *Fla. Power Corp.*, 810 F.3d at 1012) (Suhrheinrich, J., dissenting) ("RSR and the EPA exchanged promises of future performance that created an enforceable, bilateral contract…."). Third, "[i]f a covenant not to sue conditioned on completed performance negated resolution of liability, then it is unlikely that a settlement agreement could ***ever*** resolve a party's liability"[9] due to CERCLA's requirement that the President certify that remedial action has been completed before a covenant not to sue can be effective. *Asarco*, 866 F.3d at 1124 (citing 42 U.S.C. § 9622(f)(3)). Nullifying parties' ability to settle CERCLA claims is contrary to Congressional intent in providing a contribution remedy in the first place. *Id.* at 1125. Thus, as a practical matter, "[a]n agreement may 'resolve[ ]' a PRP's liability once and for all without hobbling the government's ability to enforce its terms if the PRP reneges." *Id.* at 1124. Fourth, two district courts in this Circuit have held that such conditional language does not negate resolution of liability. *Chitayat*, 702 F. Supp. 2d at 81 (finding immediate resolution of liability even where release was "contingent upon years of Compliance"); *HLP Properties*, 2014 WL 6604741, at *5, *6 ("[A]greements providing for future resolution of CERCLA liability [still] constitute administrative settlements for purposes of § 113" that trigger SOL "on the date the settlement is entered into.").

By the same logic, the Reopening Clause does not undermine the parties' intent to resolve liability at entry of settlement. The Reopening Clause allows NYSDEC to request further remediation on the covered sites to protect public health or the environment. Feb. 2007

[9] Furthermore, focusing on the conditionality of the covenant not to sue may not be a logical way to assess resolution of liability because covenants not to sue are always conditional—the government can always sue for breach of contract if a PRP fails to perform its obligations under the AOC. *See Fla. Power Corp. v. FirstEnergy Corp.*, 810 F.3d 996, 1019 n. 10 (6th Cir. 2015) (Suhrheinrich, J., dissenting). "[E]ven a[n] unconditional covenant not to sue arguably resolves liability to the same extent as a fully conditional covenant not to sue, since both terms still allow the EPA to sue…[either for breach of contract or for breach of the AOC] in the event of non-performance." *Id.*

AOC at 9 (Section II.G). Yet, the effect of the Reopening Clause is expressly limited by the same language as the Covenant Not to Sue. *Id.* ("[n]othing herein shall be construed as … in any way affecting any legal or equitable rights or claims…that…Respondent may have against anyone …, including but not limited to rights of contribution under § 113(f)(3)(B) of CERCLA…."). In addition, a district court in the Second Circuit has found that the existence of a similar Reopening Clause in an AOC does not "preclude… Plaintiff[] from seeking contribution to the extent that at least some, if not most, of [its] CERCLA liability has been resolved by the [AOC]." *New York v. Town of Clarkstown*, 95 F. Supp. 3d 660, 676 (S.D.N.Y. 2015); *see also Fla. Power Corp.*, 810 F.3d at 1016 (Suhrheinrich, J., dissenting) ("[T]his reserved authority [to order parts of clean-up not addressed by agreement] should not affect the agreement's status as an administrative settlement because 42 U.S.C. § 9613(f)(3)(B) requires only a resolution of liability for 'some' of a response action."). Thus, " [t]he [AOC] resolves … liability with regard to the 'Matters Addressed' and provides … contribution protection for those matters." *Town of Clarkstown*, 95 F. Supp. 3d at 676; *cf. Asarco*, 866 F.3d at 1126 (no resolution where "the [agreement] did not just leave open ***some*** of the United States' enforcement options, it preserved all of them"). Finally, public policy considerations indicate that the government should be able to settle with private parties under CERCLA while still being able to reopen sites to protect public health or the environment. *Cf. Asarco*, 866 F.3d at 1124 ("An agreement may 'resolve[ ]' a PRP's liability once and for all without hobbling the government's ability to enforce its terms if the PRP reneges."). In sum, it would defy logic to allow the Reopener Clause to undermine the resolution of liability in this case.

Likewise, the AOC's Termination Clause does not affect the resolution of liability. The AOC explains that "neither this Order & Settlement Agreement ***nor its termination shall affect***

any liability of Respondent may have for remediation of the Site and/or for payment of State Costs, including implementation of removal and remedial actions, interest, enforcement, and any and all other response costs as defined under CERCLA." Feb. 2007 AOC at 18 (Section XIII.C). Thus, the AOC explicitly indicates that the parties did not intend the Termination Clause to affect National Grid's liability with respect to the AOC.[10] Therefore, the AOC resolved at least some of National Grid's liability, rendering a contribution claim available. *See Town of Clarkstown*, 95 F. Supp. 3d at 676; *see also HLP Properties*, 2014 WL 6604741, at *5 (finding the fact that "Plaintiffs here may terminate the agreement at any time without consequence" irrelevant to "[t]he …determin[ation of] whether an agreement qualifies as an administrative settlement for purposes of § 113").

Because the intent of the parties was to resolve National Grid's liability at the execution of the AOC, Plaintiff had a claim for contribution under CERCLA 113 in 2007. That claim thus expired after 3 years under the statute of limitations and is now time barred. *See Fla. Power Corp.*, 810 F.3d at 1001 ("[T]o trigger the statute of limitations, an agreement must constitute an 'administrative or judicially approved settlement' within the meaning of § 113(f)(3)(B)."). The Court sees no manner in which Plaintiff could amend the CERCLA 113 claim that would survive dismissal. *See Hayden v. Cnty. of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999) ("[W]here the plaintiff is unable to demonstrate that he would be able to amend his complaint in a manner which would survive dismissal, opportunity to replead is rightfully denied."). Leave to amend would be futile. *See Harrison v. New York*, 95 F. Supp. 3d 293, 305–06 (E.D.N.Y. 2015) ("Leave to amend is

[10] Plaintiff's reference to *DMJ Assocs.* is thus not persuasive because no such limiting language was considered in that case. *See DMJ Assocs., L.L.C. v. Capasso*, 181 F. Supp. 3d 162, 168 (E.D.N.Y. 2016) ("[T]his termination occurred before the parties could fulfill all of their obligations set forth in the AOC…. Accordingly, the TPPs cannot assert a contribution claim under § 113(f)(3)(B)….").

often futile when a claim is dismissed based on… the expiration of the statute of limitations….").

Accordingly, I recommend dismissing Plaintiff's CERCLA 113 claim with prejudice.

b. CERCLA 107 Claims Should be Dismissed as Insufficiently Pled

To establish a prima facie case under CERCLA 107, a plaintiff must show that

> (1) the defendants fall within one or more of the four classes of responsible persons described in CERCLA § 107(a); (2) the site is a "facility" as defined in CERCLA; (3) a release or threatened release of a hazardous substance has occurred, (4) the release or threatened release has caused the plaintiff to incur response costs; and (5) the costs and response actions conform to the national contingency plan set up by CERCLA.

SRSNE Site Grp. v. Advance Coatings Co., No. 3:12-CV-00443 (VLB), 2015 WL 13639165, at *3 (D. Conn. Mar. 27, 2015). Responsible persons under CERCLA § 107(a) include "the owner and operator of a vessel or a facility" or "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(1), (2). A "facility" can be "any building, structure, installation, equipment, pipe or pipeline" or "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9).

A CERCLA 107 claim is not available when a party had a right of contribution under CECRLA 113 for those same costs. The Second Circuit has recognized that allowing a party to proceed under CERCLA 107 would "in effect nullify" Congressional intent of creating a distinct contribution remedy under CERCLA 113. *Niagara Mohawk*, 596 F.3d at 128. Other Circuits have come to the same conclusion. *Hobart Corp.*, 758 F.3d at 767 ("[I]t is sensible and consistent with the text to read § 113(f)'s enabling language to mean that if a party is able to bring a contribution action, it must do so under § 113(f), rather than § 107(a)."); *Bernstein*, 733

F.3d at 206 ("[W]e agree with our sister circuits that a plaintiff is limited to a contribution remedy when one is available.").

Case law is more mixed about whether response costs incurred outside of an administrative settlement can be recovered under CERCLA 107. The Second Circuit has not addressed the issue. *See Niagara Mohawk*, 596 F.3d at 127 n.17 ("We…do not decide whether a § 107(a) action could be pursued by a PRP that incurs clean up costs after engaging with the federal or a state government…."). The district courts in this Circuit appear to be split on the issue. *Compare HLP Properties*, 2014 WL 6604741, at *5 ("Because…Plaintiffs are eligible to proceed under § 113, they are not permitted to proceed under § 107, even if certain costs might be recoverable only under that provision.") *with Next Millennium Realty, L.L.C. v. Adchem Corp.*, No. CV 03-5985 (ARL), 2015 WL 11090419, at *25–26 (E.D.N.Y. Mar. 31, 2015), *aff'd*, 690 F. App'x 710 (2d Cir. 2017) ("[B]ecause Plaintiffs may have incurred costs beyond what the Consent Order requires and beyond what they could recover as contribution under § 113, the Court declines to dismiss Plaintiffs' § 107 claim at this juncture.").

This Court will assume without deciding that Plaintiff is not barred from pursuing a CERCLA 107 claim to the extent it does not overlap with its CERCLA 113 claim under the AOC. *See Whittaker Corp. v. United States*, 825 F.3d 1002, 1009 (9th Cir. 2016) ("The two other circuits [Seventh and Third] to have considered the question have held that, even where one of the statutory triggers for a contribution claim has occurred for certain expenses at a site, a party may still bring a cost recovery action for its other expenses."). The Amended Complaint states that "[a]s a result of the releases at and near the Bushwick Site, the Plaintiff has incurred and ***will continue to incur*** substantial response costs in taking actions to investigate, remediate, and monitor the hazardous substances, and to restore the Bushwick Site." Am. Compl. at ¶ 149.

Thus, in theory, Plaintiff can pursue a CERCLA 107 claim for any expenses incurred on the Bushwick Site for sites not covered by the AOC. Plaintiff can also pursue a claim for expenses, if any, incurred on the Williamsburg MGP after termination of that site from the AOC. As detailed below, however, Plaintiff has failed to sufficiently plead either claim under CERCLA 107.

i. CERCLA 107 Claim for Sites Not Under AOC

Plaintiff's CERCLA 107 claim for sites not covered by the AOC is insufficiently pled. Plaintiff has failed to sufficiently plead that the Bushwick Site constitutes a "facility" under CERCLA 107. The Amended Complaint lists the various contaminants that have been disposed on the Bushwick Site and the various parties that owned or operated parts of the Bushwick Site at different points in time. This Court has found no authority, however, that treats an area containing various structures that were never under common ownership or control and that does not involve contamination by a single contaminant as a single "facility." *See New York v. Gen. Elec. Co.*, No. 1:14-CV-747 (CFH), 2017 WL 1239638, at *21 (N.D.N.Y. Mar. 31, 2017) (not considering two sites a single "facility" despite a "a common source of contamination" where "[t]he properties were not operated as a single unit together" and "did not have a common owner at the time of the contamination"); *Alprof Realty LLC v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, No. 09-CV-5190 (CBA) (RER), 2012 U.S. Dist. LEXIS 131046, at *24 (E.D.N.Y. Sep. 12, 2012) ("The cases cited…do not establish that a CERCLA facility must always be defined to include the entire area of contamination, and they particularly do not stand for the proposition that an unrelated neighboring property onto which contamination spreads becomes part of the CERCLA facility."); *cf. Yankee Gas Servs. Co. v. UGI Utilities, Inc.*, 616 F. Supp. 2d 228, 270–71 (D. Conn. 2009) ("[A] site with a single source

of pollution is almost always considered one 'facility' within the meaning of CERCLA and is generally not divisible absent extraordinary circumstances.").

Furthermore, it would be illogical to consider the Bushwick Site a single facility given the posture of this case. Plaintiff can no longer recover costs incurred for sites under the AOC, as explained *supra*. Therefore, only certain parts of the Bushwick Site are even theoretically eligible for a CERCLA 107 claim.[11] The Amended Complaint thus needed to specify which structures on the Bushwick Site eligible for a CERCLA 107 claim constitute separate "facilities."[12] The Amended Complaint does not do so. It only alleges, in conclusory terms, that "[t]he Bushwick Site is a 'facility' within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9)." Am. Compl. ¶ 145. Although the word "facility" appears colloquially numerous times in the Amended Complaint (*see, e.g.*, Am. Compl. ¶ 9, 43), that does not necessarily establish that a site constitutes a facility under CERCLA. Again, courts look for some nexus between different structures, such as a single contaminant or common ownership, in order to consider them part of the same facility. This Court will not speculate as to which parts of the Bushwick Site not under the AOC meet these requirements. *See McGregor v. Indus. Excess Landfill, Inc.*, 856 F.2d 39, 43 (6th Cir. 1988) (A court is not "required to presume facts that would turn plaintiffs' apparently frivolous claim under Section 107 of CERCLA into a substantial one.").

Moreover, "in order to recover their response costs," National Grid should have alleged "that there has been a release of … Contaminants at Defendants' 'respective facilities.'" *See Roosevelt Irr. Dist. v. Salt River Project Agr. Imp. & Power Dist.*, 39 F. Supp. 3d 1059, 1067 (D.

[11] For example, Plaintiff has not alleged that the Wythe Street Holder Station has been terminated from the AOC. *See* Modification at 2. Thus, that portion of the Bushwick Site is not eligible for a CERCLA 107 action.
[12] It is unlikely that Plaintiff can properly plead that the all portions of the Bushwick Site not under the AOC are a single "facility" given the disparate ownership and sources of contamination in the various portions of the Site.

Ariz. 2014). It is difficult to assess whether National Grid has pled that "a release or threatened release of a hazardous substance has occurred" for each facility given the lack of a proper designation of what constitutes each "facility." *SRSNE Site Grp.*, 2015 WL 13639165, at *3. For instance, if Block 2279 is treated as a separate "facility," then the Amended Complaint only pleads that it was "the site of the former Eagle Oil Works," that "Patti 3 owns a portion of Block 2279," and that "Defendant Exxon formerly operated on Block 2279." Am. Compl. ¶ 51, 66. There is no allegation of a release of a hazardous substance as required for a CERCLA 107 claim.

The Amended Complaint also contains no allegations to support the requirement that costs incurred at sites outside of those in the AOC are "necessary costs of response … consistent with the national contingency plan." 42 U.S.C. 9706(a)(4)(B). "Costs are 'necessary' if incurred in response to a threat to human health or the environment." *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 703 (6th Cir. 2006). The Amended Complaint alleges that *all* the costs incurred on the Bushwick Site "qualify as costs of response within the meaning of CERCLA and are necessary and consistent with the National Contingency Plan. 42 U.S.C. § 9601(25); 42 U.S.C. § 9605." Am. Compl. ¶ 150. It also states that "[d]uring the period that Defendants owned, managed, directed, and controlled enterprises at or near the Bushwick Site, hazardous substances were released into the environment and/or remain a threat to the environment." Am. Compl. ¶ 157. Such conclusory language is insufficient to meet the pleading standards under *Twombly/Iqbal*. *See Iqbal*, 556 U.S. at 678 ("A pleading that offers 'labels and conclusions' or 'formulaic recitation of the elements of a cause of action will not do.'" (quoting *Twombly*, 550 U.S. at 555, 557)); *see also J & P Dickey Real Estate Family Ltd. P'ship v. Northrop Grumman Guidance & Elecs. Co.*, No. 2:11CV37, 2012 WL 925015, at *5 (W.D.N.C. Mar. 19, 2012)

(dismissing a CERCLA 107 claim where "[t]he Complaint contain[ed] no factual allegations supporting the claim that the soil and water testing and surveillance are consistent with the National Contingency Plan."). Factual detail was, in particular, necessary here, where the Bushwick Site cannot be properly treated as a single facility and the costs eligible for CERCLA 107 recovery were not incurred under the supervision of a government body responsible for environmental cleanup, such as the NYSDEC.

Therefore, Plaintiff has failed to sufficiently plead a CERCLA 107 claim for sites not under the AOC.

ii. Williamsburg MGP Expenses Incurred After Termination

In its opposition papers, Plaintiff argues that it is not precluded "from seeking ***different*** expenses under CERCLA §§ 107 and 113" because "National Grid incurred costs pursuant to the AOC and has continued to incur response costs ***after*** terminating the AOC." Pl.'s Opp'n at 15 (first emphasis in original). In particular, Plaintiff seems to imply that its costs "incurred with an administrative agreement that (like the AOC with respect to the Williamsburg MGP) was later terminated" could be recovered under CERCLA 107. *Id.*

To the extent Plaintiff is attempting to recover costs incurred at the Williamsburg MGP under CERCLA 107 after the termination of that site from the AOC, Plaintiff's claim should be dismissed as insufficiently pled. The Amended Complaint, in combination with the integrated AOC, likely contains enough information to establish that the Williamsburg MGP was a facility that was owned and/or operated by a subset of Defendants who released hazardous substances at the site. *See, e.g.*, Am. Compl. ¶ 6, 52, 61, 75, 124, 127-135; Feb. 2007 AOC at 4 (each Site under the AOC is a "facility" under CERCLA); *id.* at 5 (alleging compliance with National

Contingency Plan); *see also SRSNE Site Grp.*, 2015 WL 13639165, at *3 (listing elements of CERCLA 107 claim).

Plaintiff did not plead, however, that it continued to incur costs at the Williamsburg MGP ***after*** the site was terminated under the AOC. Costs, if any, incurred after termination are the only costs eligible for a CERCLA 107 claim for this site, as detailed *supra*. Plaintiff's statements regarding such costs in its opposition papers cannot compensate for a lack of pleading in the Amended Complaint. "It is long-standing precedent in this circuit that parties cannot amend their pleadings through issues raised solely in their briefs." *Fadem v. Ford Motor Co.*, 352 F. Supp. 2d 501, 516 (S.D.N.Y.), *aff'd*, 157 F. App'x 398 (2d Cir. 2005). Therefore, Plaintiff has failed to sufficiently plead a CERCLA 107 claim for costs incurred at the Williamsburg MGP after the AOC was terminated.[13]

In sum, Plaintiff has failed to sufficiently plead either claim under CERCLA 107. This Court recommends dismissing all of Plaintiff's CERCLA 107 claims with leave to amend. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend a pleading] when justice so requires.").

D. Declaratory Judgment Act Claim Should be Dismissed

"Plaintiff [also] seeks a declaration [under 42 U.S.C. § 9613(g)(2)(B)] that Defendants are liable to Plaintiff for [CERCLA 107] response costs." Am. Compl. ¶ 160. In a CERCLA 107 action, a court can "enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." 42 U.S.C. § 9613(g)(2)(B). However, "[d]eclaratory relief under § 9613(g)(2) is only

[13] This Court notes that whether Plaintiff met all the prerequisites in order to properly terminate the AOC with respect to the Williamsburg MGP is a factual question that cannot properly be resolved in a motion to dismiss. *See Arden Way Assocs. v. Boesky*, 664 F. Supp. 855, 857 (S.D.N.Y. 1987) ("Fed.R.Civ.P. 12(b)(6) is not an appropriate vehicle by which to decide what fundamentally are factual disputes.").

available in connection with an active cost recovery action [under CERCLA 107]." *Mercury Mall Assocs., Inc. v. Nick's Mkt., Inc.*, 368 F. Supp. 2d 513, 520 (E.D. Va. 2005). Accordingly, because I recommend dismissal of Plaintiff's CERCLA 107 claims, I recommend that the Declaratory Judgment Act claim be dismissed as well. Leave to amend may be appropriate in the future if Plaintiff properly alleges a viable CERCLA 107 claim.

III. CONCLUSION

For the foregoing reasons, I respectfully recommend that the Court grant Defendants' motion to dismiss the Amended Complaint for the CERCLA 113 claim with prejudice. I also recommend granting Defendants' motion with respect to the CERCLA 107 claim and the dependent Declaratory Judgment claim, with leave to amend.

IV. OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report and Recommendation to file written objections. Failure to file timely objections shall constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See Marcella v. Capital Dist. Physicians' Health Plan, Inc.*, 293 F.3d 42, 46 (2d Cir. 2002); *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

SO ORDERED.

/s/
Steven L. Tiscione
United States Magistrate Judge
Eastern District of New York

Dated: Brooklyn, New York
September 10, 2018