

Sullivan v Keyspan Corp.

2014 NY Slip Op 32173(U)

August 7, 2014

Supreme Court, Suffolk County

Docket Number: 36398-12

Judge: Thomas F. Whelan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

P R E S E N T :

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9/27/14 (#002)
MOTION DATE 12/13/13 (#003)
ADJ. DATES 2/21/14
Mot. Seq. # 002 - Mot D
Mot. Seq. # 003 - X Mot D
CDISP Y N X

-----X
WILLIAM SULLIVAN and LYNNE M. :
CHMURZYNSKI and those Plaintiffs listed in :
First Amended Exhibit "A", :
 :
Plaintiffs, :
 :
-against- :
 :
KEYSPAN CORP., KEYSpan ENERGY :
CORP., KEYSpan GAS EAST CORP. d/b/a :
KEYSPAN ENERGY, NATIONAL GRID and :
"JOHN DOES" Numbered 1 through 5, :
 :
Defendants. :
-----X

REILLY, LIKE & TENETY, ESQS.
Attys. For Plaintiffs
179 Little East Neck Rd., No.
Babylon, NY 11702

JOHN F. HASTINGS, ESQ.
Atty. For Def. National Grid USA
175 E. Old Country Rd.
Hicksville, NY 11801

McLANE, GRAF, RAULERSON
Attys. For Defendants
PO Box 326
Manchester, NH 03105

Upon the following papers numbered 1 to 1004 read on this motion for dismissal and cross motion for partial summary judgment, among other things; Notice of Motion/Order to Show Cause and supporting papers 1 - 352; Notice of Cross Motion and supporting papers 921-934; Answering Affidavits and supporting papers 353-368; 369-499; 500-806; 935-963; Replying Affidavits and supporting papers 881-920; 964-1004; Other 807-826 (defendants' memorandum of law); 827-880 (plaintiffs' memorandum of law); ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the branch of defendants' motion (#002) seeks the dismissal of this action pursuant to CPLR 3211 (a)(5) on the ground that it is time barred by the statute of limitations is granted to the extent set forth below; and it is further

ORDERED that the branch of the defendant's motion which seeks the dismissal of this action pursuant to CPLR 3211(a)(7) that the plaintiff's complaint is legally insufficient is granted to the extent set forth below; and it is further

ORDERED that the branch of the defendant's motion which seeks the dismissal of the EIGHTH cause of action sounding in claims of monitoring, establishment of a trust fund and injunctive relief is granted as set forth herein; and it is further

ORDERED that the branch of the plaintiff's cross motion (#003) which seeks partial summary judgment against the defendants on the issue of liability is denied; and it is further

ORDERED that the branches of the plaintiff's cross motion which seeks the appointment of a judicial hearing officer as well as the appointment of experts to serve as special masters is denied without prejudice; and it is further

ORDERED that the branch of the plaintiff's cross motion which seeks an order on behalf of the plaintiff, Aristeia Mousis, directing the defendants to pay the cost of a toxicologist to serve as a special master to evaluate and report to whether her continued occupancy of the premises located at 56 North Clinton Avenue, Bay Shore, New York, would be dangerous to her health is denied; and it is further

ORDERED all other relief requested in the motion and cross motion is denied.

This action, like a number of others commenced in this court, arises out of claims that the plaintiff's real property was contaminated by the release and migration of pollutants into the ground onto or near their property from the former manufactured gas plant ("MGP") located in Bay Shore, New York that was owned and operated by the predecessors of the defendant. The subject plant is situated on a 10.3 acre parcel just north of the Long Island Rail Road tracks. It is noted that this MPG site was decommissioned in the mid-1970's.

In 1998, KeySpan took over ownership of the decommissioned Bay Shore MGP. Thereafter on September 30, 1999, KeySpan entered into an Administrative Order on Consent with the New York State Department of Environmental Conservation ("DEC"). The Order requires KeySpan to investigate and remediate the hazardous substances released by the MGP at and around the Bay Shore MGP site. At all times since entering into this consent order, KeySpan's investigation and remediation efforts have been closely monitored and subject to the approval of the DEC. The DEC has been continually and extensively involved and informed, as well as having provided oversight to the design and the execution of the remediation plans at the Bay Shore MGP site. Further, KeySpan and its successor, National Grid, have complied with terms and conditions of the Consent Order governing the Bay Shore MGP remediation process.

Prior Litigation History

Initially, prior to her appointment to the Second Department, the various cases emanating from the remediation efforts surrounding this MPG site were assigned to Justice Sandra L. Sgroi. Her decision dated September 28, 2007, denying a motion for class action certification, was affirmed by the Appellate Division (*see Nicholson v KeySpan Corp.*, 65 AD3d 1025, 885 NYS2d 106 [2d Dept

2009]). Since the reassignment of the cases to this Court, numerous decisions have been issued involving various related cases. Motions to vacate prior dismissal orders of the Hon. Sandra L. Sgroi were denied by Orders of this Court (*see eg, Sarro v KeySpan Corp.*, Index No. 08-40827, Order dated January 26, 2010; *Giron v KeySpan Corp.*, Index No. 08-40821, Order dated February 3, 2010). Eventually, the *Nicholson v KeySpan Corp.* case, under Index No. 06-17458, which was commenced by four plaintiffs, was dismissed, on the record, as a result of a conditional dismissal order issued on September 26, 2011 and as further reflected in a short form order dated April 6, 2012.

Over the years, in various cases, the Court has dismissed the Eighth cause of action seeking injunctive relief and “medical monitoring” (*see eg, Onder Realty, Inc. v KeySpan Corp.*, Index No. 10-837, Order dated May 5, 2010; *Soldiers and Sailors Memorial Committee, Inc. v KeySpan Corp.*, Index No. 10-2085, Order dated May 5, 2010; *TJO, Inc. v KeySpan Corp.*, Index No. 10-2084, Order dated May 5, 2010), or causes of action seeking relief under Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”), breach of contract, and unjust enrichment (*see eg, Zientek v KeySpan Corp.*, Index No. 09-6411, Order dated February 8, 2010; *Tsakis v KeySpan Corp.*, Index No. 08-5022, Order dated November 29, 2010; *Grompton v KeySpan Corp.*, Index No. 08-3712, Order dated December 15, 2010; *Heuthe v KeySpan Corp.*, Index No. 07-38446, Order dated December 15, 2010; *MPH Enterprises, Inc. v KeySpan Corp.*, 08-3713, Order dated November 29, 2010).

The genesis of the instant motion arises from this Court’s dismissal, on statute of limitations grounds, of the action entitled *Benjamin v KeySpan Corp.*, Index No. 11-6653, by Order dated August 26, 2011. That Order was affirmed by the Appellate Division (*see Benjamin v KeySpan Corp.*, 104 AD3d 891, 963 NYS2d 128 [2d Dept 2013]). Previously, on identical grounds, the actions entitled *Spelman v KeySpan Corp.*, under Index No. 09-07201 and *Grancagnolo v KeySpan Corp.*, under Index No. 09-07200, were dismissed by Orders dated April 5, 2010.

Instant Motion

By motion, the Defendants, *inter alia*, seeks an order dismissing the Second Amended Complaint pursuant to CPLR 3211 (a)(7) that the plaintiff’s complaint is legally insufficient and CPLR 3211 (a)(5) on the ground that it is time barred by the statute of limitations.

The Court will initially address the statute of limitations claim. On a motion to dismiss one or more causes of action set forth in a complaint on the ground that the claims are time barred by statute of limitations, movant bears the initial burden of making a prima facie showing that the time within to commence the action has expired (*see Beizer v Hirsch*, 116 AD3d 725, 983 NYS2d 615 (2d Dept 2014); *Singh v. Edelstein*, 103 AD3d 873, 962 NYS2d 225 (2d Dept, 2013); *Rakusin v. Miano*, 84 AD3d 1051, 923 NYS2d 334 [2d Dept, 2011]; *Phillips F. v Roman Catholic Diocese of Las Vegas*, 70 AD3d 765, 894 NYS2d 125 [2d Dept, 2010]; *6D Farm Corp. v. Carr*, 63 AD3d 903, 882 NYS2d 198 [2d Dept, 2009]). “In order to make a prima facie showing, the defendant must establish, *inter alia*, when the plaintiff’s cause of action accrued” (*Swift v New York Med. Coll.*, 25 AD3d 686, 687, 808 NYS2d 731 [2d Dept, 2006]).

Upon such a showing, the burden shifts to the plaintiff to aver evidentiary facts sufficient to establish that the statute is inapplicable due to an available exception to the statute of limitations or that a question of fact exists with respect thereto (*see Matteawan On Main, Inc. v City of Beacon*, 109 AD3d 590, 970 NYS2d 631 [2d Dept, 2013]; *Santos B v. Roman Catholic Archdiocese of NY*, 51 AD3d 956, 861 NYS2d 674 [2d Dept, 2008]; *Swift v New York Med. Coll.*, 25 AD3d 686, *supra*). The plaintiff must establish that the statute of limitations has been tolled or that the plaintiff actually commenced the action within the applicable statute of limitations (*see Bullfrog, LLC v Nolan*, 102 AD3d 719, 959 NYS2d 212 [2d Dept 2013]).

The moving papers submitted by the defendants sufficiently establish that the FIRST through SEVENTH causes of action are governed by the three year statute of limitations period set forth in CPLR § 214-c, which provides in pertinent part, the following:

CPLR § 214-c. Certain actions to be commenced within three years of discovery.

1. In this section, “exposure” means direct or indirect exposure by absorption, contact, ingestion, inhalation, implantation, or injection.
2. Notwithstanding the provisions of section 214, the three-year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the reasonable diligence such injury should have been discovered by the plaintiff, which ever is earlier.

This action was originally commenced by plaintiffs, William Sullivan and Lynne M. Chmurzynski, by filing on December 4, 2012. On February 7, 2013, an amended complaint was filed by plaintiffs’ counsel and, thereafter on May 21, 2013, a second amended complaint was filed. This resulted in the addition of 81 property owners as plaintiffs to this action by simply adding individual verifications to what was now labeled a second amended verified complaint and a limited expansion of the caption, without the addition of any new specifics as to these new plaintiffs or allegations of their injuries in fact. The fact that the THIRD, SIXTH and SEVENTH causes of action are predicated on theories sounding in claims of continuing trespass and nuisance are all subject to the reach and applicability of CPLR § 214-c (2), (*see Scheg v Agway, Inc.*, 229 AD2d 963, 645 NYS2d 687 [4th Dept, 1996]; *Pfohl v Amax, Inc.*, 222 AD2d 783, 635 NYS2d 880 [4th Dept, 1995] *leave to appeal denied* 88 NY2d 1038, 651 NYS2d 12 [1996]). The FIRST, SECOND, FOURTH and FIFTH causes of action, sound in strict liability and negligence, and are also subject to the statute of limitations period set forth in CPLR § 214-c or to the finite three year statute of limitations period set forth in CPLR § 214 (2) or (4) which is not subject to the extension afforded under the discovery provisions of CPLR § 214-c.

The rule set forth in CPLR § 214-c, requires that “[A]n action to recover damage to property caused by a latent effects of exposure to any substance must be brought no later than three years from the date of discovery of the injury by the plaintiffs or from the date when, through the exercise of reasonable diligence, such injury should have been discovered by the plaintiffs, which ever is earlier.” (*DiStefano v Nabisco*, 282 AD2d 704, 724 NYS2d 444 [2d Dept, 2001] citing *Jensen v General Elec. Co.*, 82 NY2d 77, 603 NYS2d 420 [1993]). It is well settled that discovery under CPLR § 214-c occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance, the injured party discovers the primary condition on which the claim is based (see *MRI Broadway Rental, Inc. v United States Min. Prods. Co.*, 92 NY2d 421, 681 NYS2d 783 [1998]). Moreover, as noted above, the fact that the plaintiffs have characterized their claims as continuing trespass or nuisance does not relieve them of complying with CPLR § 214-c (2) (see *Jensen v General Elec. Co.*, 82 NY2d 77, *supra*).

Under the discovery rule set forth in CPLR § 214-c, where the record demonstrates that the plaintiff has knowledge of facts which would put a reasonable person on notice of the need to undertake further investigation into the contamination event, the plaintiff has three years from that date of the acquisition of that knowledge to commence suit (see *Oliver v Chevrolet Mobil Oil Corp.*, 249 AD3d 793, 671 NYS2d 850 [3d Dept, 1998]). For plaintiffs, Sullivan and Chmurzynski, the controlling date for the acquisition of knowledge becomes December 4, 2009. As for as the claims of the 81 newly added plaintiffs are concerned, it appears that the relation back doctrine does not apply since the original complaint did not give the notice of the alleged transactions, occurrences, or series of transactions and occurrences that formed the basis of the new claims of these new plaintiffs who are not united in interest with the original plaintiffs as their individual tort and damage claims differ (see CPLR 203[f]; see *Shefa Unlimited, Inc. v Amsterdam & Lewinter*, 49 AD3d 521, 856 NYS2d 118 [2d Dept 2008]; *Matter of Shelter Is. Assn. Zoning Bd. of Appeals of Shelter Is.*, 57 AD3d 907, 869 NYS2d 615 [2d Dept 2008]). Accordingly, the controlling date by which the timeliness of the claims of these 81 new plaintiffs is measured shall be May 15, 2010.

In an attempt to save their claims and enlarge the cut-off date, the plaintiffs allege that this action and the amended complaint do not assert claims for damages based upon the alleged contamination of their properties. Rather, the plaintiff’s attorney, Irving Like, Esq., proffers that the complaint alleges separate and independent substantive claims of continued trespass and nuisance and violation of the Navigation Law § 181, which seeks recovery of damages caused by the cleanup and remediation. However, a review of the complaint reveals that the effects of remediation are merely peripherally mentioned within the Amended Complaint. The gravamen of the Amended Complaint remains the alleged damages caused by the alleged contamination of the properties.

Plaintiffs premise their opposition to this motion almost entirely upon the “two-injury” rule and the lower court holding in *Suffolk County Water Auth. v Dow Chem. Co.*, 35 Misc3d 307, 942 NYS2d 765 (Sup Ct Suffolk County 2012). However, that nearly identical toxic exposure case was reversed by the Second Department on July 23, 2014 (see 2014 WL 3608520). The Second Department rejected the lower court’s reliance upon the “two-injury” rule on the grounds that “the second injury must be ‘separate and distinct’ and arise independently of prior injuries (citation

omitted), and must be “qualitatively different from that sustained earlier” (citations omitted). The plaintiff bears the burden of coming forward with a “factual substantiation” of a new injury occurring within the period of limitations which was “qualitatively different from that sustained earlier” (citations omitted)” (*Suffolk County Water Auth. v Dow Chem. Co.*, __AD3d__, __NYS2d__ [July 23, 2014]).

Here, as in the above referenced case, since there is an absence of any evidence raising an issue of fact as to whether the alleged damages during the period of limitations were separate and distinct and qualitatively different from that sustained earlier, the “two-injury rule” is not applicable. Therefore, the plaintiff failed to sufficiently plead a second injury separate and distinct from the first injury that commenced the running of a statute of limitations that would create a second statute of limitations period to begin to run. As noted by the Second Department, the “two injury rule” does not apply where the diminution in the plaintiff’s property values result from an outgrowth, maturation, or complication of the original contamination (*see DiStefano v Nabisco*, 282 AD2d 704, *supra*).

Also rejected are the claims of fraud and/or estoppel as an available exception to the statute of limitations claim. These claims have been addressed in prior decisions of this Court and rejected as a defense to excuse time-barred actions. For instance, in *Benjamin v KeySpan*, Index No. 11-6653, August 26, 2011, *affirmed* 104 AD3d 891, 963 NYS2d 128 (2d Dept 2013), this Court rejected the identical contention (“Nothing suggests that the plaintiff reasonably relied upon any deceptive acts or statements of the defendants or their agents which effectively prevented the plaintiff into commencing this action in a timely fashion”). Similar holdings were set forth in other decisions of the Court (*see Spelman v KeySpan Corp.*, *supra* and *Grancagnolo v KeySpan Corp.*, *supra*, dated April 5, 2010). The same claims were rejected by Justice Sgroi in *Russo v KeySpan Corp.*, 18 Misc3d 1118(A), 2008 WL 171017 (“There is no showing herein nor can a reasonable inference be made that the Plaintiffs relied upon fraudulent statements in refraining from the commencement of suit in a timely manner [citations omitted]”). Plaintiffs fail to offer engineering or expert affidavits or reports to support their contention of fraudulent misrepresentations that “lulled” them into not commencing actions at an earlier date. The claims of recently acquired knowledge of contamination risks and injury are only supported by the hearsay allegations of their counsel. The affidavit of Gardiner Cross, an engineering geologist with the DEC, which is overseeing the remediation activities under the Consent Order, remains unchallenged.

The EIGHTH cause of action sounds in claims of monitoring, establishment of a trust fund and injunctive relief. This cause of action is subject to the reach and applicability of CPLR § 213(1), which is a finite six-year limitations period.

Background from the Motion Papers

The moving papers submitted by the defendants establishes that in 1999, KeySpan, in conjunction with the DEC, began disseminating information to the public regarding potential contamination resulting from the release of substances into the soil and groundwater underneath certain pieces of real property within the Bay Shore community. Prior to that, in or around 1997, Key

Span's predecessor, LILCO hired GEI Consultants Inc. ("GEI"), to conduct a subsurface investigation of the Bay Shore area. To that end, GEI and LILCO installed monitoring wells at various points on Town Road, right of ways and private properties. In or around 1999, Key Span hired Dvirka & Bartilucci Consulting Engineers also to conduct a similar subsurface investigation of the Bay Shore MGP and the area down gradient. Again monitoring wells were strategically installed throughout the Bay Shore community.

By August 1999, KeySpan also established a telephone hotline so that local residents and other concerned parties could contact KeySpan with questions or concerns about the MGP site and the remediation process. This hotline number was provided to the community through the publication of fact sheets, hotline card as well as other letters and methods of publication.

In November 1999, a public document repository was established at the Bay Shore/Brightwaters Public Library in the Village of Brightwaters. This repository holds documents developed as a result of the investigation and remediation of the MGP site. In addition, it holds, site-related studies, reports and other information regarding the site including all the documentation and reports provided to the DEC. In addition, a second repository was set up at the Region 1 offices of the DEC located in Stony Brook, New York. Notice of these repositories were disseminated to the community via Updates prepared as part of KeySpan's obligation pursuant to the consent order to develop and carry out a Citizen Participation Plan.

Further, many of the plaintiff's properties were included in the 1999 door to door notification program of the remediation area. This program involved a team of environmental, government and community relations employees going door to door to provide residents with information regarding the MGP issues, groundwater plume, the investigation being conducted by KeySpan and the anticipated remediation activities. Whether the resident was home or not, each property called on, was left the July 27, 1999 letter. Said letter informed the resident of KeySpan's investigation and anticipated remediation activities. It also provided a hotline number so that the residents could address questions or concerns.

In or around April, 2002, the defendants, under the direction of the DEC, conducted a "Private Well and Basement Survey" to identify the amount of groundwater that may be infiltrating the basements of Bay Shore residents. By letter dated, April 11, 2002, the DEC requested the participation of the residents in this survey. The letter went on to explain that the survey was part of the environmental investigation of the former MGP plant located in the Bay Shore/Brightwaters community. It clearly and unequivocally went on to explain further that the purpose of this investigation was to "define the nature, extent, boundaries and environmental impact of the contamination related to the operation of the plant between the late 1880's and the early 1970's." Along with the letter, a copy of the survey and a business reply envelop was enclosed with the letter to help expedite the response. It is noted that this letter, like other documents distributed to the residents of the Bay Shore/Brightwaters community, contained contact information for questions and for health related concerns. Most of the plaintiff's were on the survey mailing list and many of them responded to the survey.

From 2003 to the present, the DEC and KeySpan have held numerous public meetings (at least eleven and five additional MGP Task Force meetings) which were noticed in the community. The purpose of these meetings was to brief the public and community on the MGP site remediation. Although the agendas for these meetings varied, all these meetings followed a standard format. Both DEC and KeySpan would make efforts to alert the public and community of these public meetings. Each meeting was held at a public location in the Bay Shore community, opening statements were made by the DEC and at times, KeySpan as well. The regulatory framework was discussed and the public would receive an explanation as to the regulatory process and the status of the remediation process. The New York State Department of Health would discuss, when appropriate, exposure pathways. Additionally, starting in 2003 and continuing to the present, KeySpan under the direction of the DEC, periodically mailed Fact Sheets. These Fact Sheets provided detailed updates on the MGP investigation and remediation. The Fact Sheets would also include information regarding upcoming public meetings. Further, to insure that the individual Fact Sheets would continue to be received by the current owner/resident of the properties designated to receive these informational documents, each Fact Sheet was addressed not only to a named owner/resident, but also to an alternate addressee, "current resident."

Since 1999, numerous print and televised news reports, including twenty-seven (27) *Newsday* articles, have been issued regarding the former BayShore MGP site and the investigation and remediation efforts. In addition, various public announcements were made by private residents. Former plaintiff, Robert V. Nicholson maintained a public website regarding the former MGP site (*see* exhibit 3-A). In July 2003, he also sent out a mass mailing to many of the property owners in the area contending that their properties had been adversely impacted by hazardous waste from the site (*see* exhibit 3-B). A number of the plaintiffs in this action were on the Nicholson mailing list. Two other property owners acknowledged hand delivering 1000 flyers to residents the day before the May 12, 2004 public meeting (*see* exhibits 3-C). One of the two property owners, Mr. Charles Lucchetti apparently continued to distribute flyers, captioned "Urgent Notice" to residents regarding other public meetings. Further, the owner of EXPO Tire located at 1591 Union Boulevard, displayed and posted multiple signs offering to provide information about the alleged contaminated Bayshore MGP site (*see* exhibit 3-E). The signs, among other things, prominently posted information about a class action lawsuit and provided Mr. Irving Like, Esq.'s phone number, e-mail address and a website, bayshoremgp.com. EXPO Tire is located on the corner of Union Boulevard and Fifth Avenue, and the defendants contend that it is situated in a prominent location when leaving the Bay Shore area and highly visible intersection.

The defendants established that project reports and updates prepared during this investigation and remediation process were continually made available to the Bay Shore/ Brightwaters community as well as the public at large, through various community outreach methods, including the distribution of fact sheets, public meetings, telephone hotline, press releases and the maintenance of the two public repositories.

Finally, smaller scale remediation activities were ongoing in the Bay Shore area since 1999. During 2007 to 2009, major remediation work was conducted along North Clinton Avenue, both north

and south of the LIRR tracks and was highly visible to the Bay Shore community. Based upon all of the above, it is defendants position that the plaintiffs reached an objective level of awareness of their alleged injuries well before December 4, 2009.

In examining the circumstances surrounding each plaintiff, the Court will be guided by the holding in *Benjamin v KeySpan*, 104 AD3d 891, *supra*, and seek to ascertain when “the plaintiff obtained knowledge that would place ‘a reasonable person on notice of the need to undertake further investigation to ascertain the scope of the contamination’ (citations omitted).”

COMMUNITY ROAD:

William Sullivan and Lynne Churzynski at 27 Community Road, Bay Shore, New York:

The above named plaintiff's were the owners of 27 Community Road, Bay Shore New York until December 27, 2007, when the property in question was transferred out of joint names to Lynne Churzynski's name alone. The parties are husband and wife, notwithstanding the recent property transfer, it appears that they both still reside at the residence in question. They have resided at said residence for approximately 28 years.

It is apparent that Mr. Sullivan and his wife, Ms. Churzynski became aware of the remediation in or around April 2002, when they were provided a copy of the NYSDEC letter, dated April 11, 2002 and the “Private Well and Basement Survey.” The plaintiffs responded to the survey on or about October 9, 2002. Additionally, the plaintiffs do not dispute that they were on the mailing distribution list and were periodically sent informational Fact Sheets in April 2003, April 2004 and September 2004. Same provided, among other things, detailed updates on the Bay Shore environmental investigation and remediation process, as well as notices to upcoming public meetings.

The plaintiff Churzynski admits that she was aware of the installation of an oxygen system and monitoring wells next door to her home.

Plaintiff/Sullivan acknowledges having multiple conversations with the defendant's representatives at his home and at their offices discussing the remediation activities. He was also provided updates. He attended various DEC public meetings including one held on May 12, 2004 held at the Bay Shore Middle School and MGP Task Force meetings on November 15, 2006 and February 7, 2007. Moreover, while apparently aware of the soil water and air testing available, he chose instead not to have his property tested. Plaintiff/Sullivan concedes that he was he was aware of the contamination and remediation work being conducted in Bay Shore for at least seven years before retaining an attorney and commencing this law suit. However, he contends his delay in filing was due to misrepresentations by the defendant which “lulled into a false sense of security... .” However, plaintiff Sullivan, like plaintiff Churzynski, were on the Nicholson July 2003 mailing list, which warned many of the property owners in the area that the DEC public meeting would “start the ‘statute of limitations’ clock ticking” (*see* exhibit 3-B). Based upon the foregoing, the Court finds that the

plaintiffs, William Sullivan and Lynne Churzynski, knew or should have known of contamination and their alleged injuries as early as 2004 and that defendants met their prima facie burden of establishing that the action is time-barred. In opposition, these plaintiffs failed to raise a triable issue of fact.

David and Lori Dunn at 63 Community Road, Bay Shore, New York:

The plaintiffs, David and Lori Dunn, are the owners of 63 Community Road, Bay Shore, New York. They both acknowledge having many dealings with Key Span representatives and their agents from 1999 to 2011. In 1999, an oxygen injection system was installed in front of their home. At that time, the Dunns had multiple discussions with KeySpan Project Manager, Theodore Leissing, about the injection system.

Their property was included in door to door canvassing conducted by KeySpan in 1999. Thereafter, they were included in the "private well and basement survey," and were provided a copy of the NYSDEC letter, dated April 11, 2002. The Dunns completed the survey and returned same on or about July 9, 2002. They were also on the mailing list for the Fact Sheets. They do not dispute receiving the Fact Sheets dated January 2003, April 2004 and September 2004, which provided detailed updates on the Bay Shore environmental investigation and remediation plan. Said Fact Sheets also provided various contact information including the New York State Department of Health for health related questions and concerns related to the contamination caused by the former MGP site.

The Dunns, as far back as 2001, had their home and property tested. In July 2001, air sampling, at the Dunn's request, was conducted at their home (*see* exhibit 8-A). In August 2007, vapor intrusion was conducted at the property. At that time, the tests revealed that no MGP related chemicals were adversely impacting the indoor air quality at the home. Upon obtaining the results, William Ryan, the Site Investigation and Remediation Manager, met with the Dunns to go over and explain the testing results. More testing was requested, so in the fall of 2008, sump water sampling was conducted. In February 2009, due to concerns about the plume, the Dunns requested additional testing. Groundwater and soil testing was performed at the Dunn residents in March 2009.

In addition to continually raising concerns about the plume. Mrs. Dunn regularly complained about the remediation process, the vibrations caused by the construction of the barrier wall and the general appearance of the neighborhood. From 2006 to the present, Mr. Ryan has personally spoken with Mrs. Dunn on numerous occasions about the remediation work. For a period from 2006 to 2007, the Dunns regularly called the hotline number. Over this period, there were days that Mrs. Dunn would call the hotline more than five times per day. She would generally complain about the vibrations from the barrier wall construction.

On March 21, 2007 and again on May 14, 2007, two pre-construction assessments were conducted at the Dunn residence. In September 2007, KeySpan agreed to pay for plastering and painting at the Dunn residence at a cost of \$18,500.00. In November 2007, as a result of the vibration disturbances at the residence, KeySpan agreed to pay the Dunns \$1,000.00 per week until the work was completed. Again in September 2008, KeySpan agreed to pay the Dunns for additional construction

work and paving in the amount of \$17,565.00. Finally, after complaining about the overall upkeep of the community, a meeting was held at the Dunn residence with KeySpan/National Grid representatives, NYSDEC representatives, Suffolk County Legislator Tom Baraga and others to address her concerns.

Like Sullivan and Churzynski, the Dunns assert only general and self-serving claims that they were “lulled into a false sense of security” by the defendant’s alleged misconduct, misrepresentations and concealment. Notwithstanding these self-serving claims, it is readily apparent that the Dunns had regular contact with KeySpan representatives, and availed themselves of the testing at their property. Furthermore, they were actively involved in information gathering. It is noted that, other than to distinguish between husband and wife, the Dunn affidavits contain the identical number of paragraphs and claims throughout, as do those of the Sullivan and Churzynski. Based upon the foregoing, the Court finds that the Dunns knew or should have known of contamination and their alleged injuries as early as 2001 and that defendants met their prima facie burden of establishing that the action is time-barred as to these plaintiffs. In opposition, these plaintiffs failed to raise a triable issue of fact.

Thomas and Ann Slattery at 15 Community Road, Bayshore, New York:

Thomas and Ann Slattery are the owners of the residence located at 15 Community Road, Bayshore, New York. Their property was included in the door to door canvassing conducted by the DEC and KeySpan in 1999. The Slatterys participated in the July 2002 “Private Well and Basement Survey.” They returned the survey on or about April 22, 2002. The Slatterys were also on the Fact Sheet mailing list. However, the Slatterys generally dispute this by asserting that they denying receipt of “regular” mailings from KeySpan. The Court, however, finds their claim in this regard to be disingenuous, as these Fact Sheets were only periodically mailed. By way of example, the first was mailed in January 2003 and the next one was mailed in April 2004.

The Slatterys also question how they could be held to have knowledge of facts to charge them with discovery of the primary condition on which their claims are based, when KeySpan never performed testing on their property, KeySpan’s representatives never contacted them at their home, and they never spoke with any KeySpan Representatives about any specific issues related to their home. It is quite apparent that Mr. Slattery attended numerous public meetings regarding the investigation and remediation of the former MGP site. He was a member of the Bayshore MGP Task Force and as such was included on Task Force e-mails. While he acknowledges his involvement with the Task Force and participation in the public meetings, he claims that KeySpan’s constant theme at these meetings was that the contamination presented no health risks to the residents of the community. However, these meetings were not only attended by KeySpan representatives. Representatives from the DEC and at times the NYSDOH and SCDOH actively participated in these meetings as well.

Oxygen injection systems were installed in or around 2008, at St. Patrick’s Church and School which were visible from the Slattery home. In addition, various types of sampling work was conducted by KeySpan or their agents at the Church and said sampling would have been visible from

their home. Mr. Slattery acknowledges that he worked with the parish priest, Father Tom, to help communicate to the parish regarding the remediation efforts.

Additionally, the Slatterys do not dispute receiving the mass mailed letter dated July 2003 from another member of the community, Robert Nicholson. Mr. Nicholson claimed the Slattery property had been impacted by hazardous waste and contaminated by the MGP site. He urged them to commence an action before the statute of limitations expired (*see* exhibit 3-B). Based upon the foregoing, the Slatterys were sufficiently informed with their participation in the 2002 well and basement survey coupled with Mr. Slattery's participation and involvement with Bay Shore MGP Task Force. Said knowledge was sufficient to charge the plaintiffs, Thomas and Ann Slattery, with discovery of the primary condition on which their claims are based, no later than 2002/2003 and that defendants met their prima facie burden of establishing that the action is time-barred as to these plaintiffs. In opposition, these plaintiffs failed to raise a triable issue of fact.

Barbara DeAngelis at 17 Community Road, Bay Shore, New York:

The Plaintiff, Barbara DeAngelis, is the owner of the residence located at 17 Community Road, Bay Shore, New York. Her property was included in Key Span's 1999 door to door canvass. Further, she was provided a copy of the NYSDEC letter, dated April 11, 2002 and the "Private Well and Basement Survey." She returned a completed survey on or about April 22, 2002. The defendants included her on the Fact Sheet mailing list. She acknowledges receiving literature from KeySpan regarding groundwater contamination from the plume and of remediation work being performed. She does not dispute receiving the Fact Sheets dated, January 2003, April 2004 and September 2004, which provided detailed information regarding the investigation and remediation efforts. For example, the January 2003 Fact Sheet, provided residents with, among other things, investigation of contaminants, a summary of the findings of the investigation, interim remedial measures to be undertaken and the future investigation planned and remedial work to be completed on the site. In addition, it announced an upcoming public meeting on January 29, 2003 at the Bay Shore High School and provided various contact information for questions and concerns.

This plaintiff also appears to have received the Robert Nicholson letter, dated July 2003. In that letter Mr. Nicholson advised the plaintiff that her property had been impacted by hazardous waste from the MGP site and instructed her to file a law suit before the statute of limitations expired. When considering all the information the plaintiff had at her disposal, she knew or should have known of her alleged injuries at least as early as 2003. The defendants met their prima facie burden of establishing that the action is time-barred. In opposition, this plaintiff failed to raise a triable issue of fact.

Denise McGarity (FKA Denise Gerlak) at 18 Community Road, Bay Shore, New York:

Denise McGarity owns the residence located at 18 Community Road, Bay Shore, New York. Her property was included in the 1999 door to door canvassing conducted by KeySpan. She also received the April 11, 2002 NYSDEC letter which included the "private well and basement survey." The plaintiff completed the survey and returned it on April 18, 2002. She indicated in her survey that

her basement occasionally had water in it, after high tide or rain. She also received the January 2003, April 2004 and September 2004 Fact Sheets

On August 15, 2002, KeySpan representatives conducted a site visit of the plaintiff's house and property. KeySpan's outside contractor, Dvirka & Bartilucci, met with the plaintiff to discuss their concerns, including a request to conduct air sampling on the property. This plaintiff concedes that water samples were taken at that time and that the test results were reported back to her. On April 13, 2005, water samples were taken from the basement drainage system. Keyspan wrote to the plaintiff on June 27, 2005 notifying her that while there was no MGP related contamination, there may be fuel oil related contamination (*see* exhibit 8-B). Plaintiff also attended the June 5, 2008 DEC public meeting. This plaintiff knew or should have known of her alleged injuries at least as early as 2002. The defendants met their prima facie burden of establishing that the action is time-barred as to this plaintiff. In opposition, this plaintiff failed to raise a triable issue of fact.

Randolph and Mary Kirchner at 19 Community Road, Bay Shore, New York:

The plaintiffs, Randolph and Mark Kirchner, are the owners of the real property located at 19 Community Road, Bay Shore, New York. Their property was included in KeySpan's door to door canvassing conducted in 1999. Notwithstanding their claims to the contrary, the Kirchner's received the April 11, 2002 NYSDEC letter, as they acknowledge receiving the "private well and basement survey" which was sent along with said letter. Moreover, they participated in the survey. Their survey response was received on April 19, 2002. As part of the survey, they reported that their basement had an occasional odor when wet.

The Kirchner's were on the Fact Sheet mailing list. While neither of these plaintiffs specifically recalls what literature they received from KeySpan, they acknowledge receiving mail from KeySpan on a few occasions. Again, while on the July 2003 Robert Nicholson mailing list, neither plaintiff recalls receiving the Nicholson letter.

On May 10, 2010, GEI conducted a soil vapor intrusion assessment at 19 Community Road, Bay Shore, New York. Shortly thereafter, William Ryan, a KeySpan representative, went over the testing results with the Kirchners. Based upon the samples obtained, it did not appear that the indoor air at the residence was being impacted by MGP site related chemicals through soil vapor intrusion. Based upon the foregoing, the Court finds that the plaintiffs, Randolph and Mark Kirchner, knew or should have known of contamination and their alleged injuries as early as 2003. The defendants met their prima facie burden of establishing that the action is time-barred as to this plaintiff. In opposition, this plaintiff failed to raise a triable issue of fact.

Mary Fisher at 20 Community Road, Bay Shore, New York:

The plaintiff owns the residence located at 20 Community Road, Bay Shore, New York. Her property was included in KeySpan's 1999 door to door canvassing. While she may not have been

home at the time the KeySpan representatives came to her house, it was their practice to leave a copy of the aforesaid letter at the residence. Said letter informed the residents about the upcoming investigation of the environmental impact the former MGP site may have had on the Bay Shore community, potential remediation efforts as well as hotline number to address questions. The records maintained by KeySpan demonstrate that during the canvass, no one at the residence was spoken with but the above-mentioned letter was left at the residence (*see* Exhibit 5-A). She artfully contends that she did not participate in the door to door canvass, but does not deny receiving the July 27, 1999 letter.

On or about April 2002, residents of Community Road were sent a letter from the NYSDEC, dated April 11, 2002 together with, among other things, the “private well and basement survey” and geographical maps. Plaintiff Fisher denies receiving the letter and the survey. Notwithstanding the foregoing, her name and address appear on the initial survey mailing list (*see* Exhibit 5-B). Further, KeySpan records reveal that after not receiving a response to the survey, gap calls were made to the plaintiff’s residences and messages were left for her on July 11, 2002, July 15, 2002 and August 14, 2002. Separate records were kept regarding responses to the survey and these “gap calls” (*see* Exhibits 5-C and 5-E). Moreover, she does not specifically deny receiving these calls. Furthermore, KeySpan records demonstrate that in a further attempt to persuade the plaintiff to participate in the survey, representatives went to her residence on September 6, 2002 and delivered a survey to her door. Thereafter, KeySpan mailed a letter dated September 30, 2002 wherein they indicated that attempts had been made to contact the resident to request their assistance in completing the well and basement survey. Included with this letter was another copy of the survey. The plaintiff at 20 Community Road was included on this mailing list (*see* Exhibit 5-F).

Mary Fisher further denies receiving any of the Fact Sheet mailings from KeySpan. Each Fact Sheet had a separate mailing list. KeySpan records reveal that the plaintiff and her residence are listed on the January 2003, April 2004 and the other later mailed Fact Sheet mailing lists (*see* Exhibit 1-F). The Court finds it extremely unlikely that none of these various documents mailed to her between 1999 to the present would not have reached her. The record establishes that she was on all of these various mailing lists, as were many of her neighbors and co-plaintiff’s who have acknowledged receipt of many of these documents.

There were numerous other sources of information regarding the former MGP site and remediation efforts available to them, including DEC mailings, public meetings, neighbors, as well as extensive news media coverage. In addition, there has been continuous and extensive remediation activities throughout the Bay Shore community since 2000. Based upon the foregoing, the plaintiff should have obtained sufficient knowledge from 1999 to 2003 that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. The plaintiff, Mary Fisher, knew or should have known of her alleged injuries no later than 2003. She does not contend that she was unaware of the contamination or the clean-up activities of the MGP site. The defendants met their prima facie burden of establishing that the action is time-barred as to this plaintiff. In opposition, this plaintiff’s general self-serving blanket denials regarding receiving any of the aforesaid information from KeySpan and the DEC fails to raise a triable issue of fact.

Barbara Robinson at 22 Community Road, Bay Shore, New York:

The plaintiff resides at 22 Community Road, Bay Shore, New York. The property in question was included in the 1999 door to door canvass conducted by KeySpan. At that time, a copy of the July 29, 1999 letter was left as a door hanger on the front door to the plaintiff's house. The letter briefly informed the residents of the environmental investigation of the MGP complex and remediation of conditions related to the site. In addition, the letter provided a hotline number for any questions the residents might have regarding same. In April 2002, the Robinsons were sent a copy of the NYSDEC letter, dated April 11, 2002 and the "Private Well and Basement Survey." In July 2002, a KeySpan representative spoke with a Thomas Robinson about the survey. On September 6, 2002, a KeySpan representative visited 22 Community Road. The representative spoke with the plaintiff's daughter, explained the survey to her and requested that her parents complete the survey or call KeySpan. A follow-up letter along with another copy of the survey was sent to the plaintiff on September 30, 2002. Notwithstanding the foregoing, the plaintiff chose not to respond to the survey.

It is undisputed that the plaintiff was sent the January 2003, April 2004 and September 2004 Fact Sheets. It is noted that the plaintiff did not file an affidavit in opposition to this motion.

In any event, there were numerous other sources of information regarding the former MGP site and remediation efforts available to them, including DEC mailings, public meetings, neighbors and extensive news media coverage. In addition, there has been continuous and large-scale remediation activities throughout the Bay Shore community since 2000. Based upon the foregoing, this plaintiff should have obtained sufficient knowledge from 1999 to 2003 that would place reasonable persons on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. The plaintiff, Barbara Robinson, knew or should have known of her alleged injuries not later than January 2003. The defendants met their prima facie burden of establishing that the action is time-barred as to this plaintiff, who failed to oppose the motion.

Paul Schulte at 26 Community Road, Bay Shore, New York:

The plaintiff purchased the residence located at 26 Community Road in December 1994. The property was included in the 1999 door to door canvassing. Thereafter, plaintiff Schulte was sent and participated in the "private well and basement survey." He returned the survey on April 22, 2002. Included in his survey he specifically commented that he was "very concerned with the contamination being investigated!" He also raised questions regarding resale of the property and health concerns. Additionally, he indicated that he only gets water in his basement after rain. Further, sometimes after it rained, his basement had an odor of either wet earth or fuel.

On August 15, 2002, at the direction of Theodore Leissing, a property inspection was conducted at the plaintiff's residence. At that time, KeySpan representatives met with the plaintiff. He expressed concerns that he occasionally smelled fuel odors during rain events. He told the KeySpan representatives he wanted testing done on his property. Testing was scheduled for August 21, 2002.

Prior to 2004, a cluster of monitoring wells were installed on Community Road in close proximity to the plaintiff's home. Further, the plaintiff acknowledges receiving the Fact Sheets periodically sent out by Key Span as early as January 2003. It is undisputed that the plaintiff had concerns regarding the contamination dating, at least as far back as April 2002 and was raising same with KeySpan representatives in or around that time. Moreover, there were numerous other sources of information regarding the former MGP site and remediation efforts available to them, including DEC mailings, public meetings, neighbors, as well as extensive news media coverage. In addition, there has been continuous and extensive remediation activities throughout the Bay Shore community since 2000.

Plaintiff Schulte knew or should have known of his alleged injuries at least as early as 2002. The defendants met their prima facie burden of establishing that this action is time-barred as to this plaintiff. In opposition, this plaintiff failed to raise a triable issue of fact.

Diane Cannoyan at 28 Community Road, Bay Shore, New York:

Plaintiff Cannoyan owns the property located at 28 Community Road, Bay Shore, New York. Like the other residents on Community Road, the plaintiff's property was included in the 1999 door to door canvassing. At that time, the KeySpan letter, dated July 27, 1999 was left on the plaintiff's front door.

In April 2002, this plaintiff received the April 11, 2002, DEC letter and the well and basement survey. By April 18, 2002, the plaintiff had returned the survey. She reported that her basement got wet only after it rained. Further, she noted that occasionally, when wet, it had an odor of wet earth or mildew. Moreover, prior to 2004 a cluster of monitoring wells were installed near her home. Additionally, the plaintiff received the January 2003, April 2004 and September 2004 Fact Sheets.

There were numerous other sources of information regarding the former MGP site and remediation efforts available to them, including DEC mailings, public meetings, neighbors, as well as extensive news media coverage. In addition, since 2000, there have been visible signs of extensive remediation activities throughout the Bay Shore community.

The plaintiff is a member of the Bay Shore MGP Task Force. As a member of the Task Force, she has attended a number of their meetings as early as March 23, 2006. Representatives from KeySpan, the DEC and the NYSDOH and SCDOH actively participated in these meetings. Clearly, the plaintiff obtained knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury in or around 2002-2003. The defendants met their prima facie burden of establishing that this action is time-barred as to this plaintiff. In opposition, this plaintiff failed to raise a triable issue of fact.

Diane Arbore at 33 Community Road, Bay Shore, New York:

Diane Arbore purchased the real property located at 33 Community Road, New York in or around September 14, 2006. While the prior owner, Elaine Johnson or current resident, appears in a number of the Fact Sheet mailing lists provided as exhibit 1-F, it is apparent from a review of these documents that these Fact Sheets were not sent to 33 Community Road but rather 34 Community Road. Notwithstanding the foregoing, the prior owner, Elaine Johnson, participated in the well and basement survey. Further, in 1999, four monitoring wells were installed on the front lawn of this property.

The Court finds the plaintiff's claim that the prior owner did not share any information she may have gotten from KeySpan to be disingenuous, at best. She does not contend that she was unaware of the contamination or the clean-up activities of the MGP site. However, even if true, with the numerous sources of information regarding the former MGP site and remediation efforts, including the real estate agent/broker disclosures, KeySpan and DEC mailings, public meetings, neighbors, news media, as well as visible signs of remediation underway throughout the Bay Shore area, including the four monitoring wells on the property, the plaintiff knew or should have known of her alleged injuries in or around the time of her purchase of the property. The defendants met their prima facie burden of establishing that this action is time-barred as to this plaintiff. In opposition, this plaintiff failed to raise a triable issue of fact.

Steven Kureczko at 34 Community Road, Bay Shore, New York:

Plaintiff Kureczko, is the owner of the house and property located at 34 Community Road, Bay Shore, New York. In 1999, his property was included in KeySpan's door to door canvassing of the Bay Shore area. He also participated in the private well and basement survey in 2002. He completed his survey and returned same on May 20, 2002. As part of his survey response, he acknowledged that about four years earlier, he had contacted the EPA regarding a petroleum film on the water that accumulated in his basement from time to time (*see* exhibit 5-D). He may even had samples taken at that time. He was aware and concerned about the condition of the water in his basement as early as 1998.

Plaintiff Kureczko was also on the Fact Sheet mailing lists including, but not limited to, the January 2003 and the April 2004 Fact Sheets. The Court is unpersuaded by his claim that he couldn't have been on the KeySpan mailing list because he didn't receive regular mailings from KeySpan. The Court, however, finds his claim in this regard to be flawed. These Fact Sheets were only mailed out periodically.

On August 19, 2002, KeySpan and their consultants, Dvirka and Bartilucci, conducted an inspection of the plaintiff's property. During that inspection, this plaintiff acknowledges having a discussion about the sheen and petroleum odor and his concerns regarding same. Thereafter, on at least two occasions, one on March 23, 2006, the plaintiff attended public meetings run by the DEC in conjunction with KeySpan. Clearly, the plaintiff obtained knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury certainly no later than 2002. The defendants met their prima facie burden of

establishing that the action is time-barred as to this plaintiff. In opposition, this plaintiff failed to raise a triable issue of fact.

Ryan and Suzanne Meliere at 36 Community Road, Bay Shore, New York:

Ryan and Suzanne Meliere purchased the subject property located at 36 Community Road, Bay Shore, New York in or around September 2009. The property in question was included in the 1999 door to door canvassing. Further, the prior owners, Mary and John Finnin, responded to the private well and basement survey. The Finnins' reported in their survey response that they never got water in their basement at 36 Community Road. Notwithstanding the defendants' claim that the Finnins were on the Fact Sheet mailing lists, the mailing list records provided by the defendant's demonstrate the contrary. However, there were numerous other sources of information regarding the former MGP site and remediation efforts, including disclosure of same by the prior owners and/or the real estate agent/broker, KeySpan and DEC mailings, public meetings, neighbors, news media, as well as visible signs of remediation underway throughout the Bay Shore area, including a cluster of monitoring wells installed since 2002 in close proximity to the home of these plaintiffs.

In their nearly identical affidavits in opposition to the instant motion, neither of the Meliere plaintiffs contends they were unaware of KeySpan's investigation of potential contamination from the former MGP site or the remediation efforts that are ongoing in the Bay Shore area at the time they purchased the property. Rather, they merely assert that KeySpan never directly contacted or communicated with them about these issues. They both acknowledge that they saw literature which contained a copy of the plume map. They further concede that they were aware that the plume cut across a portion of their property. Furthermore, there were visible signs of remediation throughout the community. Accordingly, the plaintiffs knew or should have known of their alleged injuries at least in or around September 2009.

Based upon the foregoing, the FIRST through SEVENTH causes of action are dismissed as time barred against the plaintiffs, Ryan and Suzanne Meliere. However, it does not appear these plaintiffs are time barred with respect to the EIGHTH cause of action sounding in monitoring and injunctive relief, which is governed by a six-year statute of limitations period set forth in CPLR § 213(1).

Mark and Anabel Darini at 37 Community Road, Bay Shore, New York:

Mark and Anabel Darini are the owners of the real property located at 37 Community Road, Bay Shore, New York. The property in question was part of the 1999 KeySpan door to door canvassing. The plaintiffs participated in the 2002 private well and basement survey. They returned their response to the survey on April 18, 2002. As part of their response to the survey, they indicated that they did not get water in their basement or have any odor either.

There was visible remediation being performed in close proximity to their home. Prior to 2004, a cluster of monitoring wells were installed near 33 Community Road. Moreover, on April 20,

2006, at the plaintiff's request, KeySpan conducted air testing at their residence. The testing was conducted by KeySpan's environmental consultant, GEI Consultants, Inc. During the testing, William Ryan, a Site Investigation and Remediation Manager, was present to explain the testing and answer any questions the homeowner might have. KeySpan employee, James Christman was also present during the air testing. He made himself available to explain the testing project to the homeowners and answer questions about the remediation. In addition, he also prepared, with the help of Mrs. Darini, an Indoor Air Quality Questionnaire and Building Inventory. In June 2006, upon receiving approval from the NYSDEC, Mr. Ryan delivered the results of the air testing to these plaintiffs. The test results revealed that twelve volatile organic compounds were detected above their respective minimum level of detection in at least one indoor sample and one compound in the outdoor sample.

Thereafter, in or around February 2007, Mr. Christman again contacted the plaintiff to schedule soil vapor intrusion testing at the residence. Mr. Christman, explained to Mr. Darini that a sub-slab test was required to be conducted. In January 2008, after a discussion about the sub-slab testing with KeySpan representatives, the plaintiff declined to have the sub-slab testing done. The plaintiffs concede that they declined to have the sub-slab testing done because they did not want to potentially open up a pathway for future vapor intrusion. In addition to the contact and testing by KeySpan and their representatives at their home, the plaintiff, Mr. Darini, also attended various Bay Shore MGP Task Force public meetings held by the DEC and KeySpan (National Grid), wherein, among other things, an overview of the MGP site was provided along with an explanation of the DEC's role and the remedial investigation results. The plaintiff also appears to have received the Robert Nicholson letter, dated July 2003. In that letter Mr. Nicholson advised the plaintiff to file a law suit before the statute of limitations expired.

In 2010, the plaintiff, Mr. Darini, reported to National Grid damage to his home which he claimed was caused by the remediation efforts. A site inspection was conducted and the National Grid consultant reported due to the age of the home, the other areas of cracking plaster throughout the home, the distance from the remedial site and the high water table levels all mitigate against the cause of damage due to the remediation work. In any event, the plaintiffs obtained knowledge that would place reasonable persons on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury certainly no later than 2004. The defendants met their prima facie burden of establishing that the action is time-barred as to these plaintiffs. In opposition, these plaintiffs failed to raise a triable issue of fact.

Brian and Stephanie Turner at 45 Community Road, Bay Shore, New York:

The plaintiffs, Brian and Stephanie Turner, purchased the property located at 45 Community Road, Bay Shore, New York from Matthew Alicanti in or around May 2007. The property was included in the 1999 door to door canvassing. Additionally, the prior owner, participated in the April 2002 well and basement survey. He returned the survey on April 17, 2002. He reported that he rarely ever had water in his basement and only after it rained. He also did not report any odor in the basement when wet.

Contrary to the Leissing affidavit, it does not appear that the prior owner was on any of the Fact Sheet mailing lists. Notwithstanding the foregoing, these plaintiffs do not dispute periodically receiving literature from KeySpan and the DEC. However, they assert that the correspondence they received did not inform them that there were alleged health risks as a result of the contamination nor did it inform them of a right to take legal action. Moreover, they concede that they were aware of the contamination and the plume at the time of purchase, wherein they both state, "*if KeySpan had told the residents honestly that the contamination posed a serious health risk, which we believe now to be the case, we would certainly not have exposed our family to toxic chemicals in the air and groundwater, and we wouldn't have brought a home so close to the plume.*" (see page 2; paragraph 8 of both Brain and Stephanie Turner's Affidavit in Opposition).

Prior to 2002, a cluster of monitoring wells were installed in close proximity to the plaintiff's property. The plaintiff's knew or should have known of there alleged injuries and the contamination and remediation efforts at the time of purchase in 2007 as were numerous sources of information regarding the former MGP site and remediation efforts available to them, including disclosure of same by the prior owners and/or the real estate agent/broker, KeySpan and DEC mailings, public meetings, neighbors, news media, as well as visible signs of remediation underway throughout the Bay Shore area, including a cluster of monitoring wells installed in close proximity to the plaintiff's home.

Accordingly, the FIRST through SEVENTH causes of action are dismissed as time barred against the plaintiffs, Brian and Stephanie Turner. However, it does not appear these plaintiff are time barred in regard to the EIGHTH cause of action sounding in monitoring and injunctive relief, which is governed by a six-year statute of limitations period set forth in CPLR § 213(1).

Steven and Theresa Kennedy at 48 Community Road, Bay Shore, New York:

The plaintiffs Steven and Theresa Kennedy, purchased the subject property located at 48 Community Road, Bay Shore, New York in or around May 5, 2005. The aforesaid property was included in the 1999 KeySpan door to door canvassing conducted in the Bay Shore area, and while the prior homeowner was not home at the time of the neighborhood canvassing, the July 27, 1999 KeySpan letter was left as a door hanger at the residence. Furthermore, it is likely that the prior homeowner received the April 11, 2002 DEC letter and well and basement survey as the address is specifically listed in the well and basement survey responses annexed as part of Exhibit 5-C, but for some reason the pertinent information for that address was redacted. Moreover, contrary to the Leissing affidavit, it does not appear that the prior owner or address was included on the January 2003 or April 2004 redacted Fact Sheet mailing lists (see exhibit 1-F).

In virtually identical affidavits both plaintiffs, Mr. and Mrs. Kennedy, contend they had no personal dealings with KeySpan and were not aware of any prior dealings the prior homeowner had with KeySpan. However, it defies credulity that at the time of their purchase of this property, they were unaware of the potential contamination caused by the former MGP site or the extensive remediation effort being conducted in the Bay Shore area as a result thereof. In any event, since 2002

there were ongoing remediation efforts in the form of a cluster of monitoring wells in close proximity to the plaintiffs' home. Moreover, there were numerous other sources of information regarding the former MGP site and remediation efforts available to them, including disclosure of same by the prior owners and/or the real estate agent/broker, KeySpan and DEC mailings, public meetings, neighbors, as well as extensive news media coverage. It appears that the plaintiffs, while aware of the conditions, chose not to reach out to KeySpan or the DEC at the time of purchase. It appears further that it was their choice to not undertake further investigation to ascertain the scope of the contamination or injury, rather than any lack of knowledge about the contamination concerns or based upon any misconduct, misrepresentation or concealment by the defendants. Plaintiffs do not contend that they were unaware of the contamination or the clean-up activities of the MGP site. The defendants met their prima facie burden of establishing that the action is time-barred as to these plaintiffs. In opposition, the Kennedys' general self-serving blanket denials of receipt of any of the aforesaid information from KeySpan and the DEC since May 5, 2005 fail to raise a triable issue of fact.

Rosemarie Fanelli and William Geiss at 53 Community Road, Bay Shore, New York:

The plaintiffs, Rosemarie Fanelli and William Geiss, are the owners of the property located at 53 Community Road, Bay Shore, New York. Like the other properties on Community Road, said property was included in the 1999 KeySpan door to door canvassing. The records of the canvassing reveal that someone from the household was home at the time the canvassing was being conducted but they were too busy to talk to the KeySpan representatives at that time (*see* exhibit 5-A). In 2002, the plaintiffs participated in the private well and basement survey and returned said survey on May 28, 2002. Moreover, prior to 2002, a cluster of monitoring wells were installed near the property.

The plaintiff, Rosemarie Fanelli, was on the Fact Sheet mailing lists, including January 2003 and April 2004, which described, among other things, the investigation of contaminants, a summary of the findings of the investigation, investigation and remediation of the area and an explanation of the four designated operable units. These Fact Sheets also provided important contact information as well as upcoming public meeting dates. It is not disputed by either plaintiff that they received these Fact Sheets. In fact, neither plaintiff submitted any opposition to the defendant's motion to dismiss. Further, James Christman, recalls speaking with Rosemarie Fanelli, in or around 2009, to discuss remediation work that was to be performed in the plaintiff's driveway. The plaintiffs knew or should have known of their alleged injuries at least in or around September 2002. The defendants met their prima facie burden of establishing that the action is time-barred as to these plaintiffs, who failed to oppose the motion.

Kathleen Huegel at 54 Community Road, Bay Shore, New York:

Kathleen Huegel is the owner of the real property located at 54 Community Road, Bay Shore, New York. Her property was included in the 1999 door to door canvassing conducted by KeySpan. While the records of the canvassing reveal that the plaintiff was not home at the time of the canvassing, it is apparent that the July 27, 1999 KeySpan letter was left as a door hanger at the

residence. This letter, among other things, provided the resident with an overview of the soil and groundwater sampling to be imminently undertaken to help determine the environmental impact the former MGP site had on the community.

On April 11, 2002, the DEC letter and private well and basement survey were sent out to residents of Community Road, including the plaintiff, Ms. Huegel. Several follow-up calls were made with respect thereto. The plaintiff and/or her address were on the Fact Sheet mailing lists and were sent a number of the Fact Sheets, including January 2003 and April 2004. The plaintiff denies ever receiving the survey, the Fact Sheets or any other mailings from KeySpan. The Court finds her claims in this regard to be disingenuous as each mailing generated a separate and distinct mailing list. While it might be possible that one or more documents mailed did not reach the plaintiff, it is highly unlikely that none of the documents alleged to have been mailed to her residence were not received over the last ten or more years. Moreover, since 2000, there has been extensive remediation work throughout the Bay Shore area. More specifically, from 2000 to 2010 the Defendants maintained an oxygen injection system in close proximity to the plaintiff's residence. Furthermore, prior to 2002, a cluster of monitoring wells were installed by the defendants on Community Road near her home. Plaintiff does not contend that she was unaware of the contamination or the clean-up activities of the MGP site. The defendants met their prima facie burden of establishing that the action is time-barred. In opposition, this plaintiff's general self-serving blanket denials regarding receiving any of the aforesaid information from KeySpan and the DEC fails to raise a triable issue of fact.

Doug Delisle at 60 Community Road, Bay Shore, New York:

The plaintiff, Doug Delisle, is the owner of the property located at 60 Community Road, Bay Shore, New York. In 1999, 60 Community Road was included in the KeySpan door to door community canvassing. At the time of the canvassing, the plaintiff was not home. However, the July 27, 1999 KeySpan letter which described the investigation activities and provided a hotline phone number to address questions and concerns was left at the residence. In or around April 11, 2002, the DEC letter and well and basement survey were mailed to the plaintiff. Thereafter, a number of follow up calls (gap calls) were made. Notwithstanding the foregoing, the plaintiff did not take part in the survey.

The plaintiff and his address were on various Fact Sheet mailing lists, including January 2003 and April 2004. It is not disputed that he periodically received these Facts Sheets since 2003. Moreover, in 2000 there was a oxygen injection system installed adjacent to his property. This system remained in place until 2010. The plaintiff knew or should have known of his alleged injuries at least in or around January 2003, after receiving mailings from both the DEC and KeySpan in 1999 and 2002, the visible long term remediation work being performed near his property as well as receiving the information contained in the Fact Sheets. The defendants met their prima facie burden of establishing that the action is time-barred as to this plaintiff. In opposition, this plaintiff failed to raise a triable issue of fact.

Joseph Massaro at 71 Community Road, Bay Shore, New York:

The property located at 71 Community Road, Bay Shore, New York was included in the 1999 KeySpan door to door community canvassing. Further, the prior homeowner, Lisa Bidanset, received the April 11, 2002 DEC letter and participated in the private well and basement survey. She returned said survey on May 28, 2002. In said survey, the prior owner raised some concerns and requested that she be contacted to address these concerns.

In or around January 2005, the plaintiff, Joseph Massaro, purchased the above mentioned property. In March 2007, a pre-construction site inspection was conducted by PS&S, a consultant, retained by KeySpan to perform such site inspections. James Christman, a KeySpan representative, was present during said assessment of the property. In April 2007, the plaintiff authorized KeySpan to conduct an investigation of his property. A detailed inspection of the property was performed by GEI Consultants, Inc., on April 16 - 17, 2007. At that time of the investigation and testing, both William Ryan, a KeySpan representative and James Christman were present on site to meet with the plaintiff. Further, at Mr. Ryan's direction, sump water and indoor and outdoor air samples were taken for testing. The testing results were provided to the plaintiff in August, 2007. These results revealed that while there were potentially MGP-related chemicals detected in the various samples taken, there was no apparent vapor intrusion on the indoor air quality at the residence.

On February 14 and 15, 2008, a second round of soil vapor intrusion testing was performed by GEI at 71 Community Road, Bay Shore, New York. Both Mr. Ryan and Mr. Christman were again present and available to answer questions and concerns. On April 2, 2008, the results of said sampling were provided to the plaintiff. Again plaintiff Massaro was clearly informed that the "potentially MGP related chemicals were detected in the soil vapor, but that the assessment showed that there was no apparent effect of vapor intrusion of MGP-related chemicals on the indoor air quality at the property." (*see* Exhibit 17-C). Testing was once again performed by GEI on October 1 and 2, 2008. During this round of testing, the plaintiff was specifically interviewed. The results of this assessment were forwarded to the plaintiff by Mr. Ryan on December 3, 2008. These samples also revealed the presence of potential MGP-related chemicals in the soil vapor samples collected (*see* exhibit 17-E).

Based upon the foregoing, the Court finds that the plaintiff obtained knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury certainly no later than 2007. The defendants met their prima facie burden of establishing that the action is time-barred as to this plaintiff. In opposition, this plaintiff failed to raise a triable issue of fact.

Maria Sneed at 73 Community Road, Bay Shore, New York:

Maria Sneed apparently purchased the subject property in or around 2004. The prior owner of said property received the April 11, 2002 DEC letter and participated in the private well and basement survey. The plaintiff's name and/or her address appears on various redacted Fact Sheet mailing lists as early as April 2004.

In or around April 19, 2004, the plaintiff began receiving the Fact Sheets prepared and/or approved by the DEC. The April 2004 Fact Sheet described the investigation and remediation of the Bay Shore area and provided an explanation of the four designated operable units. Further it provided important contact information and announced the next public meeting.

It is undisputed that on March 20, 2007, at the direction of William Ryan, PS&S Engineering performed a pre-construction property condition assessment. On April 14, 2007 a letter was provided to the plaintiff regarding said assessment. Thereafter in April 2007, the plaintiff, Ms. Sneed, authorized an investigation of her property. On April 18 and 19, 2007, GEI Consultants Inc., a KeySpan consultant, performed a site investigation and took air samples. James Christman, a KeySpan representative, was present during the investigation and spoke with the plaintiff regarding the investigation and addressed her concerns and questions. He also completed a questionnaire with the plaintiff. The results of the testing was provided to this plaintiff by letter dated August 23, 2007. The report indicated that three potential MGP-related chemicals were detected in the living room and duplicate indoor air sample above the upper range of residential background concentrations.

Based upon the foregoing, the Court finds that the plaintiff obtained knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury certainly no later than August 2007. The defendants met their prima facie burden of establishing that the action is time-barred as to this plaintiff. In opposition, this plaintiff failed to oppose the motion with an affidavit.

Ellen Molin at 79 Community Road, Bay Shore, New York:

The plaintiff, Ellen Molin owns the real property located at 79 Community Road, Bay Shore, New York. In 2000, an oxygen injection system was installed across the street from the plaintiff's residence. On June 4, 2001, at the direction of Mr. Theodore Leissing, a KeySpan representative, Dvirka and Bartilucci Consulting Engineers, performed indoor and outdoor air sampling at 79 Community Road. The results of said testing were provided to the plaintiff by letter dated July 9, 2001. Contrary to the plaintiff's assertion, the letter report did not indicate that there was no problem with the air quality. Rather, the report revealed that a number of organic compounds were detected in both the indoor and outdoor samples taken at her property (*see* exhibit 18-B).

As early as January, 2003, the plaintiff's name and/or address appear on various redacted Fact Sheet mailing lists. She acknowledges receiving these Fact Sheets sent out to keep the residents informed and updated on the site investigation and remediation efforts along with providing them with information of upcoming public meetings and important contact information. In July 2003, the plaintiff was included in the mass mailed Nicholson letter. However, she does not recall receiving such a letter from Mr. Nicholson.

She acknowledges that one of her family members, Sean Molin, attended the March 23, 2006 public meeting, at which time, an MGP site overview was presented and the DEC's role was explained.

On September 8, 2009, National Grid contracted with H2M Associates, Inc., to perform a visual site inspection of the plaintiff's residence for the purpose of assessing the baseline condition of the property prior to remediation work being performed at the adjacent LIRR site. James Christman, was present with the plaintiff at the site assessment. Further, on November 9, 2009, Mr. Christman visited the property as vibration monitoring was being performed. Based upon the foregoing, the Court is satisfied that the plaintiff obtained or should have obtained knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury certainly no later than January 2003. The defendants met their prima facie burden of establishing that the action is time-barred as to this plaintiff. In opposition, this plaintiff failed to raise a triable issue of fact.

Gregory and Emily Geiger at 83 Community Road, Bay Shore, New York:

The plaintiffs, Gregory and Emily Geiger are the owners of 83 Community Road, Bay Shore, New York and have been involved in the remediation activities since 1998. On or about February 13, 1998, the plaintiff, Gregory Geiger, executed a letter agreement granting access to 83 Community Road to the defendant's predecessors for, among other things, excavation and soil removal, collection of soil samples, the installation of test and/or monitoring wells and the staging of all equipment associated with these activities (*see* exhibit 12-A). Groundwater monitoring wells were later installed on the property.

In 2000, a groundwater treatment system was installed across the street from the plaintiff's property. On or about March 8, 2001, the plaintiff executed a second letter access agreement, this time with the defendant, KeySpan. This agreement permitted the defendant to conduct air sampling in the basement of the property, the installation of seal covers and exhaust hoses on the basement sump pumps, the installation of temporary soil probes, and the installation of a two-inch diameter microwell and a four-inch diameter well for the purpose of conducting groundwater monitoring (*see* exhibit 12-C).

In addition, a number of tests were conducted at the property. In May 2000, indoor air sampling was performed at 83 Community Road by Dvirka and Bartilucci Consulting Engineers. In May 2001, repeat air testing was conducted by Dvirka and Bartilucci and again in October, 2001. Although, he acknowledges giving the defendant's authorization to conduct the testing in 2001, he contends none of these test results were ever shared with him. The plaintiffs also claim to have not received the Robert Nicholson letter, dated July 2003, which advised them to file a law suit before the statute of limitations expired. However, additional testing was performed at the residence in 2007 and 2008. On May 17 and 18, 2007 a detailed site inspection was undertaken at the subject premises, which included samples being taken. By letter dated August 24, 2007, the results of the May, 2007 testing were hand delivered to the plaintiff (*see* exhibit 12-I). A soil vapor intrusion assessment was again conducted on February 12 and 13, 2008 by GEI Consultants, Inc. The results of said testing were hand delivered to the plaintiff on or about March 28, 2008 (*see* exhibit 12-J). The report indicated that while potential MGP chemicals were detected in the crawl space air sample and the sump water, there was no apparent effect of vapor intrusion of MGP-related chemicals on the indoor air quality. On

September 16 and 17, 2008, GEI conducted another soil vapor intrusion assessment at 83 Community Road. By letter, dated November 14, 2008, the results of said assessment were forwarded to the plaintiff (*see* exhibit 12-K). Again, it was reported that potential MGP related chemicals were detected within the indoor air samples, but the detections are within background levels and did not present any exposure concerns. The plaintiff was clearly made aware of background levels of contamination.

On March 30, 2009, Mr. Joseph S. Giordano, Program Manager for National Grid, met with the plaintiff, Gregory Geiger, at 83 Community Road, to discuss further use and/or the acquisition of the property in connection with the remediation efforts in the Bay Shore area. Also present at the meeting were Mr. Ryan and Mr. Christman. During their meeting, they discussed various remediation options under consideration and also gave the plaintiff an opportunity to ask any questions he had about the project and the impact on his property. On August 10, 2009, the defendant's three representatives, met with both plaintiffs to again discuss the defendant's remediation needs and the potential impact the project might have on the subject property. Before concluding this meeting, both the plaintiffs were given an opportunity to ask questions. In September 2009, James Christman, met with the plaintiff, Mr. Geiger, regarding the possible removal and rebuilding of the garage at the residence to provide greater access to the preform remediation. Based upon the foregoing, the Court finds that the plaintiff obtained knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury certainly no later than August 2001. The defendants met their *prima facie* burden of establishing that the action is time-barred as to these plaintiffs, whose opposition failed to raise a triable issue of fact.

SOUTH UNION STREET:

Anthony and Linda Garramone at 7 South Union Street, Bay Shore New York:

Anthony and Linda Garramone are the owners of the property located at 7 South Union Street, Bay Shore New York. Their property was included in the 1999 door to door canvassing conducted by KeySpan. Further, they received the April 11, 2002, letter from the DEC and the well and basement survey. The plaintiff's responded to the survey on April 19, 2002. They reported that their basement was occasionally wet and it sometimes smelled musty.

The plaintiff's were on the Fact Sheet mailing list since January, 2003. Moreover, the plaintiff's acknowledge receiving the Fact Sheets and other literature mailed by KeySpan and the DEC. The initial Fact Sheet sent out in January 2003, provided the residents with, among other things, information regarding the investigation of contaminants, a summary of the findings of the investigation, remedial measures undertaken and future investigation planned and remedial work to be conducted. In addition, it provided important contact information and announced a public meeting on January 29, 2003.

The plaintiff, Linda Garramone, attended the January 29, 2003 public meeting held at the Bay Shore High School. At the meeting representatives from the NYSDEC and KeySpan discussed the regulatory framework and process, the scope and findings of the remedial investigation, exposure

pathways, future planned activities and observations and conclusions from the investigation. Additionally, there was a question and answer session to address the concerns of the community. The Garramones acknowledge continuing to attend numerous public meetings thereafter. They were monitoring the remediation efforts as members of the Bay Shore MGP Task Force. On May 2, 2007, they attended a task force meeting wherein they received an update of the remediation process from KeySpan, DEC and SCDOH representatives.

In June 2004, the plaintiff, Linda Garramone, contacted the defendants to request soil and air sample testing be conducted at her property on 7 South Union Street. At Mr. Theodore Leissing's direction, sampling was conducted at the plaintiffs' property on July 20, 2004. The report of the indoor and outdoor air sampling conducted at the residence was provided to the plaintiff, Anthony Garramone by letter, dated October 7, 2004. The report indicated that ten volatile organic compounds were detected above their respective minimum level of detection in at least one indoor sample (*see* exhibit 19-A). In May 2007, the plaintiffs again requested testing at their property. On May 14 and 15, 2007 an investigation and soil vapor intrusion assessment was performed at 7 South Union Street. During the course of this investigation, James Christman among other things, spoke with and interviewed the plaintiff, Mr. Anthony Garramone. Additionally, Mr. Christman discuss with the plaintiffs the remediation progress and future planned remediation projects. The results were reported to the plaintiff's by letter dated August 21, 2007.

Two more soil vapor intrusion assessments were conducted by GEI at the subject property. The first was conducted on February 25 and 26, 2008. Mr. William Ryan, a project Manager was present during this investigation and assessment. At that time he met with the plaintiffs and was available to answer their questions and again the plaintiff, Anthony Garramone, was interviewed. The test results were provided to the plaintiffs by letter dated April 1, 2008. The report indicated, in pertinent part, that while potential MGP-site related chemicals were detected in the soil vapor there was no apparent effect of the vapor intrusion on the indoor air quality at 7 South Union Street (*see* exhibit 19-E). The second assessment was preformed by GEI on September 8 and 9, 2008. Samples were taken and interviews were conducted during the course of the investigation. The results of said assessment were provided to the plaintiffs by letter dated October 17, 2008 (*see* exhibit 19-G).

In addition to the multiple testings, a pre-construction property condition assessment was conducted at the Garramone property on March 14, 2007. Thereafter, on May 19, 2008, KeySpan representatives returned to the property for a final property assessment after the remediation work in the area was concluded. KeySpan's contractor, H2M Associates, Inc., concluded that there had been damage attributable to the remedial work being performed. In their report H2M outlined the specific damage to the residence they attributed to the remediation efforts (*see* exhibit 19-F). By letter, dated March 20, 2009, the plaintiff sent a copy of an estimate from A.A. Drywall Corp., she had obtained to repair the aforesaid damages caused by the drilling and other clean up activities at the former MGP site. On May 26, 2009 the plaintiffs and the defendants entered into a release and settlement agreement wherein the defendants agreed to contract with New York Home Improvement, Inc., to perform repairs to the plaintiff's home at 7 South Union Street as set forth in exhibit A of the agreement as full settlement of the claim. Based upon the foregoing, the Court finds that the plaintiffs

obtained knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury certainly no later than January 2003. The defendants met their prima facie burden of establishing that the action is time-barred as to these plaintiffs, whose opposition failed to raise a triable issue of fact.

Joseph and Sharon Robinson at 10 South Union Street, Bay Shore, New York:

The plaintiffs, Joseph and Sharon Robinson are the owners of the house and property located at 10 South Union Street, Bay Shore, New York. Their property was also included in the door to door canvassing effort conducted by KeySpan in 1999. Additionally, the plaintiff's received the April 11, 2002, DEC letter and accompanying private well and basement survey. Contrary to their claims, the Robinsons participated in said survey and returned it on July 8, 2002. As part of the survey, Mrs. Robinson indicated that their house did not have a basement and there was no groundwater well on their property.

The plaintiff's virtually identical affidavits contain merely general denials regarding receiving the many mailings sent out directly to them by the defendants from 2003 to the present and the self-serving and unsupported claim of the defendant's misconduct, misrepresentation and concealment. Further, they fail to set forth any specific injury to themselves or their property that they have suffered as a result.

The Robinsons were on the Fact Sheet mailing lists since January 2003. The Court finds the Robinson's general denial regarding not receiving the mailings is disingenuous at best. A review of the various redacted mailing lists provided by the defendants, indicates that the Robinsons name and address appears on them. While it might be possible that any one of the mass mailed Fact Sheets did not reach them, it is inconceivable that they did not receive any of them. This is especially true, where as here, they clearly received earlier mailings to their residence. Sharon Robinson at 10 South Union Street is specifically listed in each and every redacted Fact Sheet mailing list annexed to the instant motion as exhibit 1-F, as follows: January 2003, April 2004, April 2005, May 2006, December 13, 2006, December 27, 2006, April 2007, September 6, 2007, September 14, 2007, November 2007, July 2008, October 2009, May 2010, November 2010, and March 2011 (*see* exhibit 1-F).

On June 5, 2008, the plaintiffs attended a public meeting which focused on the remedial action for operable unit 2 and was held in response to community questions and concerns about the proposed action. Shortly thereafter, the plaintiff's requested air sampling at their property. Upon being contacted by National Grid representatives to schedule such testing, the plaintiff's raised concerns about the defendants or their agents conducting such tests. As a result, William Ryan, project manager, made a request to the SCDOH to contact the plaintiffs to schedule testing. The Robinsons do not dispute these assertions. However, they fail to provide any information regarding the SCDOH testing results or any thing else they did thereafter to further investigate potential injury or contamination of their property.

Accordingly, the plaintiffs knew or should have know of their alleged injuries long before 2012. Clearly by their actions in or around June 2008, they had obtained sufficient knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. The defendants met their prima facie burden of establishing that the action is time-barred. In opposition, these plaintiffs failed to raise a triable issue of fact.

Glen Kresge at 11 South Union Street, Bay Shore, New York:

Glen Kresge, plaintiff, is the owner of the house and real property located at 11 South Union Street, Bay Shore, New York. His property was included in the 1999 door to door canvassing of the community by KeySpan and their representatives. Further, he received the letter disseminated by the DEC, dated April 11, 2002 which included the private well and basement survey. Mr. Kresge participated in the survey and returned same on May 3, 2002. In his survey, he reported that he had water in his basement only after it rains and that it occasionally smelled like wet earth.

The plaintiff does not deny receiving the July 2003 Nicholson letter sent out by a member of the Bay Shore community and licensed professional engineer. The letter warned the residents of the potential contamination, the devaluation of property values and long period of time needed to clean up the plume. Further, Nicholson, warned them of the statute of limitations to bring a law suit against the defendants on these and other issues.

Notwithstanding the foregoing, the plaintiff was on the Fact Sheet mailing lists since January 2003. It is apparent that he received a number of these periodic mailings from 2003 to the present. Each of these Fact Sheets provided him, among other things, with updates on the investigation and remediation efforts, explanations of the plume and the four operable units, contact information and upcoming public meetings.

The plaintiff acknowledged that he was aware of testing being performed in the area. In fact, he observed testing being conducted in front of his home. Further, in March 2007, the plaintiff authorized the defendants to conduct a pre-construction property condition assessment prior to the beginning of the sheet pile work in the area. On March 20, 2007, PS&S performed the property condition assessment at his home. During this assessment, Mr. James Christman, a KeySpan project manager, was present and discussed with the plaintiff, among other things, the remediation progress and future planned remediation activities. After completion of the sheet pile work, the defendant's engineering consultants, H2M, conducted a final property assessment. H2M determined that the residence had not sustained any damage as a result of the remedial work performed by the defendants.

Based upon the foregoing, the plaintiff knew or should have known of his alleged injuries on or before January 2004. The defendants met their prima facie burden of establishing that the action was time-barred. In opposition, the plaintiff failed to raise a triable issue of fact.

GARNER LANE:

Alexander and Amy Hazelton at 7 Garner Lane, Bay Shore, New York:

The plaintiffs, Alexander and Amy Hazelton, purchased to real property located at 7 Garner Lane, Bay Shore, New York in or around September 2005. The prior owner received the DEC letter dated April 11, 2002 and the annexed private well and basement survey. He thereafter completed the survey and returned it on July 8, 2002. He indicated on the survey that the house on 7 Garner Lane had no basement and that there was no groundwater wells on the property. On or about May 28, 2003, the owner, Mr. Salvatore Alternative, transferred the property to Reginald Workman. Thereafter, Mr. Workman, on September 30, 2005, transferred the house to Alexander and Amy Hazelton, the present owners and plaintiffs in this action. Neither Alexander or Amy Hazelton submitted any opposition to the defendant's motion to dismiss.

From July to September 2004, monitoring wells were installed next to the driveway of 7 Garner Lane. In or around September 2005, KeySpan sent out letters informing the residents of community that there would be traffic disruptions on Garner Lane resulting from remedial work. In the Fall of 2005, KeySpan conducted major trench work along Garner Lane which extended in front of the plaintiffs' property as well as an oxygen system (*see* Exhibit 4 [2005]). There is no question that the remediation work was visible to the plaintiffs. Further, Mrs. Hazelton had a conversation with Mr. Ryan of KeySpan regarding this remedial work as early as October 2005. Mr. Ryan recalls that Mrs. Hazelton was relieved to learn that they would not be trenching in the center of her front yard. Additionally, in January 2006, KeySpan sent out a letter to the residents of the Garner Lane and the Bay Shore community reporting the completion of a major Interim Remedial Measure (IRM) in Operable Unit 2 (OU-2) along Garner Lane. The letter further went on to explain that the IRM was designed to reduce the concentration of MGP-related contaminants, primarily BTEX and naphthalene, in the plume path (*see* exhibit 29-D).

At the plaintiff's request, KeySpan preformed testing on their property. On March 5, 2008, a pre-sampling inspection of the property was conducted. Thereafter, over the course of two days, March 6 and 7, 2008, samples were taken at 7 Garner Lane. As part of this testing process, the plaintiff Amy Hazelton was interviewed by a KeySpan representative. By letter, dated April 21, 2008, the results of said testing was provided to the plaintiffs. The letter, in pertinent part, indicated that "*although potentially MGP chemicals were detected in the soil vapor, the results of this assessment showed that there is no apparent effect of vapor intrusion of MGP-related chemicals on the indoor air quality at the property*" (*see* Exhibit 31-C). In October 2008, the property was tested again. On October 29, 2008, one of defendant's representatives, conducted an in-depth interview with the plaintiff, Amy Hazelton. Sampling was then conducted on October 30 and 31, 2008. The results were provided to the plaintiffs by letter, dated December 29, 2008. They revealed that the indoor air quality at 7 Garner Lane was not being impacted by the MGP- site related chemicals (*see* exhibit 31-F). The letter further indicated that both the DEC and NYSDOH agreed with these findings and the results of the October 2008 assessment.

Based upon the foregoing, the plaintiffs, Alexander and Amy Hazelton, knew or should have known of their alleged injuries no later than January, 2006. The defendants met their prima facie

burden of establishing that the action is time-barred as to these plaintiffs, who failed to oppose the motion.

Thomas and Lori Corcoran at 24 Garner Lane, Bay Shore, New York:

The plaintiffs, Thomas and Lori Corcoran, are the owners of the real property located at 24 Garner Lane, Bay Shore, New York. In April 2002, the Corcoran's received the DEC letter, dated April 11, 2002, which included the private well and basement survey. The plaintiff's participated in the well and basement survey and returned said survey on April 22, 2002. Mrs. Corcoran reported in the survey that they had no basement, but that there was a crawl space with a dirt floor.

The Corcorans were on the first Fact Sheet mailing list, January, 2003. Further, Lori Corcoran and their address 24 Garner Lane appears on multiple redacted Fact Sheet mailing lists (*see* exhibit 1-F). The Corcorans acknowledge receiving these periodic Fact Sheet mailings about the plume and the clean up activities. Furthermore, it is undisputed that the Corcoran's received the July 2003, Nicholson letter, which among other things, contended that residents been adversely impacted by hazardous waste from the site as well as warned them of the statute of limitations to bring on a suit against the defendants (*see* exhibit 3-B).

The plaintiff's admit that in early 2000, they requested that KeySpan conduct testing at their home, because they were concerned about possible exposure to dangerous chemicals. At their request, on November 8, 2000, KeySpan and members of Dvirka & Bartilucci Consulting Engineers, met with the plaintiffs and conducted a visual assessment of their home and property along with air samples from the first floor, crawl space and yard area. Results of this assessment and sampling were provided to the plaintiffs by letter dated February 22, 2001. The letter reported that while low levels of various compounds were detected, the home was not impacted by MGP chemicals (*see* Exhibit A annexed to plaintiff, Lori Corcoran's affidavit in opposition and Defendant's Exhibit 29-B). Both plaintiffs also concede that during this time period, they met with KeySpan personnel at their home to discuss their concerns regarding possible health risks from continuing to reside at the 24 Garner Lane home. Mr. Leissing of KeySpan personally discussed the indoor air sampling with Mrs. Corcoran during the 2000-2001 time frame.

In or around 2004, the plaintiff's authorized the defendant to install monitoring wells on their property. Other wells were installed near their property at that time. In March 2008, Mr. William Ryan, a Project Manager for KeySpan, met with the plaintiff, Lori Corcoran, to discuss adding additional wells on the property. Further, there was an oxygen injection system installed in the Corcoran's driveway. In August 2008, KeySpan paid \$2,226.81 for the repairs to the Corcoran driveway caused by the installation of the oxygen injection system.

In addition to the testing performed in 2000, the plaintiff's had their property tested at least three more times. In February 2007, the plaintiffs authorized KeySpan to conduct a further investigation and take air samples to determine whether there was any impact from MGP related chemicals on the indoor air at the property. A soil vapor intrusion assessment was performed on

February 13 and 14, 2007. Representatives from KeySpan and GEI Consultants, Inc., conducted a pre-sampling property visit, interviewed the plaintiff and took air and crawl space samples. During the assessment, Mr. Christman met with Mrs. Corcoran regarding the air sampling and answered her questions and addressed her concerns. By letter, dated July 27, 2007, the results of the testing were provided to the plaintiffs. The testing revealed that there was no apparent vapor intrusion of MGP related chemicals on the indoor air quality at the home.

Apparently, during the same period as the February, 2007, KeySpan testing, the plaintiffs had the property tested by the Suffolk County Department of Health Services in collaboration with the NYSDOH. The results of this sampling were provided to the plaintiffs by letter dated, April 30, 2007. The water analysis conducted on January 2, 2007 and February 21, 2007 revealed the presence of semi volatile and volatile organic chemicals associated with the former MGP site. Further, this sampling detected a significantly higher concentration of MGP chemicals than the prior December, 2004, samples. The Suffolk County Department of Health Services postulated that the increase may have been caused by a change in the flow direction of the plume. In addition, indoor air samples and soil vapor samples were taken on January 11, 2007 and February 13, 2007. The sampling detected low levels of MGP related chemicals as well as other chemicals. The report indicated that the results of the February sampling had lower concentration levels than the samples taken in January. Based upon the results found and that the residence was built over a dirt floor crawl space, SCDHS recommended continued air and water monitoring. Mr. Ryan met with Mrs. Corcoran to review these SCDHS test results in June 2007.

In January, 2008, the Corcoran's again authorized further testing and sampling be conducted at the residence. Based upon their request, another soil vapor intrusion assessment was conducted at the Corcoran residence on January 24 and 25, 2008, by Keyspan and GEI Consultants, Inc. Like the other assessments of the property, indoor and outdoor air and soil vapor samples were collected and the plaintiff was again interviewed. The results were mailed to the plaintiff by letter, dated March 11, 2008. The report indicated that while MGP related chemicals were detected in the soil vapor, there was no apparent effect of MGP related chemicals on the indoor air quality at the residence (*see* exhibit 29-H). Once again, soil vapor intrusion testing was performed, at the request of the plaintiffs by representatives of National Grid and GEI on October 23 and 24, 2008. The results were reported to the plaintiffs on December 22, 2008. The report provided that it did not appear that the indoor air quality was being impacted by MGP site-related chemicals (*see* exhibit 29-J). Finally, at the plaintiff, Thomas Corcoran's request, National Grid undertook a barnacle assessment to determine whether oxygen injection groundwater remediation system could increase the barnacle population in Lawrence Creek and on his boat. The expert retained to complete this study determined that the ecological conditions found in Lawrence Creek reflect local conditions found in tidal creeks outside the area potentially effected by the oxygen injection groundwater remediation system (*see* exhibit 29-K)

It is further noted that the plaintiffs, Thomas and Lori Corcoran, mis-characterize the DEC letter, dated June 14, 2013, as an indictment on the defendant's investigation and remediation efforts. However, the letter in question, by in large, provides a positive report on the remediation process and progress. Further, the letter alleviates the resident's concerns regarding human exposure to

contaminants in the groundwater plume by indirect pathways known as soil vapor intrusion. Specifically, it is stated that “ *the potential for people to inhale site contaminants in indoor air due to soil vapor intrusion in off-site buildings has been extensively evaluated, and the environmental sampling conducted to date indicates that soil vapor intrusion is not a concern*” (see exhibit B annexed to plaintiff, Lori Corcoran’s affidavit in opposition).

The plaintiffs do not dispute the significant contacts with KeySpan representatives, the SCDHS or the numerous tests performed at their residence. However, they claim that based upon the defendant’s reassurances, they believed that the contamination from the plume presented no danger to their health or safety, they were lulled into believing their property was fine. However, as outlined above, plaintiffs, Thomas and Lori Corcoran, knew or should have known of their alleged injuries no later than July 2003. The defendants met their prima facie burden of establishing that the action is time-barred. In opposition, these plaintiffs failed to raise a triable issue of fact.

Richard and Barbara Varone at 25 Garner Lane, Bay Shore, New York:

The plaintiffs, Richard and Barbara Varone have owned the real property located at 25 Garner Lane, Bay Shore, New York for the past 35 years. In 1999, the plaintiffs’ property located at 25 Garner Lane was included in the door to door canvassing of the community by KeySpan. Thereafter, in or around January 2003, the plaintiffs began to receive the periodic Fact Sheets prepared by KeySpan, in conjunction with the DEC and the NYSDOH.

In 2004, the plaintiffs authorized KeySpan to place monitoring wells on their property. Moreover, during this time period, visible and significant remediation work was performed along Garner Lane. In or around September, 2005, KeySpan sent out letters informing the residents of the community that there would be traffic disruptions on Garner Lane resulting from remedial work. In the Fall of 2005, KeySpan performed major trench work along Garner Lane which extended along much of Garner Lane (see Exhibit 4 [2005]). This work entailed digging long trenches along Garner Lane and installing oxygen injection wells into the trenches to a depth of between 25 and 80 feet below the surface. It is noted that this extensive remedial work caused traffic disruptions along Garner Lane throughout the Fall of 2005.

The plaintiffs admit receiving the periodic mailings from the defendant about the contamination from the plume and the clean up activities over the last ten years or more. Moreover, they concede that they authorized the installation of monitoring wells on their property in 2004. Nevertheless, they both contend that they only became aware of the actual risks that they were being exposed to, based upon information they received from Mr. William Sullivan, a co-plaintiff and their attorneys. Further, they assert that prior to receiving this information they were lulled into a false sense of security by the defendants that the contamination and clean-up did not pose a health or safety risk to them. Notwithstanding the foregoing, the plaintiffs, Richard and Barbara Varone, knew or should have known of their alleged injuries no later than the Fall 2005. The defendants met their prima facie burden of establishing that the action is time-barred. In opposition, the plaintiffs failed to raise a triable issue of fact.

James Cullen at 50 Garner Lane, Bay Shore, New York:

The plaintiff, James Cullen, purchased the real property located at 50 Garner Lane, Bay Shore, New York as an investment property in or around March 16, 2009. Mr. Cullen admits to being a real estate speculator, in the business of property management and buying and selling homes. In light of his acknowledged profession, the Court finds that his claim that he had no idea that this Bay Shore property was at or near the plume from the former Bay Shore MGP site or the extensive investigation and remedial efforts being conducted in the Bay Shore area defies credibility.

In any event, the plaintiff admits calling the hotline, in June 2009, to request testing at the property as he was already in the process of selling the residence. He further acknowledges that upon purchasing the property he saw the ongoing remedial work by KeySpan/National Grid in his neighborhood. In addition, he admits to getting the periodic Fact Sheets and other literature keeping the community informed about the plume, investigation and the clean up activities mailed to the residents of the Bay Shore area by the defendants. Moreover, the plaintiff sold this property in March 2012, approximately eight months prior to signing the verification annexed to the second amended verified complaint filed with the Court in or around December 10, 2012.

Based upon the foregoing, the plaintiff, James Cullen, knew or should have known of their alleged injuries no later than June 2009. Accordingly, the FIRST through SEVENTH causes of action are dismissed as time barred. However, it does not appear this plaintiff is time barred in regard to the EIGHTH cause of action sounding in monitoring and injunctive relief, which is governed by a six-year statute of limitations period set forth in CPLR § 213(1).

NORTH CLINTON AVENUE:

Nicholas Dennis Divaris at 56 North Clinton Avenue, Bay Shore, New York:

The plaintiff, Nicholas Dennis Divaris, owns the piece of real property located at 56 North Clinton Avenue, Bay Shore, New York. He contends that he did not start living in or occupying the 56 North Clinton Avenue residence until Late Winter or early Spring 2006. In 1999, the plaintiff's property was included in the door to door canvassing of the community by KeySpan representatives.

Remediation efforts were ongoing in the area near the residence prior to 2003. A well cluster was installed on the southwest corner of Union Boulevard and North Clinton Avenue, adjacent to 56 North Clinton Avenue. On March 15, 2007, a pre-construction property condition assessment was conducted at the plaintiff's residence, by one of KeySpan's consultants, PS&S Engineering. The plaintiff was present during the assessment along with a KeySpan representative. A report of the assessment was provided to the plaintiff by letter dated April 19, 2007 (*see* Exhibit 34). Further, from April 30, 2007 to May 24, 2007, North Clinton Avenue was closed due to extensive remediation and construction work being performed by the defendants. Clearly, the remediation efforts would have been visible to the plaintiff from the time he began occupying the 56 North Clinton Avenue. In addition, the plaintiff also admits that testing was conducted on his property. The plaintiff, Nicholas

Dennis Divaris, knew or should have known of their alleged injuries upon moving into the residence in 2006 but certainly not later than May 2007. The defendants met their prima facie burden of establishing that the action is time-barred as to this plaintiff. In opposition, the plaintiff failed to raise a triable issue of fact.

Aristea Mouris at 58 North Clinton Avenue, Bay Shore, New York:

The plaintiff, Aristea Mouris, owns the residence located at 58 North Clinton Avenue, Bay Shore, New York. She resided there with her husband George until his death in 2005. The residence was included in the 1999 door to door canvassing of the community due by Keyspan representatives. This notification program consisted of a team of environmental, government and community relations employees who provided residents with information about the MGP issues, groundwater plume, the investigation being conducted by KeySpan and anticipated remediation activities. In addition, the team provided each resident with a copy of the July 29, 1999 letter which described the activities and provided a hotline number for the resident to address questions or concerns. The records provided by KeySpan appear to indicate that a resident at 58 North Clinton was spoken to by team members that day. However, at the very least, the July 29, 1999, letter was left on the door of said residence.

In April, 2002, the plaintiff or another member of her household received the April 11, 2002 DEC letter and the accompanying private well and basement survey. The plaintiff's husband, George Mouris, completed the survey and returned same on May 28, 2002. Mr. Mouris reported, in his survey, that the basement at 58 North Clinton Avenue occasionally gets an odor when wet that smells like wet earth. Starting in January 2003, the plaintiff's husband and her address appeared on the Fact Sheet mailing lists. Fact Sheets appear to have been sent to the residence since that time. The plaintiff does not dispute receiving the periodic Fact Sheets.

The January 2003, Fact Sheet, among other things, announced the January 29, 2003 public meeting held at the Bay Shore High School. The plaintiff attended this meeting wherein the regulatory framework and process, remedial investigation scope and findings, exposure pathways, observations and conclusions of the investigation and future remediation activities were discussed. Additionally, there was a question and answer session to address community concerns and questions. Moreover, she does not dispute receiving the July 2003, Nicholson letter.

On April 2, 3 and 4, 2007, a soil vapor intrusion assessment was conducted at the plaintiff's residence by KeySpan representatives and their environmental consultants, GEI Consultants, Inc. The off-site sampling document form, prepared during the assessment by James Christman of KeySpan, indicates that Mrs. Aristea Mousis was present but her daughter was interviewed as part of the assessment. By letter, dated August 8, 2007, KeySpan provided the plaintiff, Aristea Mousis, with the results of testing and assessment conducted at her property that April (*see* exhibit 33-B). The results indicated that no MGP related chemicals were detected in the indoor air at her home above background concentrations. Said report was also provided to the DEC, the NYSDOH and the SCDHS. The NYSDOH had reviewed the report and approved the findings and results of the assessment. Additional sampling was apparently conducted at 58 North Clinton Avenue at the request of the DEC

in August, 2008. The SCDHS appears to have preformed a pre-sample inspection on August 12, 2008 and thereafter conducted sampling on August 18 and 19, 2008. The plaintiff's daughter, Frenia Arena, was listed as the contact person.

In addition to the soil vapor intrusion assessment, on March 21, 2007, a pre-construction property condition assessment was conducted by PS&S engineering. The report was provided to the plaintiff by letter, dated April 19, 2007. Shortly thereafter, from April 30, 2007 to May 24, 2007, North Clinton Avenue was closed due to extensive remediation and construction work being preformed by the defendants. Clearly, the remediation efforts would have been visible to the plaintiff from the time she began occupying the 58 North Clinton Avenue property. Upon completion of the remedial work, H2M performed a visual inspection of the property and issued a final property condition assessment. The report clearly indicated that there was some interior damage to the residence attributable to the remedial work performed in the area. Mr. Christman was also present during both condition assessments and on both occasions spoke with the homeowner. The plaintiff, Aristeia Mousis, knew or should have known of her alleged injuries certainly not later than May 2007. The defendants met their prima facie burden of establishing that the action is time-barred. In opposition, this plaintiff failed to raise a triable issue of fact.

FIFTH AVENUE:

Patrick and Angela Adams owners of 43 Fifth Avenue, 45 Fifth Avenue and 49 Fifth Avenue, Bay Shore, New York:

The plaintiffs, Patrick and Angela Adams own three parcels of property located in Bay Shore, New York. 43 Fifth Avenue and 45 Fifth Avenue are undeveloped vacant lots the third, 49 Fifth Avenue, is apparently an unoccupied piece of commercial property. Their claims of potential serious health risks to themselves as a result of the toxic substances in the plume, borders on the absurd as they concede two of the pieces of property are vacant lots and the three is an unoccupied commercial building. Moreover, the plaintiffs apparently never lived in the Bay Shore area and have, by their own admission, lived in Naples, Florida for the past twelve (12) years.

The defendants assert that these three pieces of real property are not located in the area designated as operable units 1 - 4 of remediation. Notwithstanding the foregoing, the property in question was included in the area covered by the 1999 door to door canvassing of the Bay Shore community. The KeySpan records of the 1999 canvassing do note that 49 Fifth Avenue was a law office. In addition, the plaintiff, Patrick Adams, and 49 Fifth Avenue appear together in the January 2003 Fact Sheet mailing list. It does appear that at least some of the Fact Sheets were mailed to 49 Fifth Avenue while it was occupied by a Law firm. Moreover, while remediation and excavation activities at the MGP site would have been visible, no remedial activities were performed at or near the subject properties.

Neither plaintiff denies knowledge of the ongoing investigation and remediation activities surrounding the former Bay Shore MGP. Rather, they merely contend that they have never been in

contact with KeySpan personnel or contractors. Further, they submit that they have never received any mailings from KeySpan as they never lived at any of the above-mentioned addresses and have been out of state for twelve (12) years. It is unfathomable that as a landlord of commercial property in the Bay Shore area, even an absentee landlord, would be unaware of the ongoing investigation and remediation activities surrounding the former Bay Shore MGP site since 1999/2000. Moreover, the Court finds it is curious that the plaintiffs would have received the William Sullivan letter, dated October 12, 2012, which they claim was the impetus for them joining the suit, but nothing from KeySpan or the DEC since 1999. In any event, the standard for commencing the statute of limitations in an action to recover damage to property caused by a latent effects of exposure to any substance is from the date of discovery of the injury by the plaintiff or from the date when, through the exercise of reasonable diligence, such injury should have been discovered by the plaintiffs, which ever is earlier. The Court finds that the plaintiffs, Patrick and Angela Adams, knew or should have known of their alleged injuries not later than 2003. The defendants met their prima facie burden of establishing that the action is time-barred. In opposition, these plaintiffs failed to raise a triable issue of fact.

George Strain at 56 Fifth Avenue, Bay Shore, New York:

The defendants assert that this parcel is not located in the area designated as operable units 1 - 4 of remediation. Notwithstanding the foregoing, the property in question was included in the area covered by the 1999 door to door canvassing of the Bay Shore community. It does appear that the Fact Sheets were mailed to the prior owner, Brian Clark, who provided a response to the private well and basement survey. Moreover, while remediation and excavation activities at the MGP site would have been visible, no remedial activities were performed at or near the subject properties. However, the plaintiff, George Strain, purchased the residence located at 56 Fifth Avenue, Bay Shore, New York in June 2010. Accordingly, it appears his claims are not be time-barred, when measured from the date of May 15, 2010. The defendants have failed to met their prima facie burden with respect to this plaintiff.

LANIER LANE:

Geraldine Coupe at 15 Lanier Lane, Bay Shore, New York:

The plaintiff, Geraldine Coupe, is the owner of the property located at 15 Lanier Lane, Bay Shore, New York. Her property was included in the 1999 door to door canvassing conducted by KeySpan. At that time, at the very least, the KeySpan letter, dated July 27, 1999 was left at her door. Said letter informed the residents of the investigation, sampling and remediation planned surrounding the potential environmental impact on the community from the former Bay Shore MGP site. It also provided a hotline number for questions and concerns regarding the same.

In April of 2002, the plaintiff received the April 11, 2002 DEC letter and the accompanying private well and basement survey. She participated in the survey and returned it on July 16, 2002. She reported having a crawl space and a groundwater well. On August 19, 2002, the plaintiff was contacted by KeySpan representatives. After a discussion, she informed them that she had no interest

in scheduling a further meeting with KeySpan. Further, she declined to have the groundwater tested because the groundwater well on her property was not used in years. She indicated that she had been using city water since moving to 15 Lanier Lane.

Notwithstanding the foregoing, KeySpan placed her on the Fact Sheet mailing lists and began sending her these periodically commencing in January, 2003. Moreover, there has been continuous and extensive remediation activities throughout the Bay Shore community, which would have been visible to the plaintiff. Finally, it appears that the plaintiff did not submit an affidavit in opposition to the instant motion to dismiss. The Court finds that the plaintiff, Geraldine Coupe, knew or should have known of her alleged injuries not later than January 2003. The defendants met their prima facie burden of establishing that the action is time-barred as to this plaintiff who failed to oppose the motion.

Richard and Judy Carroll at 21 Lanier Lane, Bay Shore, New York:

The plaintiffs, Richard and Judy Carroll, own the real property located at 21 Lanier Lane, Bay Shore, New York. Their property was included in the 1999 door to door canvassing conducted by KeySpan. At that time, at the very least, the KeySpan letter, dated July 27, 1999 was left at their door. Said letter informed the residents of the investigation, sampling and remediation planned surrounding the potential environmental impact on the community from the former Bay Shore MGP site. It also provided a hotline number for questions and concerns regarding the same.

In April of 2002, the plaintiffs received the April 11, 2002 DEC letter and the accompanying private well and basement survey. They participated in the survey and returned it on July 8, 2002. Mr. Carroll reported that their basement occasionally got wet after it rained and occasionally, when wet, had a musty smell.

The Carrolls were placed on the Fact Sheet mailing lists. KeySpan began sending periodic Fact Sheets to the plaintiffs in January 2003. Moreover, there were numerous other sources of information regarding the former MGP site and remediation efforts available to them, including KeySpan and DEC mailings, public meetings, neighbors, as well as extensive news media coverage. The written information provided by both the Defendants and the DEC coupled with the continuous and extensive remediation activities throughout the Bay Shore community since 2000 should have provided the plaintiffs with sufficient knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. The plaintiffs, Richard and Judy Carroll, knew or should have known of their alleged injuries not later than January 2003. The defendants met their prima facie burden of establishing that the action is time-barred as to these plaintiffs. In opposition, the plaintiff failed to raise a triable issue of fact.

Eileen Heckel at 22 Lanier Lane, Bay Shore, New York:

The plaintiff, Eileen Heckel, is the owner of the property located at 22 Lanier Lane, Bay Shore, New York. Their property was included in the 1999 door to door canvassing conducted by KeySpan. Further, KeySpan had contact with the Mr. Alfred Heckel, the plaintiff's husband in August 1999. At

that time he indicated that he regularly noticed odor from the sewer trap. Mr. Leissing of KeySpan performed an assessment and explained the project to Mr. Heckel and answered questions about remediation. Mr. Heckel thereafter signed an access agreement with KeySpan but refused equipment. He also requested that he be home when all work was to be done at 22 Lanier Lane. The plaintiff mistakenly claims that defendants' submitted a false affidavit "stating they spoke with Alfred Heckel in 2001 at my home," as she states he was no longer living at the residence in 2001. However, after a through review of the multiple affidavits submitted by the defendant's, the only such reference about their contact with Mr. Heckel took place during the summer of 1999.

On January 13, 2000, Ms. Eileen Heckel attended the Bay Shore Manufactured Gas Plant/Brightwaters Oil Spill Investigation and Remediation public meeting held at the Brook Avenue Middle School in Bay Shore. Said meeting was run by the DEC. Over the course of this comprehensive meeting, DEC representatives discussed and explained the oil spill investigation, the consent order process and the MGP remediation. KeySpan representatives discussed their environmental remediation program and the project status. Additionally, KeySpan consultants explained their field investigations to date and their planned assessment of the assessment results. Finally, there was a question and answer period. It is noted, that Ms. Heckel attended another public meeting on September 30, 2009. This meeting was held by National Grid to update the community on the remedial progress. Representatives of the DEC were also present.

The plaintiff received the April 11, 2002 DEC letter and the accompanying private well and basement survey. She participated in the survey and returned it on July 16, 2002. Mrs. Heckel reported that there was a crawl space at the residence, which did not get water in it. Starting in January 2003, the plaintiff's husband and her address appeared on the Fact Sheet mailing lists. Fact Sheets appear to have been periodically sent to the residence since that time. The plaintiff does not dispute receiving the periodic Fact Sheets.

Based upon the multiple contacts with the defendants since 1999, her attendance at public meetings, her receipt of the periodic Fact Sheets since 2003 as well as the continuous and extensive remediation activities throughout the Bay Shore community since 2000 should have provided the plaintiff with sufficient knowledge that would place reasonable persons on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. The plaintiff, Eileen Heckel, knew or should have known of her alleged injuries not later than January 2000. The defendants met their prima facie burden of establishing that the action is time-barred as to this plaintiff. In opposition, this plaintiff failed to raise a triable issue of fact.

Joyce Malakoff at 23 Lanier Lane, Bay Shore, New York:

The plaintiff Joyce Malakoff, owned the real property located at 23 Lanier Lane with her husband, Stanley Malakoff until October 5, 2004. At that time, she transferred her interest she had in said residence to Stanley Malakoff. Based upon this transfer, the defendants contend that she has standing to be a plaintiff in this action. In any event, the Court has considered whether her claims, if she has standing, are time barred.

At the outset, the plaintiff admits to having groundwater testing performed by LIPA in 1998. She concedes that the test results were reported to her at that time. Furthermore, it appears that she claims that from 1985 to 2000, she continually reported foul odors emanating from the sewer grate at her bus stop on the corner of Lanier Lane and Cooper Lane. Also, she appears to be claiming that odors emanated from the sump pump in the basement as well as the water that flooded the basement.

Her property was included in the 1999 door to door canvassing conducted by KeySpan. At that time, at the very least, the KeySpan letter, dated July 27, 1999 was left at her door. Said letter informed the residents of the investigation, sampling and remediation planned surrounding the potential environmental impact on the community from the former Bay Shore MGP site. It also provided a hotline number for questions and concerns regarding the same.

In April of 2002, the plaintiff's household received the April 11, 2002 DEC letter and the accompanying private well and basement survey. Stanley and Joyce participated in the survey and returned it on April 17, 2002. They reported that they occasionally got water in their basement when it rained, but they did not detect any odor in the basement when wet. They also indicated that they had a groundwater well on their property. It was specifically noted in the survey response, that the groundwater running through their sprinkler system left big brown stains on the house.

In August, 2002, as a result of their survey responses, the Malakoffs were listed on a master list by KeySpan's outside contractor, Dvirka & Bartilucci. KeySpan requested that Dvirka & Bartilucci conduct a field investigation of 23 Lanier Lane. On August 16, 2002, representatives of Dvirka & Bartilucci met with Mrs. Malakoff to address concerns they had including the groundwater well on the property. On August 26, 2002, Dvirka & Bartilucci returned to the property to perform testing. Sampling was conducted under a sampling procedure approved by the DEC. The results of the sampling was provided to the Malakoffs by letter dated January 16, 2003. The test data revealed no MGP related volatile or semi-volatile organic compounds were detected.

The Malakoffs were included on the Fact Sheet mailing lists since 2003. While the plaintiff contends she did not receive these mailings, this is highly unlikely as each mailing generated a separate and distinct mailing list. While it might be possible that one or more documents mailed did not reach the plaintiff, it is highly unlikely that none of the documents alleged to have been mailed to the residence, were not received over the years. Moreover, at the time she transferred the home to her husband, only three Fact Sheets had been mailed.

Notwithstanding her claims to the contrary, her multiple contacts with the defendants and/or their consultants since 1998, testing at the property, receipt of the periodic Fact Sheets since 2003 as well as the continuous and extensive remediation activities throughout the Bay Shore community since 2000 should have provided the plaintiff with sufficient knowledge that would place reasonable persons on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. The plaintiff, Joyce Malakoff, knew or should have known of her alleged injuries not later than January 2002. The defendants met their prima facie burden of establishing that the action was time-barred. In opposition, the plaintiff failed to raise a triable issue of fact.

Casilda Del Valle at 26 Lanier Lane, Bay Shore, New York:

The plaintiff, Casilda Del Valle, owns and resides at 26 Lanier Lane, Bay Shore, New York. Her property was included in the 1999 door to door canvassing conducted by KeySpan. At that time, at the very least, the KeySpan letter, dated July 27, 1999 was left at her door. Said letter informed the residents of the investigation, sampling and remediation planned surrounding the potential environmental impact on the community from the former Bay Shore MGP site. It also provided a hotline number for questions and concerns regarding the same. Further, it appears that on multiple occasions in July and August of 1999, KeySpan representatives went to the plaintiff's residence at 26 Lanier Lane in an attempt to have the plaintiffs sign an access agreement permitting KeySpan access to the property to conduct an investigation and remediation from the property. Representatives apparently went to the residence on four (4) occasions, leaving their card with a neighbor on the last visit. It is noted that her former neighbor, Alfred Heckel, at 22 Lanier Lane, Bay Shore, New York signed an access agreement with KeySpan in or around the same time frame.

In April of 2002, the plaintiff was mailed a copy of the April 11, 2002 DEC letter and the accompanying private well and basement survey. She does not deny receiving this letter and survey request, but she did not respond to same. Further, KeySpan records indicate that there were at least two follow up messages left at the plaintiff's home in an attempt to have the plaintiffs complete the well and basement survey.

Further she admits to receiving the periodic Fact Sheets issued by the DEC and mailed to the residents of the Bay Shore area over the years, since January, 2003. Further, she acknowledges they provide her with information regarding, among other things, the contaminated area, the investigation of contaminants, remedial actions undertaken and future planned investigations and remedial work to clean up the Bay Shore area. Finally, she acknowledges receiving the July 2003 Nicholson letter, which warned its recipients of potential impact of their property, potential health risks as well as an alleged reduction in property values in the area as a result of the contaminants released from the Former MGP site. In addition, Nicholson advised each recipient of the limited time frame in which to commence suit against the defendants.

There were numerous other sources of information regarding the former MGP site and remediation efforts available to them, including DEC mailings, public meetings, neighbors, as well as extensive news media coverage. In addition, there has been continuous and extensive remediation activities throughout the Bay Shore community since 2000. Based upon the foregoing, the plaintiff should have obtained sufficient knowledge from 1999 to 2003 that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. The plaintiff, Casilda Del Valle, knew or should have known of her alleged injuries not later than July 2003. The defendants met their prima facie burden of establishing that the action is time-barred. In opposition, the plaintiff failed to raise a triable issue of fact.

Joseph and Maureen Simone at 27 Lanier Lane, Bay Shore, New York:

The plaintiffs, Joseph and Maureen Simone, owns and resides at 27 Lanier Lane, Bay Shore, New York. Their property was included in the 1999 door to door canvassing conducted by KeySpan. At that time, at the very least, the KeySpan letter, dated July 27, 1999 was left at their door. Said letter informed the residents of the investigation, sampling and remediation planned surrounding the potential environmental impact on the community from the former Bay Shore MGP site. It also provided a hotline number for questions and concerns regarding the same. The plaintiffs' received the April 11, 2002 DEC letter and the accompanying private well and basement survey. They participated in the survey and returned it on May 3, 2002. The plaintiffs' reported that their basement leaks through cracks in the floor during the summer months. Further, it was noted that occasionally when wet the basement had an odor characterized as musty.

The plaintiff, Maureen Simone and the plaintiff's address, 27 Lanier Lane, Bay Shore, New York, were on the DEC Fact Sheets since January 2003. Furthermore, her name and/or address, appeared in the redacted mailing lists January 2003, April 2004, April 2005, May 2006, December 13, 2006 and December 27, 2006 (*see* exhibit 1-F). Both plaintiffs deny receiving any of these Fact Sheets. However, the likelihood that they did not receive any of these periodic mailings is minute. Each mailing generated a separate and distinct mailing list. While it might be possible that one or more documents mailed did not reach the plaintiffs, it is highly unlikely that none of the documents alleged to have been mailed to the residence were not received over the last ten or more years.

In any event, there were numerous other sources of information regarding the former MGP site and remediation efforts available to them, including DEC mailings, public meetings, neighbors and extensive news media coverage. In addition, there has been continuous and large-scale remediation activities throughout the Bay Shore community since 2000. Based upon the foregoing, in particular, their response to the private well and basement survey, the plaintiffs should have obtained sufficient knowledge from 1999 to 2003 that would place reasonable persons on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. The plaintiffs, Joseph and Maureen Simone, knew or should have known of their alleged injuries not later than July 2003. The defendants met their prima facie burden of establishing that the action is time-barred as to these plaintiffs. In opposition, they failed to raise a triable issue of fact.

John Schmutz and Georgia Payne at 30 Lanier Lane, Bay Shore, New York:

The plaintiffs, John Schmutz and Georgia Payne, acquired the property located at 30 Lanier Lane, Bay Shore, New York in April, 2003. The property was included in the 1999 door to door canvassing conducted by KeySpan. Prior to their purchase of the aforementioned property, the prior owner, Veronica Dillon, received the April 11, 2002 DEC letter and the accompanying private well and basement survey. She participated in the survey and returned it on May 3, 2002. Ms. Dillon reported that the property at 30 Lanier Lane had no basement or groundwater well.

KeySpan alleges that their records demonstrate that the prior owner was on the Fact Sheet mailing lists, dated January 2003, April 2004 and September 2004. Further, the plaintiff, Georgia

Payne, at 30 Lanier Lane appears on the Fact Sheet mailing list dated April 8, 2004. The address 30 Lanier Lane appears on a number of the other subsequent Fact Sheet mailing lists. Each Fact Sheet was addressed to a particular resident or current resident. Even if the named resident no longer resided at the address listed, the mailing would be left for the current resident of the property. Notwithstanding their claims to the contrary, the likelihood that they did not receive any of these periodic mailings is remote.

Moreover, both, John Schmutz and Georgia Payne, attended the project status update and information public meeting held on March 23, 2006. During this comprehensive meeting, the attendees were given an MGP site overview, were explained the DEC's role and remediation investigation results (*see* Exhibit 1-A). At the meeting the residents were provided important contact information, including, a telephone phone number for health related concerns, the telephone number for Mr. Amen Omorogbe, P.E. of the DEC Division of Environmental Remediation, the telephone number for the Bay Shore Site Hotline, as well as the location of both document repositories.

In virtually identical affidavits both plaintiffs, John Schmutz and Georgia Payne, contend they had no personal dealings with KeySpan and were not aware of any prior dealings with the prior homeowner had with KeySpan. However, it defies logic that at the time of their purchase of this property, they were unaware of the potential contamination caused by the former MGP site or the extensive remediation effort being conducted in the Bay Shore area as a result thereof. Moreover, there were numerous other sources of information regarding the former MGP site and remediation efforts available to them, including disclosure of same by the prior owners and/or the real estate agent/broker, KeySpan and DEC mailings, public meetings, neighbors, as well as extensive news media coverage. Based upon the foregoing, the plaintiffs should have obtained sufficient knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. It simply appears that their failure not to undertake such an investigation, in a more timely fashion, was by choice rather than any lack of knowledge about the contamination concerns or based upon any misconduct, misrepresentation or concealment by the defendants. The plaintiffs, John Schmutz and Georgia Payne, knew or should have known of their alleged injuries not later than March 2006, after attending the public meeting. The defendants met their prima facie burden of establishing that the action is time-barred as to these plaintiffs. In opposition, these plaintiffs failed to raise a triable issue of fact.

Stuart and Lourice Staples at 37 Lanier Lane, Bay Shore, New York:

The alleged plaintiffs, Stuart and Lourice Staples own the real property located at 37 Lanier Lane, Bay Shore New York. At the outset it is noted that neither Stuart nor Lourice Staples submitted an affidavit in opposition to the defendants' motion to dismiss. More disconcerting, however, is while both persons are listed as plaintiffs in this action, upon a careful review of the Second Amended Verified Complaint annexed to the supporting affirmation as exhibit 1-A, it is clear that neither Stuart Lourice nor Lourice Staples, executed the verification. At least, with regard to Lourice Staples, it appears that her daughter Debbie Staples-Waarst signed on her behalf as Power of Attorney. It is noted that no power of attorney has been provided to this point to ascertain whether Ms. Staples-

Waarst has the authority to commence litigation on her mother's behalf. Ms. Staples-Waarst contends, that she holds a power of attorney for her mother, and that Mrs. Staples is disabled. Accepting, for the purposes of this motion, that Ms. Staples-Waarst holds a valid power of attorney, the Court shall consider whether the instant matter should be dismissed against the plaintiff, Lourice Staples, as being time barred. However, Stuart Staples' name has been crossed out on said verification. Accordingly, with regard to Stuart Lourice, the matter is dismissed as he is not a proper plaintiff in this action.

The Staples' property was included in the 1999 door to door canvassing conducted by KeySpan. At that time, at the very least, the KeySpan letter, dated July 27, 1999 was left at their door. Said letter informed the residents of the investigation, sampling and remediation planned surrounding the potential environmental impact on the community from the former Bay Shore MGP site. It also provided a hotline number for questions and concerns regarding the same. Thereafter, KeySpan's records provide that the April 11, 2002 DEC letter and accompanying private well and basement survey was sent to the plaintiff's residence. However, for reasons not explained, the KeySpan records reveal that the plaintiff or someone in her household in April 2002, flatly refused to participate in the survey. The plaintiff through her daughter does not recall receiving the survey request.

Notwithstanding the Staples failure to return the well and basement survey, both she and 37 Lanier Lane were listed on multiple Fact Sheet mailing lists, commencing with the January 2003 Fact Sheet. Through her daughter, the plaintiff denies receiving these Fact Sheets. She claims that she believes if she was on the mailing list, she should have received regular mail from KeySpan, which she does not recall receiving. Her contention in this regard is faulty and misplaced as these Fact Sheets were not mailed out on a weekly or even monthly basis. Rather, the DEC and KeySpan would issue a Fact Sheet once or twice a year, when important information needed to be disseminated.. Moreover, the likelihood that she did not receive any of these periodic mailings is minute. Each mailing generated a separate and distinct mailing list. While it might be possible that one or more documents mailed did not reach the plaintiff, it is highly unlikely that none of the documents alleged to have been mailed to the residence were received over the last ten or more years.

There were numerous other sources of information regarding the former MGP site and remediation efforts available to them, including DEC mailings, public meetings, neighbors, as well as extensive news media coverage. In addition, for many years there has been visible and continuous extensive remediation activities throughout the Bay Shore area. Accordingly, the plaintiff Lourice Staples, knew or should have known of their alleged injuries not later than January 2003. The defendants met their prima facie burden of establishing that the action is time-barred as to each of these plaintiffs. In opposition, they failed to raise a triable issue of fact.

Harry and Marybeth Muth at 39 Lanier Lane, Bay Shore, New York:

The plaintiff's Harry and Marybeth Muth, purchased the property located at 39 Lanier Lane, Bay Shore, New York in or around July 2, 2007. The property was included in the 1999 door to door canvassing conducted by KeySpan. Prior to their purchase of the aforementioned property, the prior owners, Paul and Dawn White, received the April 11, 2002 DEC letter and the accompanying private

well and basement survey. Paul White participated in the survey and returned it on July 8, 2002. Mr. White reported that occasionally, after a heavy rain, they got water in the basement. He further indicated that when wet, there was an odor of gasoline in the basement. He reported that there was a groundwater well on the property not currently in use. Finally, he specifically indicated that KeySpan had already tested the water "several years ago." He also stated that he had a private company do additional testing as well.

The KeySpan records confirm that on March 13, 2000, at KeySpan's request, representatives from Dvirka & Bartilucci conducted air sampling at 39 Lanier Lane. On May 8, 2000, testing results were provided to the Whites, (*see* Exhibit 22-A). The results of the assessment and testing indicated that the home was not impacted by MGP waste. Further, by letter dated October 18, 2006, the Whites received information from the DEC regarding the property's proximity to the Brightwaters yard and the groundwater plume from the former MGP site (*see* Exhibit 22-B). Clearly, the Whites were aware of the ongoing investigation and remediation efforts being conducted by KeySpan and had obtained knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury.

KeySpan asserts that the Whites were on the Fact Sheet mailing list since January, 2003. It appears that the Fact Sheets continued to be mailed to current owner of 39 Lanier Lane, after the plaintiffs purchased the property in 2007. Notwithstanding their claims to the contrary, it appears to the satisfaction of this Court that at least some of the Fact Sheets mailed out to 39 Lanier Lane after June 2007, were received by the plaintiffs.

On February 8 and 9, 2007, soil vapor intrusion testing was conducted at 39 Lanier Lane. The Muths' purchased the house on or about July 2, 2007. The test results of the aforesaid soil vapor intrusion assessment were forwarded to 39 Lanier Lane on July 30, 2007, after the Muths had already closed on the property (*see* Exhibit 22-C). The plaintiffs contend that the prior owners never shared with them any information they may have gotten from KeySpan. Their claim in this regard is patently incredible. There is no legitimate reason for the prior owners to have obtained significant and compelling information about their property, its proximity to the plume and testing results which indicated the property was not impacted by the MGP site, in such close proximity to placing the property on the market for sale but then failed to disclose same to prospective buyer. In any event, it would appear that the Muths received the February, 2007, assessment and testing results.

It is beyond belief that at the time of their purchase of this property, the Muths were unaware of the potential contamination caused by the former MGP site or the extensive remediation effort being conducted in the Bay Shore area as a result thereof. Moreover, there were numerous other sources of information regarding the former MGP site and remediation efforts available to them, including disclosure of same by their the real estate agent/broker, public meetings, neighbors, as well as extensive news media coverage. Based upon the foregoing, the plaintiffs are charged with sufficient knowledge that should have placed a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. The plaintiffs, Harry and Marybeth Muth, knew or should have known of their alleged injuries not later than July 2007.

Accordingly, the FIRST through SEVENTH causes of action are dismissed as time-barred against the plaintiffs, Harry and Marybeth Muth. However, it does not appear these plaintiffs are time barred with respect to the EIGHTH cause of action sounding in monitoring and injunctive relief, which is governed by a six-year statute of limitations period set forth in CPLR § 213(1).

Yolanda Arzt at 45 Lanier Lane, Bay Shore, New York:

The plaintiff, Yolanda Arzt, owns the real property located at 45 Lanier Lane, Bay Shore, New York. At the outset, it is noted that Ms. Arzt did not file an affidavit in opposition to the defendant's motion to dismiss. In any event, her property was included in the 1999 door to door canvassing conducted by KeySpan.

On January 13, 2000, Mr. Henry Arzt attended the Bay Shore Manufactured Gas Plant/Brightwaters Oil Spill Investigation and Remediation public meeting held at the Brook Avenue Middle School in Bay Shore. This meeting was run by the DEC. During the course of this comprehensive meeting, DEC representatives discussed and explained the oil spill investigation, the consent order process and the MGP remediation. KeySpan representatives discussed their environmental remediation program and the project status. Additionally, KeySpan consultants explained their field investigations to date and their planned assessment of the assessment results. There was also a question and answer period.

The plaintiff received the April 11, 2002, DEC letter and the accompanying private well and basement survey. Paul White participated in the survey and provided a response on August 22, 2002. The plaintiff reported that her basement occasionally got water in it after rain. She also indicated that occasionally when the basement was wet it had an odor of wet earth. Thereafter, she was included in the Fact Sheet mailing lists. Keyspan began sending her Fact Sheets as of January 2003.

In July 2004, Mr. Theodore Leissing of KeySpan was meeting with her neighbor, Justin Klainowski. During this meeting, Mrs. Arzt approached Mr. Leissing to discuss her property. Mr. Leissing spoke with her, at which time, she requested that testing be done on her property. Shortly thereafter, KeySpan representatives contacted the plaintiff to set up a testing date. However, at that time, she declined testing of her property. She indicated that she was not interested, but requested testing results of sampling conducted near her property on Lanier Lane.

Based upon the foregoing, the plaintiffs should have obtained sufficient knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. Accordingly, the plaintiff, Yolanda Arzt, knew or should have known of her alleged injuries not later than July 2004. The defendants met their prima facie burden of establishing that the action against is time barred against this plaintiff who failed to oppose the motion.

Michael and Susan Smith at 50 Lanier Lane, Bay Shore, New York:

The plaintiffs, Michael and Susan Smith, purchased the property located at 50 Lanier Lane, Bay Shore, New York in or around October, 2006. The property was included in the 1999 door to door canvassing conducted by KeySpan. Prior to their purchase of the aforementioned property, the prior resident, Sherlynn Brightman, received the April 11, 2002 DEC letter and the accompanying private well and basement survey. Ms. Brightman participated in the survey and returned a response on September 6, 2002.

Keyspan records suggest that Fact Sheets were sent to 50 Lanier Lane beginning in January 2003. It is more than likely that these periodic Fact Sheets continued to be mailed to the residence after the plaintiff's purchase. In March, 2003, KeySpan consultants conducted indoor and ambient sampling in the basement and living room at the 50 Lanier Lane residence. In addition, the prior owner was on the July, 2003, Nicholson letter mailing list.

As noted above, the plaintiffs purchased 50 Lanier Lane in or around October, 2006. Upon moving in to the home, the plaintiff's quickly began to monitor the remediation. On January 22, 2007, the plaintiff, Susan Smith, at the advise of neighbors, contacted the KeySpan hotline number. She requested all the information and testing results KeySpan maintained on 50 Lanier Lane. She also requested further testing. On January 24, 2007, she called the hotline again, informing KeySpan that she now had water in her basement and noticed odors in the basement as well. On February 2, 2007, Mr. William Ryan from KeySpan, met with the plaintiff, Michael Smith, at the residence. They discussed the pending air sampling. In addition, the plaintiff told Mr. Ryan that the SCDHS had already collected samples at 50 Lanier Lane.

On February 1, 2007, the SCDHS collected indoor air and soil vapor samples from the plaintiff's house and property. SCDHS provided the plaintiffs a detailed report on May 2, 2007. The report revealed the presence of certain chemicals in the sub-slab soil vapor sample and the indoor air sampling. However, upon review of the contaminants found, SCDHS determined that they were at such low levels that there did not appear to be a soil vapor intrusion concern at their home.

Representatives from KeySpan and their environmental consultant, GEI Consultants, Inc., conducted a soil vapor intrusion assessment at the residence on February 5 and 6, 2007. By letter, dated July 30, 2007, the plaintiffs were provided with the results of that assessment. GEI's assessment determined that there was no apparent vapor intrusion of MGP related chemicals on the indoor air quality at 50 Lanier Lane. However, the report did indicate that several MGP related chemicals were detected in the indoor air samples.

There were numerous other sources of information regarding the former MGP site and remediation efforts available to them, including disclosure of same by their the real estate agent/broker, public meetings, neighbors, as well as extensive news media coverage and remediation activities throughout the Bay Shore Area. Based upon the foregoing, the plaintiffs should have obtained sufficient knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. The plaintiffs, Michael and Susan Smith, knew or should have known of their alleged injuries not later than July 2007.

Accordingly, the FIRST through SEVENTH causes of action are dismissed as time-barred against the plaintiffs, Michael and Susan Smith. However, it does not appear these plaintiffs are time barred with respect to the EIGHTH cause of action sounding in monitoring and injunctive relief, which is governed by a six-year statute of limitations period set forth in CPLR § 213(1).

Justin and Jennifer Kalinowski at 51 Lanier Lane, Bay Shore, New York:

The property was included in the 1999 door to door canvassing conducted by KeySpan. Prior to their purchase of the aforementioned property, the prior owner received the April 11, 2002 DEC letter and the accompanying private well and basement survey. Ms. Jennifer Huff participated in the survey and returned a response on July 16, 2002. Ms. Huff indicated in her survey response that the residence had no basement or groundwater well.

The plaintiffs, Justin and Jennifer Kalinowski, purchased the property located at 51 Lanier Lane, Bay Shore, New York between 2002 and 2004. The plaintiffs admit that in May 2004, Justin Kalinowski, contacted KeySpan to request soil testing. On May 27, 2004, Mr. Theodore Leissing of KeySpan met with the plaintiff, Mr. Kalinowski and discussed the community response program and also informed him that GEI would perform soil sampling at his residence. On July 20, 2004 three soil samples were collected from the plaintiff's Lanier property. The results of that those samples were sent to the plaintiffs by letter dated December 22, 2004. The sampling revealed that polycyclic aromatic hydrocarbons (PAH) associated with MGP sites were detected. However, the PAH's detected were at low concentration levels at or below levels normally found in urbanized neighborhoods.

On March 23, 2006, the plaintiff, Justin Kalinowski, attended the project status update and information public meeting. During this comprehensive meeting, the attendees were given an MGP site overview, were explained the DEC's role and remediation investigation results (*see* Exhibit 1-A). At the meeting, the residents were provided important contact information, including, a telephone phone number for health related concerns, the telephone number for Mr. Amen Omorogbe, P.E. of the DEC Division of Environmental Remediation, the telephone number for the Bay Shore Site Hotline, as well as the location of both document repositories.

In mid November 2008, the plaintiff approached two KeySpan representatives and questioned them as to whether the oxygen injection station located on Union Blvd. was operational. During their discussion, how the oxygen system works was explained to the plaintiff along with its rate of treatment and removal of source materials. He was told the system was currently running, even though it was not audible. A silencer had recently been installed. The plaintiff also accused GEI of not having air monitors installed during the recent storm drain replacement work on Lanier Lane. However, he was told smaller air monitors were put in place during that work. The KeySpan representative asked the plaintiff if he wished to have soil vapor intrusion testing at his home. He told them he would get back to them regarding testing.

On December 13, 17 and 18, 2008, National Grid and their environmental consultant conducted a soil vapor intrusion assessment on the plaintiff's property. The results of said testing were provided

to the plaintiff by letter dated January 28, 2009. The samples revealed that there did not appear to be any impact on the indoor air quality at the property by MGP related chemicals.

Since purchasing the property, there were numerous other sources of information regarding the former MGP site and remediation efforts available to the plaintiffs, including disclosure of same by their the real estate agent/broker, periodic Fact Sheets and other DEC and KeySpan mailings, public meetings, neighbors, as well as extensive news media coverage and extensive remediation activities throughout the Bay Shore Area. Based upon the foregoing, the plaintiffs should have obtained sufficient knowledge that would place reasonable persons on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. The plaintiffs, Justin and Jennifer Kalinowski, knew or should have known of their alleged injuries not later than December 2004. The defendants met their prima facie burden of establishing that the action is time-barred as to these plaintiffs who failed to oppose the motion.

Genevieve Spelman at 54 Lanier Lane, Bay Shore, New York:

The plaintiff, Genevieve Spelman, owns the property located at 54 Lanier Lane, Bay Shore, New York. The property was included in the 1999 door to door canvassing conducted by KeySpan. Further, the plaintiff received the April 11, 2002 DEC letter and the accompanying private well and basement survey. She acknowledges receiving the well and basement survey and admits to refusing to complete the survey. She contends she didn't respond to it because she felt she had nothing unusual to report, after she conducted a visual inspection of her property. Further, she admits she saw no reason in submitting the survey unless KeySpan agreed in advance to take samples and test the groundwater on her property. Apparently, the defendants or their agents initially performed testing and sampling at the plaintiff's property as early as 1999.

Ms. Genevieve Spelman admits to attending a community meeting in May 2004. During the course of the meeting, the plaintiff left her name with a KeySpan contractor requesting an exposure consultation. Later in May, she called the hotline expressing concerns about possible exposure to children playing in her yard. On May 27, 2004, KeySpan representatives met with the home owners who requested soil sampling be conducted at the property. On March 13, 2006, Mr. William Ryan of KeySpan informed the plaintiff that any test results could be found at either the Bay Shore-Brightwaters Library or DEC headquarters in Stony Brook.

At her request, additional vapor intrusion sampling and testing was conducted at the plaintiff's property on April 13, 2006 and July 13, 2006. On June 29, 2006, Mr. William Ryan of KeySpan met with Ms. Spelman and delivered the April 2006 testing results to her. On October 27, 2006, Mr. Ryan and Mr. Christman again went to the plaintiff's home to meet with her and deliver the July 2006 testing results. At that time, the plaintiff informed both KeySpan representatives that she had additional questions about the results and was going to follow up with the NYSDOH. In 2008, further soil vapor intrusion testing was requested by the DEC at 54 Lanier Lane. The defendant originally scheduled testing for on February 4 and 5, 2008; however, the plaintiff requested that it be rescheduled due to illness and jury duty. In March, 2008, plaintiff again asked to reschedule the testing due to

illness. Finally, the soil vapor intrusion assessment was conducted on November 4 and 5, 2008. Indoor and outdoor samples were taken along with proxy sub-slab soil vapor sample. In addition, the plaintiff was interviewed by a National Grid employee. The results of said testing were provided to the plaintiff by letter on December 23, 2008. In December 2008, Mr. Ryan again met with the plaintiff, this time to address her concerns regarding the lack of progress on the project and the value of her home. He further discussed the sampling results with her.

She was critical of the previous sampling report. As a result, another round of soil vapor intrusion testing was conducted on February 19 and 20, 2009. The assessment consisted of a pre-sampling property visit, an interview with the plaintiff, indoor and outdoor samples as well as a proxy sub-slab soil vapor sample and a soil vapor sample from the property. By letter, dated April 13, 2009, the plaintiff received the testing results along with a detailed inspection report. As with the other assessments, it did not appear that the indoor air quality at 54 Lanier Lane was being impacted by MGP related chemicals.

In February 2009, the plaintiff indicated to the defendant's representatives that she was open to having a monitoring well placed on her property. Further, in May 2009, she contacted the DEC and requested to receive bi-weekly updates, information about the railroad property and concerns regarding her monitoring well.

The Spelman's were placed on the informational Fact Sheet mailing lists as early as January 2003. The plaintiff does not dispute receiving these periodic Fact Sheets. Rather she contends, without any competent evidence to support her claim, that the information provided was inaccurate and misleading.

More important to this analysis of whether the plaintiff, Genevieve Spelman, is time-barred from prosecuting this law suit against the defendants, and more disturbing to this Court, is the fact that she already commenced a prior suit against the defendant, wherein she sought substantially similar relief, *Genevieve Spelman v. KeySpan Corp., KeySpan Energy Corp., KeySpan Gas East Corp.*, Index number 07201-2009. That action commenced in 2009, where in the SECOND through EIGHTH causes of action were dismissed as time-barred by Order dated April 5, 2010. She cannot dispute that she knew of her claims when she filed her first action in February 2009. While it is noted that the defendants informally raise the issue of *res judicata* and collateral estoppel, the Court will not have to reach these issues as it is clear that the plaintiff is time-barred from proceeding with this action.

Based upon the foregoing, the plaintiffs should have obtained sufficient knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. The plaintiffs, Genevieve Spelman, knew or should have known of their alleged injuries not later than 1999. The defendants met their prima facie burden of establishing that the action is time-barred. In opposition, this plaintiff failed to raise a triable issue of fact.

Timothy and Kim Crichton at 60 Lanier Lane, Bay Shore, New York:

The plaintiffs, Timothy and Kim Crichton, own and reside at 60 Lanier Lane, Bay Shore, New York. Their property was included in the 1999 door to door canvassing conducted by KeySpan. At that time, at the very least, the KeySpan letter, dated July 27, 1999 was left at their door. Said letter informed the residents of the investigation, sampling and remediation planned surrounding the potential environmental impact on the community from the former Bay Shore MGP site. It also provided a hotline number for questions and concerns regarding the same.

Contrary to the plaintiff's assertions, they unequivocally received the April 11, 2002 DEC letter. Accompanying this letter was the private well and basement survey, that the plaintiffs responded to and returned on April 22, 2002. The plaintiff's reported that they had a crawl space at their residence which got water in it after it rained. Occasionally, when wet, it smelled of wet earth. In addition, they indicated that there was a groundwater well on the property, but that it was not in use.

The defendant's records indicated that the plaintiffs were listed on the master list prepared by KeySpan's outside contractor Dvirka & Bartilucci. Further, it appears that representatives from Dvirka & Bartilucci attempted to contact the plaintiffs in August of 2002 to schedule conduct field observations following the well and basement survey, but to no avail.

The plaintiffs were placed on the informational Fact Sheet mailing lists on January 2003. The Crichtons contend that they do not think they were on the KeySpan mailing list because they did not receive regular mail from Keyspan. The plaintiff's argument in this regard is flawed as these mailings were not sent out weekly or even monthly. Rather, these Fact Sheets were only periodically mailed once or twice per year. Furthermore, the likelihood that they did not receive any of these periodic mailings is minute. Each mailing generated a separate and distinct mailing list. While it might be possible that one or more documents mailed did not reach the plaintiffs, it is highly unlikely that none of the documents alleged to have been mailed to the residence were received over the last ten or more years.

The Crichtons were also included in the Nicholson letter, which was mailed in July, 2003. In said letter, Mr. Nicholson claimed that properties in Bay Shore were contaminated. Mr. Nicholson also urged residents to take legal action against KeySpan before the statute of limitations period expired. The plaintiff's first claim that they did not receive the mailing from Nicholson. Thereafter they make the self-serving claim that if they received the letter, they would have probably just have discarded it.

In any event, there were numerous other sources of information regarding the potential contamination in or around the Bay Shore area from the former MGP site and remediation efforts available to them, including public meetings, neighbors and extensive news media coverage. In addition, there have been continuous and large-scale remediation activities throughout the Bay Shore community since 2000. Based upon the foregoing, the plaintiffs should have obtained sufficient knowledge from 1999 to 2003 that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. The plaintiffs, Timothy and Kim Crichton, knew or should have known of their alleged injuries not later than July 2003. The

defendants met their prima facie burden of establishing that the action is time-barred as to these plaintiffs. In opposition, they failed to raise a triable issue of fact.

Thomas Honor at 59 Lanier Lane, Bay Shore, New York:

The property was included in the 1999 door to door canvassing conducted by KeySpan. The prior owner received the April 11, 2002 DEC letter and the accompanying private well and basement survey. Ms. Nancy Cummings returned a response to the survey on July 11, 2002. Ms. Cummings indicated in her survey response that the residence had no basement or groundwater well. Further, the informational Fact Sheets were mailed to the prior owner on January, 2003, April, 2004 and September, 2004.

The plaintiff, Thomas Honor, purchased the real property located at 59 Lanier Lane, Bay Shore, New York on December 31, 2009. Prior to purchasing the residence, the plaintiff admits that he contacted National Grid and was informed that they were conducting a soil vapor intrusion assessment at the residence in July, 2009. In September, 2009, a copy of the soil vapor intrusion report was mailed to the realtor selling the home. Moreover, the prior owner had multiple rounds of indoor and outdoor air, water and soil testing. At the plaintiff's request, the defendant provided him with a copy of all the historical testing on said residence.

In or around December 16, 2009, the plaintiff contacted National Grid and spoke with a representative about the air monitoring equipment in his new home. He also indicated that he was aware of the work being done in the area by National Grid from his neighbors. Thereafter, he requested water sampling of his sump. On January 8 and 15, 2010, National Grid conducted sump water testing at 59 Lanier Lane. The results of testing result for January, 2010, were sent to the plaintiff along with a copy of the prior testing done in July, 2009. The report indicated that the sump water samples taken in January 2010, were not impacted by MGP related chemicals. The prior assessment conducted in July 2009, indicated that a potentially MGP-related chemical was detected in the indoor air samples at concentrations above the NYSDOH 95th percentile for background indoor air concentrations. However, based upon the lower concentrations found in the sub-slab sample and lack of detection or lower concentrations found in the soil samples as compared with the indoor air samples, its likely from an indoor source rather than vapor intrusion. The report went on to state further that the DEC and NYSDOH agreed with these findings. Further, during the January 2010 testing, Mr. William Ryan and Mr. James Christman met with the plaintiff and answered many of his historical questions regarding the property and house. He specifically had questions about the venting system installed on the exterior of the house in 2004 to vent the crawl space.

The plaintiff continued to keep informed of the remediation process. He attended a public meeting held on April 26, 2011. In June, 2011, he requested another round of sump water testing and possible indoor air sampling. Said testing was conducted on June 21, 2011. Mr. Ryan was present and met with the property owner at that time. The results were provided to the plaintiff on August 19, 2011. These results revealed that the sump water and crawl space water are not impacted by MGP site related chemicals. He also had additional sump water testing on June, 2013.

There were numerous other sources of information regarding the potential contamination in or around the Bay Shore area from the former MGP site and remediation efforts available to him, including disclosure of same by the prior owner and/or his the real estate agent/broker, periodic Fact Sheets and other DEC and KeySpan mailings, public meetings, the Document Repositories, located at the Bay Shore/Brightwaters Library and DEC Region 1 office in Stony Brook, neighbors and extensive news media coverage. In addition, there has been continuous and large-scale remediation activities throughout the Bay Shore community, particularly including a monitoring well installed in front of the plaintiff's house. Based upon the foregoing, the plaintiff should have obtained sufficient knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. The plaintiff, Thomas Honor, knew or should have known of their alleged injuries not later than December 2009.

Accordingly, the FIRST through SEVENTH causes of action are dismissed as time barred against plaintiff, Thomas Honor. However, it does not appear this plaintiff is time barred with respect to the EIGHTH cause of action sounding in monitoring and injunctive relief, which is governed by a six-year statute of limitations period set forth in CPLR § 213(1).

JOHNSON LANE:

Kimberly Shannon at 59 Johnson Lane, Bay Shore, New York:

The plaintiff, Kimberly Shannon, owns the real property located at 59 Johnson Lane, Bay Shore, New York. She has been living at the house in the Bay Shore community since 1987. Ms. Shannon acknowledges receiving the periodic informational Fact Sheets. The KeySpan records indicate that she has been receiving these Fact Sheets since January 2003. These Fact Sheets were prepared in conjunction with the DEC.

The January 2003 Fact Sheet, among other things, described the history of the former MGP site, investigation of contaminants, a summary of the findings of the investigation, interim remedial measures already undertaken, future investigation planned and further remedial work to be completed. This Fact Sheet also provided interested members of the community with important phone numbers for the DEC, Bay Shore Site Hotline and the NYSDOH. It also announced the January 29, 2003 public meeting held at the Bay Shore High School, and provided information for the two Document Repositories.

The April 2004, Fact Sheet described the environmental investigation history, investigation and remediation of the area. Further, it provided an explanation of the designated four operable units, and future investigation planned and further remedial work to be completed. This Fact Sheet also announced the May 12, 2004 public meeting held at the Bay Shore Middle School. The September, 2004, Fact Sheet, described the final remedial action plan, recent developments and future investigation planned and further remedial work to be completed. Each Fact Sheet provided the residents with important phone numbers including a number for the NYSDOH for health related

concerns and the DEC for project related issues.

While not directly contacted by the defendants, it is evident that the plaintiff was aware of the potential contamination caused by the former MGP site, the investigation and remedial efforts being conducted throughout Bay Shore for more than ten years. She further admits to being aware of prior law suits involving other members of the Bay Shore Community against KeySpan, and choosing not to join same. In addition to receiving the periodic informational Fact Sheets since 2003, the plaintiff admits to attending several public meetings related to these issues. She further acknowledges that while she was aware of the MGP waste and the plume, she was not overly concerned. In addition to receiving the Fact Sheets and her attendance of public meetings, there were various other sources of information available to a long time Bay Shore resident like the plaintiff regarding the potential contamination in or around the Bay Shore area from the former MGP site and remediation efforts, including, the Document Repositories, located at the Bay Shore/Brightwaters Library and DEC Region 1 office in Stony Brook, neighbors and extensive news media coverage. In addition, there has been continuous and highly visible large-scale remediation activities throughout the Bay Shore community. Based upon the foregoing, the plaintiff should have obtained sufficient knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. The plaintiff, Kimberly Shannon, knew or should have known of her alleged injuries not later than January 2003. The defendants met their prima facie burden of establishing that the action is time-barred as to this plaintiff. In opposition, she failed to raise a triable issue of fact.

OAK STREET:

John and Kim Ann Price at 23 Oak Street, Bay Shore, New York:

The plaintiffs, John and Kim Ann Price, own the real property located at 23 Oak Street, Bay Shore, New York. They claim that they never lived at the 23 Oak Street property. Rather, it was used as a rental property. They further claim to have continually resided at 163 Driftwood Drive, West Islip, New York. West Islip is the community immediately west and adjacent to Bay Shore/Brightwaters.

The property was included in the 1999 door to door canvassing of the community conducted by KeySpan and their representatives. As part of the community canvassing, the plaintiffs and/or their tenant would have received a copy of the KeySpan letter, dated July 27, 1999, which would have been left on the door of the residence, if no one was home. Said letter informed the residents of the investigation, sampling and remediation planned surrounding the potential environmental impact on the community from the former Bay Shore MGP site. It also provided a hotline number for questions and concerns regarding the same.

The plaintiffs do not deny having knowledge of the contamination and remedial work being conducted in the Bay Shore area. Rather, they contend that they were lulled into a false sense of security by the defendant's alleged misconduct, misrepresentations and concealment. Moreover, they contend that they have never been contacted KeySpan personnel or contractors. However, it is clear

that their tenants had multiple interactions with the defendants. The defendants and their contractors installed a noise and vibration monitoring system at the property. Further, they conducted a two pre-construction property assessments of said property on in April 2010 and the other April 2011. The plaintiffs contend further, that their tenants never shared any of the literature they may have received from KeySpan. However, he does admit to attending at least one public meeting

In the Fall of 2005, there was highly visible and extensive long term remediation and excavation work being performed at 3 Center Avenue and 22 Oak Street, directly across the street from 23 Oak Street. The work included the excavation of a former cesspool area and drainage pipe along the south side of Oak Street, along with work conducted at 22 Oak Street. Mr. Price admits to having conversations with KeySpan employees regarding water in the basement of 23 Oak Street. Further, in 2011, while significant remedial work and demolition was being conducted at the 22 Oak Street house across the street, the plaintiff, John Price, admits to speaking with several engineers who were working on that project. He acknowledges asking whether their work would have any impact on his property.

In addition to continuous and highly visible large-scale remediation activities throughout the Bay Shore community. There were various other sources of information available to the plaintiffs regarding the potential contamination in or around the Bay Shore area from the former MGP site and remediation efforts, including, the Document Repositories, located at the Bay Shore/Brightwaters Library and DEC Region 1 office in Stony Brook, neighbors and extensive news media coverage. It is inconceivable that a landlord of real property in the Bay Shore area would not be acutely aware of the ongoing investigation and remediation activities surrounding the former Bay Shore MGP site since 1999/2000. Moreover, both plaintiffs acknowledge they discovered the potential contamination caused by the former MGP site and the investigation and remediation efforts by the defendants more than three years ago. The standard for commencing the statute of limitations in an action to recover damage to property caused by a latent effects of exposure to any substance is from the date of discovery of the injury by the plaintiff or from the date when, through the exercise of reasonable diligence, such injury should have been discovered by the plaintiffs, which ever is earlier. The Court finds that the plaintiffs, John and Kim Ann Price, knew or should have known of their alleged injuries no later than 2005. The defendants met their prima facie burden of establishing that the action is time-barred as to these plaintiffs. In opposition, these plaintiffs failed to raise a triable issue of fact.

ACKERSON STREET:

Kurt and Toshiko Koncelik at 20 Ackerson Street, Bay Shore, New York:

The plaintiffs, Kurt and Toshiko Koncelik, are the owners of the real property located at 20 Ackerson Street, Bay Shore, New York. They own and operate a bait and tackle store from this location, known as Willie K. Bait and Tackle Shop. Contrary to the plaintiff, Kurt Koncelik's, contention, the defendants don't claim to have spoken with him during the 1999 door to door canvassing of the community. Rather, the defendants submit that the property was included in the community canvassing and at the very least, a copy of the KeySpan letter, dated July 27, 1999, was

left on the door of the store, if it were not open at the time the canvassing was conducted. Said letter informed the residents of the investigation, sampling and remediation planned surrounding the potential environmental impact on the community from the former Bay Shore MGP site. It also provided a hotline number for questions and concerns regarding the same.

Furthermore, contrary to the plaintiffs assertions, they clearly received the April 11, 2002 DEC letter. The plaintiff, Kurt Koncelik, completed the private well and basement survey that was sent as an attachment to said letter. The plaintiff responded to same on June 27, 2002. He reported that there was no basement or groundwater well on the property. He added in the comment section of the survey that "smells petroleum - area- DEC- Not far from water. Saltwater intrusion-property-." Moreover, while he denies receiving any of the informational Fact Sheets, KeySpan's records indicate that a Rita Koncelik and 20 Ackerson Street were listed on these mailing lists as early as January, 2003. The likelihood that they did not receive any of these periodic mailings is highly improbable. Each mailing generated a separate and distinct mailing list. While it might be possible that one or more documents mailed did not reach the plaintiffs, it is highly unlikely that none of the documents alleged to have been mailed to the store were received over the last ten or more years.

In any event, even if the plaintiffs did not receive any of the Fact Sheets, there were numerous other sources of information available to a long time Bay Shore business owner regarding the potential contamination in or around the Bay Shore area from the former MGP site and remediation efforts, including, the Document Repositories, located at the Bay Shore/Brightwaters Library and DEC Region 1 office in Stony Brook, neighbors and customers, and extensive news media coverage. In addition, there has been continuous and highly visible large-scale remediation activities throughout the Bay Shore community. The plaintiff was aware of the Hotline phone number as early as 2005. Thereafter, in 2007, he had a number of meetings with KeySpan employees with regard to compensation as a result of traffic issues associated with the sheet pile driving work being conducted from April 23, 2007 to May 18, 2007. These meetings culminated in the defendants agreeing to pay the plaintiff \$9,375.00 in June, 2007, for the disruption to his business due to the aforesaid remedial work. The plaintiff and defendant's signed a release and settlement agreement on August 2, 2007.

The standard for commencing the statute of limitations in an action to recover damage to property caused by a latent effects of exposure to any substance is from the date of discovery of the injury by the plaintiff or from the date when, through the exercise of reasonable diligence, such injury should have been discovered by the plaintiffs, whichever is earlier. The Court finds that the plaintiffs, Kurt and Toshiko Koncelik, knew or should have known of their alleged injuries not later than 2002. The defendants met their prima facie burden of establishing that the action is time-barred as to these plaintiffs. In opposition, they failed to raise a triable issue of fact.

COOPER LANE:

Gary Patterson at 25 Cooper Lane, Bay Shore, New York:

The plaintiff, Gary Patterson, is the owner of the real property located at 25 Cooper Lane, Bay Shore, New York. The property was included in the 1999 door to door canvassing conducted by

KeySpan throughout the Bay Shore community.

In July 27, 1999, Clair Patterson executed an access agreement letter, which granted KeySpan access to 25 Cooper Lane, to collect soil or groundwater samples, install groundwater monitoring wells, surveying of sample points and staging of all equipment associated with these activities (*see* Exhibit 35-A). The defendants were actively working at the property in August 1999. It appears the defendants conducted well sampling and microseep work.

The April 11, 2002 DEC letter and the accompanying private well and basement survey was mailed to 25 Cooper Lane. Ms. Clair Patterson participated in the survey. She returned a response to the survey on April 19, 2002. Ms. Patterson indicated in her survey response that the residence had no basement nor groundwater well. Further, the informational Fact Sheets was mailed to the Patterson residence on January 2003, April 2004 and September 2004. There is no dispute that these Fact Sheets were received by the Patterson family. Further, it appears from the mailing list records that additional Fact Sheets were sent to 25 Cooper Lane after September 2004. In addition to receiving the Fact Sheet mailings, the Pattersons were included in the Nicholson letter mailed in July, 2003, wherein Mr. Nicholson claimed that properties in Bay Shore were contaminated and urged residents to take legal action against KeySpan before the Statute of limitations period expired.

In March 2008, the DEC requested soil vapor intrusion testing be performed at 25 Cooper Lane. After several failed attempts to contact the property owner or residents, the DEC letter was delivered to the residence on March 20, 2008. Later that year, the defendant gained access to the property and conducted surface water sampling from O-Co-Nee Pond. In or around April and May, 2009, a handout was distributed to all residents of Cooper Lane advising them of the installation of an oxygen injection system in the right- of-way and implications to driveways an the road way during this remedial work.

Based upon the foregoing, the plaintiff should have obtained sufficient knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. The plaintiff, Gary Patterson, knew or should have known of their alleged injuries not later than January, 1999. Furthermore, the plaintiff sold the property on May 21, 2013. The defendants met their prima facie burden of establishing that the action is time-barred as to this plaintiff. In opposition, this plaintiff failed to raise a triable issue of fact.

JAN COURT:

Otoneil and Elizabeth Giron at 52 Jan Court, Bay Shore, New York:

The plaintiffs, Otoneil and Elizabeth Giron, are the owners of 52 Jan Court, Bay Shore, New York. Their property was included in the 1999 door to door canvassing conducted by KeySpan throughout the Bay Shore community. At that time, at the very least, the KeySpan letter, dated July 27, 1999 was left at their door. Said letter informed the residents of the investigation, sampling and remediation planned surrounding the potential environmental impact on the community from the

former Bay Shore MGP site. It also provided a hotline number for questions and concerns regarding the same.

The Girons' received the April 11, 2002 DEC letter and the accompanying private well and basement survey. They returned a survey response on June 13, 2002. The plaintiffs' indicated in the survey response that the residence had no basement nor groundwater well. Further, the plaintiffs were on the informational Fact Sheet mailing lists as early as January 2003. Both Mr. Otoneil Giron and their address, 52 Jan Court appear on multiple redacted Fact Sheet mailing lists annexed to the instant motion, (*see* Exhibit 1-F). The plaintiffs' claim they never received any of these informational mailings as they moved to Florida on December 20, 2002 and have lived there permanently since that time. The Girons were included in the mass mailed July 2003, Nicholson letter wherein Mr. Nicholson claimed that properties in Bay Shore were contaminated and urged residents to take legal action against KeySpan before the Statute of limitations period expired.

Further, notwithstanding their claims of not receiving other mailings, both plaintiffs acknowledge receiving the October, 2012, letter from Mr. William Sullivan, a co-plaintiff in this litigation, which they both assert caused them to contact their attorney and join the suit.

In September, 2008, the plaintiff, Elizabeth Giron, contacted KeySpan claiming that her kitchen cabinets were falling off the wall and there were cracks in the wall as well. She further claimed to have just returned after being away for a few years and had renters in the home. As a result of her call, William Ryan a KeySpan Project Manager authorized one of KeySpan's contractors to conduct a site visit of the residence located at 52 Jan Court. On September 9, 2008, a member of H2M performed a visual inspection of the loose kitchen cabinets and cracked soffit at the plaintiff's home. The H2M employee determined that the cabinet movement likely occurred as a result of poor construction. In addition, he determined that the soffit damage was not caused by vibrations originating at the ground level, but rather caused by expansion of the building materials or deflection of elements framing the soffit from upstairs loading. Some of the damage was acknowledged to be pre-existing by the homeowner. In any event, the defendant paid \$550.00 to fix the damage in the kitchen area of the house.

The plaintiff's failed to inform this Court that they were plaintiff's in a similar law suit commenced some time in 2008. More important to this analysis of whether the plaintiffs, Otoneil and Elizabeth Giron, are time barred from prosecuting this law suit against the defendants, is the fact that they already commenced a prior suit against the defendant, *Otoneil and Elizabeth Giron v. KeySpan Corp., KeySpan Energy Corp., KeySpan Gas East Corp.*, Index number 40821-2008, wherein they sought substantially similar relief. They can not dispute that they had discovered the primary condition on which their claims are based when they filed their first action in 2008. It is disingenuous, at best, to have failed to mention the prior action in either of the plaintiff's affidavits in opposition, especially where as here, the same law firm represented them in the prior related action. Based upon the foregoing, the Court finds the plaintiffs, Otoneil and Elizabeth Giron, claims regarding when they discovered the alleged contamination or injury to be incredible.

The standard for commencing the statute of limitations in an action to recover damage to

property caused by a latent effects of exposure to any substance is from the date of discovery of the injury by the plaintiff or from the date when , through the exercise of reasonable diligence, such injury should have been discovered by the plaintiffs, which ever is earlier. The Court finds that plaintiffs, Otoneil and Elizabeth Giron, knew or should have known of their alleged injuries not later than 2003. The defendants met their prima facie burden of establishing that the action istime-barred. In opposition, these plaintiffs failed to raise a triable issue of fact.

Lawrence and Margie Hansen at 57 Jan Court, Bay Shore, New York:

The plaintiffs, Lawrence and Margie Hansen, own the property located at 57 Jan Court, Bay Shore, New York. Their property was included in the 1999 door to door canvassing conducted by KeySpan throughout the Bay Shore community. At that time, at the very least, the KeySpan letter, dated July 27, 1999 was left at their door. Said letter informed the residents of the investigation, sampling and remediation planned surrounding the potential environmental impact on the community from the former Bay Shore MGP site. It also provided a hotline number for questions and concerns regarding the same. Furthermore, in April 2002, the plaintiffs received the April 11, 2002 DEC letter and the accompanying private well and basement survey. They returned a survey response on July 11, 2002. The plaintiff, Margie Hanson, indicated in the survey response that their residence had no basement or groundwater well.

The plaintiff, Lawrence Hanson, and 57 Jan Court were on the informational Fact Sheet mailing lists as early as January, 2003. Both of the plaintiffs deny receiving any mail from KeySpan. However, the likelihood that they did not receive any of these periodic mailings is highly improbable. Each mailing generated a separate and distinct mailing list. While it might be possible that one or more documents mailed did not reach the plaintiffs, it is highly unlikely that none of the documents alleged to have been mailed to the residence were received over the last ten or more years.

Even if the plaintiffs did not receive any of the Fact Sheets, there were numerous other sources of information available to a long time Bay Shore residents, like the plaintiffs, regarding the potential contamination in or around the Bay Shore area from the former MGP site and remediation efforts, including, the Document Repositories, located at the Bay Shore/Brightwaters Library and DEC Region 1 office in Stony Brook, neighbors, and extensive news media coverage. In addition, there has been continuous and highly visible large-scale remediation activities throughout the Bay Shore community. The Court finds that the plaintiffs, Lawrence and Margie Hanson, knew or should have known of their alleged injuries no later than 2003, particularly in light of the fact that they returned the private well and basement survey. The defendants met their prima facie burden of establishing that this action is time-barred as to these plaintiffs. In opposition, they failed to raise a triable issue of fact.

UNION BOULVARD:

Pat Pesola Trust at 1603 and 1607 Union Blvd., Bay Shore, New York:

The plaintiff, the Pat Pescola Trust, owns the properties located at 1603 and 1607 Union Blvd.,

Bay Shore, New York. From 1999-2002 extensive remediation activities and construction were conducted across the street from the plaintiff's property. The work involved the removal of shallow creek sediment, re-alignment, and drainage of the Watchogue Creek/Crum Brook.

While KeySpan records indicate that the plaintiff was on the Informational Fact Sheet mailing lists since January, 2003, it appears that they were sent to 1607 Union Blvd., a rental property. The tenant may have provided the Fact Sheets to the plaintiff. However, the plaintiff denies receiving any of these periodic Fact Sheets. The Nicholson July 2003 letter was sent to Pat Pesola at the Brightwaters address.

Beginning in or around September, 2003, the plaintiff approached William Ryan, Project Manager for KeySpan, about purchasing 1611 Union Blvd. This property is directly to the east of 1607 Union Blvd. Extensive remediation was being conducted at 1611 Union Blvd in 2003. In fact, the house on the property was demolished in March 2003. In September 2003 the property was scheduled to undergo additional environmental remediation. Clearly, the remedial work and demolition was visible from the plaintiff's property. Moreover, the plaintiff was obviously acutely aware of the remediation work being conducted next to his property on Union Blvd. In addition, the plaintiff admits to discussing with Mr. Ryan, at that time, issues of the potential contamination of his property. While Mr. Ryan may have told the plaintiff that the demolition work at 1611 Union would have no impact on his property, the Court finds the plaintiff's claim that Mr. Ryan also told him that there was no contamination on his property to be unlikely as, at that point, no testing had been done on this property.

In any event, around April 2006, the plaintiff again made contact with KeySpan regarding his purchase of 1611 Union Blvd. Apparently, after seeing a survey crew at the property he called the Hotline to inquire about whether the property was going on the market. Mr. Ryan spoke with the plaintiff about him purchasing 1611 Union Blvd from KeySpan. He told Mr. Ryan that he was still interested in purchasing the lot. While the plaintiff contends that Mr. Ryan informed him that KeySpan was interested in purchasing his property, the records of their contact, do not support his claim.

After seeing one of KeySpan's field crews taking soil samples from the backyard of the plaintiff's property located at 1607 Union Blvd., in May 2004, the plaintiff's tenant, called the Hotline to inquire about the soil sampling. He was mainly concerned about eating the vegetables from his garden that he maintained in the back of the property. Further testing was conducted by GEI Consultants, Inc., in October 2008. At that time, GEI performed indoor and outdoor air testing and soil vapor testing at the property located at 1607 Union Blvd. Mr. Ryan states that in December 2008, he spoke with the plaintiff about where to send the testing results. He asserts that the plaintiff advised him to send the results of said assessment to Mr. Don Paeth, at 1607 Union Blvd., the tenant at the property and his employee. Interestingly, the plaintiff denies telling Ryan to sent the report to 1607 Union Blvd. However, he does not deny the rest of the conversation.

There is no dispute that the plaintiff did not reside at either 1603 and 1607 Union Blvd., Bay Shore, New York. However, he is apparently a long time Bay Shore area resident. When initially

contacting Keyspan in 2004, he indicated he resided at 288 Plymouth Ave., Brightwaters, New York. As a resident of the Bay Shore/Brightwaters community, there were numerous other sources of information available to him regarding the potential contamination in or around the Bay Shore area from the former MGP site and remediation efforts, including, literature from KeySpan and the DEC, public meetings, the Document Repositories, located at the Bay Shore/Brightwaters Library and DEC Region 1 office in Stony Brook, neighbors, and extensive news media coverage. In addition, there has been continuous and highly visible large-scale remediation activities throughout the Bay Shore community. The Court finds that the plaintiff, Pat Pesola Trust, knew or should have known of his alleged injuries no later than 2004. The defendants met their prima facie burden of establishing that the action was is time-barred. In opposition, this plaintiff failed to raise a triable issue of fact.

CENTER AVENUE:

Jack and Cynthia Meltzer at 12 Center Avenue, Bay Shore, New York:

Apparently, the plaintiff, Cynthia Meltzer and her husband Jack Meltzer, owned the property located at 12 Center Avenue, Bay Shore, New York, until Jack Meltzer's death. While both Mr and Mrs. Meltzer are listed as plaintiff's in this action, a review of the executed verification page, dated January 17, 2013, only Mrs. Meltzer signature is affixed thereto. Jack's signature line reads "deceased." It does not appear that Mrs. Meltzer has filed an affidavit in opposition to the instant motion to dismiss.

At the outset, the plaintiff and/or her deceased husband, Jack Meltzer were plaintiffs in a prior action, commenced against the defendants in or around 2006, *Robert V. Nicholson, Jeff Mattera, Donald Watson, and Jack Meltzer v. KeySpan Corp., KeySpan Energy Corp., KeySpan Gas East Corp.*, Index number 17458-2006. Said action was dismissed by Order, dated February 7, 2011 (Whelan, J.). It is noted that the plaintiff's current attorneys also filed this prior action. It is not seriously controverted that this prior action was substantially similar to the instant action, as such the defendants contend this action should be dismissed against Mrs. Meltzer based upon *res judicata* and/or collateral estoppel. However, without a complete set of the pleadings to compare with the current action it is difficult for this Court to grant such relief.

Notwithstanding the foregoing, the standard for commencing the statute of limitations in an action to recover damage to property caused by a latent effects of exposure to any substance is from the date of discovery of the injury by the plaintiff or from the date when, through the exercise of reasonable diligence, such injury should have been discovered by the plaintiffs, which ever is earlier. It is uncontroverted that the plaintiff, Cynthia Meltzer, was at some point was substituted into that prior action upon the death of her husband. Further, it is axiomatic that the plaintiff and her late husband had obtained sufficient knowledge that would place reasonable persons on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury prior to commenced the prior action. In Plaintiff's Objections and Answers to Defendant's First Set of Per-Class Certification Interrogatories to Plaintiff Jack Meltzer, dated March 13, 2008, served in the prior litigation, Mr. Meltzer admitted having obtained knowledge that his property was contaminated in

2006 (*see* Exhibit K annexed to Defendant's Affirmation). Accordingly, The Court finds that the plaintiff, Cynthia Meltzer, knew or should have known of her alleged injuries no later than 2006, upon the commencement of the prior related action. The defendants met their prima facie burden of establishing that the action is time-barred as to these plaintiffs. In opposition, they failed to raise a triable issue of fact.

SMITH AVENUE:

All the Smith Avenue plaintiffs reside in the South Wind Village development. In 1999, the Town of Islip took the property on Smith Avenue under eminent domain to improve the area. Thereafter, the Town demolished the substandard houses. In 2000, the Long Island Housing Partnership began building low to moderate income housing.

Upon completion, the South Wind Village development consisted of twenty-six (26) rental apartments owned by the Town of Islip, and fifty-two (52) three-bedroom attached townhouses. These townhouses built with the help of Federal, State and private grants were sold to first-time home buyers chosen by lottery. It is not disputed that all of the Smith Avenue plaintiffs, other than the Turners, purchased their homes after the lottery selection in 2002. The Turners purchased their home located at 71 Smith Avenue on January 17, 2006. It is noted that the plaintiffs who purchased their homes in 2002 paid \$84,000.00, while the Turner's paid \$250,000.00 for their home in 2006. Clearly, the real estate values continued to rise in the Bay Shore area, notwithstanding the well publicized contamination from the former Bay Shore MGP site.

The defendants assert that Smith Avenue never required any remediation due to the MGP contamination. However, they acknowledge that Watchogue Creek/Crums Brook, which runs to the east of the Smith Avenue properties, underwent remediation efforts in or around 2000. As a result, the defendant's consider the Smith Avenue properties to be in the OU-4 Watchogue Creek/Crums Brook area. The remedial work at the Creek involved the removal of shallow creek sediment, realignment, and drainage of the Watchogue Creek/Crums Brook. In 2000, the defendant's remediated a 1,400 foot long section of the Creek. Since the completion of the remedial process, no MGP related impact was detected from surface water samples were taken from the Creek.

The defendants' uncontroverted assertion is that the Smith Avenue plaintiffs fail to state a claim for which relief can be granted because their properties were never impacted by MGP contamination. Furthermore, the properties were all purchased after the remediation in the immediate area was completed.

Osie and Ebonie Turner at 71 Smith Ave, **Stephanie Irvin** at 73 Smith Ave., **Evelyn Santos** at 76 Smith Ave., **Yvonne Wallace** at 78 Smith Ave., **Kara Hubbard** at 80 Smith Ave., and **Darcel Curtis** at 92 Smith Ave., submitted affidavits in opposition to the instant motion. However, these seven affidavits are nothing more than surmise and conjecture, without any factual allegations of any alleged injury or damage as a result of the alleged contamination from the former MGP site. It appears that the following plaintiffs residing on Smith Avenue, Bay Shore, New York, failed to

submit an affidavit in opposition to the defendant's motion to dismiss, **Karen Jackson** at 74, **Shirlyn Taylor** at 33 Smith Ave., **Debra Fonville** at 40 Smith Ave., **Darraine Barrow** at 61 Smith Ave., **Debra Smith** at 82 Smith Ave., **Jose and Anna Martinez** at 49 Smith Ave., and **Pamela Hagans** at 62 Smith Ave.

It is noted that these seven affidavits submitted in opposition to said motion are virtually identical. Each plaintiff admits receiving copies of the DEC/KeySpan Fact Sheets upon moving into the Smith Avenue development. All make the same self-serving contention that prior to moving in to the development they were not provided with any information by KeySpan or anyone else about the groundwater contamination and ongoing remediation activities in the area. The Court notes that it was not KeySpan's obligation to inform any prospective home buyer in the Bay Shore area of the potential contamination and its remedial efforts to clean up the area. However, this Court is hard pressed to believe that these plaintiffs did not receive or obtain any information regarding the potential for contamination in and around the Bay Shore area from the former MGP site prior to their purchase.

In any event, they all admit to having knowledge of the contamination and ongoing remediation activities in the area upon moving into their homes from information they received from the defendants. Their only claim for not commencing a suit sooner is that the defendants lulled them into thinking the contamination was not serious or hazardous to their health and that everything was "being taken care of." This was coupled with the general claim that only recently they "became aware of the actual risks they were exposed to," based upon information they received from Mr. William Sullivan and their attorneys. The Smith Avenue plaintiffs completely failed to provide any competent proof that they reasonably relied on the deceptive acts or statements of the defendants or their agents which effectively prevented them from commencing this action in a timely fashion.

All fifteen Smith Avenue plaintiffs obtained or should have obtained an objective level of awareness of the possible dangers and consequences of the potential contamination resulting from the former MGP site in or around the time they acquired their respective properties. There is no doubt that they were provided sufficient information by the defendants and others in or around the time of their purchase of the property on Smith Avenue of the potential contamination as well as the likely cause of said contamination. In addition to the information they received from the sellers and real estate agents/brokers involved in the purchase of these homes, there were various other sources of information available to them regarding the potential contamination in or around the Bay Shore area. There were hotline phone numbers, dedicated phone numbers for remediation as well as health related questions or concerns, posted notices, publicly available documents, public meetings all of which the plaintiffs on Smith Avenue would have been provided notice of in the informational Fact Sheets. Moreover, there has been widespread media coverage regarding release of potentially hazardous substances from the former Bay Shore MGP site and KeySpans investigation and remediation efforts to clean up same. Further, there has been highly visible extensive long term remediation work, including, excavation, demolition and construction throughout the Bay Shore area since 1999/2000. There has also been the installation of large scale remedial equipment like monitoring wells and oxygen injection systems, in plain sight, in and around the vicinity of their homes.

Based upon the foregoing, all of the Smith Avenue plaintiffs are found to have obtained sufficient knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury. Each of the Smith Avenue plaintiffs, knew or should have known of their alleged injuries in or around the time of purchase of their Smith Avenue properties but certainly no later than January 2003 or in the case of the Turners, no later than January 2006. Accordingly, all claims by the Smith Avenue plaintiffs in this action are dismissed as time-barred.

Summary on Statute of Limitations

As set forth above, in the discussion of the applicable case law, counsel's argument that the plaintiffs are entitled to a finding that the defendants are equitably estopped from raising the defense of statute of limitations lacks merit. This Court has consistently held otherwise. At the outset, the plaintiffs general unsupported allegations of fraud, concealment and misrepresentation purportedly perpetrated by the defendants is wholly insufficient to raise any issue of fact as to an applicable exception to the statute of limitations or that the statute of limitations were tolled or extended or that the causes of action were interposed within the applicable limitations period. Moreover, the plaintiffs failed to demonstrate any evidence that these plaintiffs relied on the misrepresentations, fraudulent or deceptive practices or statements of the defendants or their agents which effectively prevented the plaintiffs from commencing this action in a timely manner (*see Phillips F. v Roman Catholic Diocese of Las Vegas*, 70 AD3d 765, 894 NYS2d 125 [2d Dept 2010]).

The Court finds that all of these plaintiffs (with the exception of George Strain) have sufficient knowledge of facts to charge them with discovery of which the primary condition on which their claims are based (*see MRI Broadway Rental, Inc. v United States Min. Prods. Co., supra*). In their affidavits, these plaintiffs do not claim that they were unaware of the contamination or the decade long remediation efforts. Further, these plaintiffs obtained knowledge that would place a reasonable person on notice of a need to undertake further investigation to ascertain the scope of the contamination or injury (*see Benjamin v KeySpan Corp., et al*, 104 AD3d 891, 963 NYS2d 128 [2d Dept 2013] *citing Oliver v Chevrolet Mobil Oil Corp.*, 249 AD3d 793, 671 NYS2d 850 [3d Dept 1998]). Since this action was commenced in 2012 and all of these plaintiffs (except Strain) were only added to the litigation in 2013, with the filing of the Second Amended Complaint, after the expiration of the three-year statute of limitations period set forth in CPLR § 214-c, the plaintiffs' FIRST through SEVENTH causes of action are dismissed as time-barred. Further, to the extent indicated herein, the plaintiffs' EIGHTH cause of action sounding in monitoring and injunctive relief, which is governed by a six-year statute of limitations period set forth in CPLR § 213(1) is also time-barred as this claim was filed too late under the six (6) year time limitation.

MAPLE AVENUE, HEMLOCK LANE, BURCHELL AVENUE and JOHNSON LANE:

There are seven households that have joined the instant law suit as plaintiffs from the above-mentioned blocks, to wit; **Paul Anthony and Catherine Jan**, owners of 56 Maple Avenue; **Spiro and Susan Stathopolous**, owners of 69 Hemlock Lane; **Karen and Micheal Maggiore**, owners of 67

Hemlock Lane; **Susannah Moran**, owner of 71 Hemlock Lane; **Barbara Flanagan**, owner of 68 Johnson Lane and **Leigh and Mary Ellen Straub**, owners of 60 Johnson Lane. The Stathopolous' and the Straubs have failed to submit affidavits in opposition to the motion and the affidavits submitted by the Maggiores' are not signed or notarized.

These plaintiffs were not in the former Bay Shore MGP remedial site based upon their distance from and proximity to the MGP site. The defendants completed the delineation of the groundwater contamination for the designated operable units 1-4 and it did not extend to Maple Avenue, Hemlock Lane, Burchell Avenue or Johnson Lane. The defendants acknowledge that no Fact Sheets were ever mailed to the residents of Maple Avenue, Hemlock Lane, Burchell Avenue or Johnson Lane, as these properties were not in the area designated as operating units 1-4 or within the area of remediation. Simply put, these plaintiffs are not on the plume and the defendants assert that the complaint fails to establish any damages on behalf of these distant plaintiffs.

The defendants assert that while general remediation and excavation efforts performed at the former MGP site would have been visible from these blocks, there were no activities in the immediate area of Maple Avenue Hemlock Lane or Burchell Avenue. All four blocks are clearly outside of the four operating units, (*see* Exhibit 41-A). Based upon the foregoing, the defendants contend that the plaintiffs located on these four streets in Bay Shore can not prove any contamination of their property, and are unable to establish damages. Therefore, the defendants seek a dismissal of the FIRST through SEVENTH causes of action against the plaintiffs located on Maple Avenue, Hemlock Lane, Burchell Avenue and Johnson Lane for failing to state a cause of action upon which relief can be granted (*see* CPLR 3211[a][7]).

The legal standard to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) is whether “the pleading states a cause of action, not whether the proponent of the pleading has a cause of action” (*Marist Coll. v Chazen Envtl. Serv.*, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], *quoting Sokol v Leader*, 74 AD3d 1180, 1180-81, 904 NYS2d 153 [2d Dept 2010]). On such a motion to dismiss, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *Leon v Martinez*, 84 NY2d 83, 87, 614 NYS2d 972 [1994]). However, the complaint must “contain statements of sufficient particularity to give the court and the parties notice of the transactions and occurrences intended to be proved, along with the material elements of each cause of action (CPLR 3013) ... [a] complaint is insufficient if based solely on conclusory statements, unsupported by factual allegations” (*Melito v Interboro-Mut. Indem. Ins. Co.*, 73 AD2d 819, 820, 423 NYS2d 742 [4th Dept 1979]). In fact, bare legal conclusions and factual averments flatly contradicted by the record are not presumed to be true (*see Simkin v Blank*, 19 NY3d 46, 945 NYS2d 222 [2012]; *Khan v MMCA Lease, Ltd.*, 100 AD3d 833, 954 NYS2d 595 [2d Dept 2012]; *U.S. Fire Ins. Co. v Raia*, 94 AD3d 749, 942 NYS2d 543 [2d Ept 2012]; *Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020 [2d Dept 2007]).

Where a party offers evidentiary proof on a motion pursuant to CPLR 3211(a)(7) and such proof is considered but the motion has not been converted to one for summary judgment, “the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; see *Bua v Pursell & Ingraio, P.C.*, 99 AD3d 843, 952 NYS2d 592 [2d Dept 2012]; *Jannetti v Whelan*, 97 AD3d 797, 949 NYS2d 129 [2d Dept 2012]; *Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 941 NYS2d 675 [2d Dept 2012]). Accordingly, where the court considers evidentiary material, a motion to dismiss pursuant to CPLR 3211(a)(7) should be granted only when (1) it has been shown that a material fact alleged in the complaint is not a fact at all; and (2) there is no significant dispute regarding it (see *Weill v East Sunset Park Realty, LLC*, 101 AD3d 859, 955 NYS2d 402 [2d Dept 2012]; *Cucco v Chabau Café Corp.*, 99 AD3d 965, 952 NYS2d 463 [2d Dept 2012]; *Norment v Interfaith Ctr. of New York*, 98 AD3d 955, 951 NYS2d 531 [2d Dept 2012]; *Basile v Wiggs*, 98 AD3d 640, 950 NYS2d 148 [2d Dept 2012]).

The Court has examined the complaint and there are no specific allegations of injuries or damages to these seven households in the second amended complaint. Both parties have submitted evidentiary proof, with five of the seven plaintiffs submitting affidavits to support their claim. However, these streets are not listed in the complaint and these parties are asserting bare legal conclusions by simply verifying the allegations of the other parties who are within the remediation area and who can assert an injury in fact. Such boot-strapping upon the factual claims of others, without demonstrating specific damages constitutes an insufficient pleading. There is no showing of just how these seven plaintiffs have been impacted by the MGP contamination. Defendants, by challenging these plaintiffs and their inability to establish injury and damages, are contesting their standing to sue. As explained in *Suffolk County Water Auth. v Dow Chem. Co.*, __AD3d__, __NYS2d__ (July 23, 2014):

Generally, a plaintiff has standing to sue if it suffered an injury in fact (see *In re Methyl Tertiary Butyl Ether [MTBE] Prods. Liab. Litig.*, 725 F3d 65, 107 [2d Cir]; *MRI Broadway Rental v United States Min. Prods. Co.*, 92 NY2d 421, 427-428) in some way different from that of the public at large and within the zone of interests to be protected by relevant statutory and regulatory provisions (see *Matter of Save The Pine Bush, Inc., v. Common Council of the City of Albany*, 13 NY3d 297, 304; *Society of Plastics Industry, Inc., v. County of Suffolk*, 77 NY2d 761, 774).

As the Second Department has recently held, “[w]hen, however, the defendant has placed standing in issue, the plaintiff must establish proper standing as part of its prima facie case (citations omitted)” (*Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]). Here, however, unlike the plaintiff in *Suffolk County Water Auth. v Dow Chem. Co.*, *supra*, who could show some injury such as increased monitoring costs, irrespective of the level of contamination, here,

these seven plaintiffs have not alleged that they have suffered an injury for which they may seek redress. No physical damage to their properties has been alleged and the parcels are not in close proximity to the plumes or ongoing remediation.

As it appears that these plaintiffs cannot, within the four corners of the complaint, alleged facts sufficient to establish damages to support a cause of action for the FIRST through SEVENTH causes of action (seeking damages), defendants' motion to dismiss pursuant to CPLR 3211 (a) (7) is granted. Three plaintiffs failed to submit opposition to the motion.

THE EIGHTH CAUSE OF ACTION:

The defendants also seek dismissal of this claim due to the primary jurisdiction doctrine and the lack of standing (no injury-in-fact). The EIGHTH cause of action sounds in claims of monitoring, establishment of a trust fund and injunctive relief.

The defendants initially assert that the EIGHTH cause of action should be dismissed based upon the primary jurisdiction doctrine. The primary jurisdiction doctrine enjoins courts having concurrent jurisdiction to refrain from adjudicating disputes within an administrative agency's authority, especially where the agency's specialized experience and technical expertise is involved (*see Sohn v Calderon*, 78 NY2d 755, 579 NYS2d 940 [1991]; *Massaro v Jaina Network Systems, Inc.*, 106 AD3d 701, 964 NYS2d 588 (2d Dept 2013)).

It is uncontroverted that since the defendant's executed the Consent Order governing the remediation of the Bay Shore MGP site, the DEC has been extensively involved and informed in the ongoing remediation process being conducted in Bay Shore. In addition, the DEC has provided oversight to both the design and execution of the remediation plan for the former Bay Shore MGP site.

Contrary to the plaintiff's unsubstantiated assertions of the defendants' misconduct, misrepresentations and concealment, the credible competent evidence presented, clearly demonstrates that the defendants have fully complied with the Consent Order (*see* Exhibit N, Affidavit of Gardiner Cross of DEC). The credible evidence further establishes that as a result of the defendant's remediation efforts, the plumes have been significantly reduced. Furthermore, the contaminant concentrations within the plumes have been significantly reduced since the remediation process began. Additionally, while there are still areas of groundwater contamination remaining within the plumes, this is consistent with the DEC's expectations for the long term remediation of the site. Moreover, the DEC continues to scrutinize the remediation process and has the authority to require additional treatment at the site, if needed. Should the DEC determine that the reduction contamination levels in the remaining areas is insufficient, the DEC will exercise its authority and direct additional treatment of these effected areas.

It appears to the satisfaction of this Court that the DEC is actively and appropriately monitoring and exercising its authority over the investigation and remediation efforts being conducted by the defendants in and around the Bay Shore area as a result of the release of contaminants from the former

MGP site. Further, the plaintiffs' fail to demonstrate why the courts should intervene in areas which appear to require the specialized experience as well as the technical expertise of the DEC and NYSDOH. As such, the Court dismisses the EIGHTH cause of action based upon the doctrine of primary jurisdiction.

Turning to the branch of the defendant's application which seeks dismissal of the EIGHTH cause of action against various plaintiffs based upon lack of standing to seek injunctive relief against KeySpan, it is noted that the issue of standing has largely been rendered moot by the dismissal of the EIGHTH cause of action based upon the doctrine of primary jurisdiction and the dismissal of the damage claims of some of these plaintiffs for failure to state a cause of action. Notwithstanding the foregoing, the Court has considered the defendants' alternative ground for dismissal of this cause of action against the plaintiffs located at Maple Avenue, Hemlock Lane, Burchell Avenue and Johnson Lane, as well as the plaintiffs, Malakoff, Patterson and Cullen.

As noted above, the defendants contend that the plaintiffs located at Maple Avenue, Hemlock Lane, Burchell Avenue and Johnson Lane are not on the plume or in the areas of remediation. They further assert that the plaintiffs, Malakoff, Patterson and Cullen no longer own the Bay Shore properties at issue. Therefore, these plaintiffs lack "injury in fact" and as such do not have standing to seek injunctive relief against KeySpan. With this contention the Court agrees.

For the reasons stated above, the plaintiff/owners living on Maple Avenue, Hemlock Lane, Burchell Avenue and Johnson Lane, cannot demonstrate an "injury in fact" to establish standing in this action. Additionally, regarding the plaintiffs who have transferred their interest in their former Bay Shore property, it would appear that they can no longer establish any "injury in fact." Accordingly, any of the plaintiffs that have transferred their interest in their Bay Shore property at issue, would lack standing to seek injunctive relief against KeySpan.

Finally, with regard to the EIGHTH cause of action, upon reading Paragraph 27 of the second amended complaint and the WHEREFORE clause thereof (*see e.[iii]*), which specifically seeks medical monitoring ("the monitoring of the adverse health affects resulting therefrom") and upon reading the various affidavits submitted by the plaintiffs, many of whom claim there is an environmental health risk present, it has been recently held by the Court of Appeals that New York does not recognize an independent cause of action for medical monitoring (*see Caronia v Philip Morris USA, Inc.*, 22 NY3d 439, 982 NYS2d 40 [2013]; *see also Ivory v International Bus. Machs. Corp.*, 116 AD3d 121, 983 NYS2d 110 [3d Dept 2014]).

PLAINTIFFS' CROSS-MOTION:

The plaintiffs by motion papers, dated December 10, 2013, seek, among other things, partial summary judgment against the defendants on the issue of liability, the appointment of a Judicial Hearing Officer, and the appointment of experts, to serve as Special Masters and direct the defendants to pay for the costs of same. In addition, the motion seeks an order on behalf of the plaintiff, Aristeia Mousis, directing the defendants to pay the costs of a toxicologist to serve as a Special Master to

evaluate and report whether her continued occupancy of the premises located at 58 North Clinton Ave, Bay Shore, New York, would be dangerous to her health.

The cross-motion has been, to a large extent, rendered moot by the decision above. However, for completeness purposes, the Court will examine the claim. First, summary judgment is available only after issue has been joined (*see* CPLR 3212 [a]; *cf.*, CPLR 3211[c], which has not been invoked by either the court or the parties). This joinder of issue requirement is strictly adhered to and a court is powerless to grant summary judgment in the absence of such joinder (*see City of Rochester v Chiarella*, 65 NY2d 92, 490 NYS2d 174 [1985]; *Gaskin v Harris*, 98 D3d 941, 950 NYS2d 751[2d Dep 2012]). In addition, the motion must be supported by the pleadings served and an affidavit from a person having knowledge of the facts and by other proof (*see* CPLR 3212[b]). Here, issue has not been joined as the defendants moved in lieu of answering to dismiss the amended complaint pursuant to CPLR 3211 and their motion has not been converted into one for summary judgment pursuant to CPLR 3211(c). A denial of the plaintiffs' motion is thus warranted on these procedural grounds alone.

In any event, the plaintiffs' cross motion lacks substantive merit. Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141[1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*see S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*see Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

The plaintiffs' motion for partial summary judgment is only supported by a twelve page supporting affirmation by the plaintiff's attorney Irving Like, Esq., of which only about one and a half pages are dedicated to the issue of summary judgment. Thereafter, the plaintiff's attorney submitted a forty-one (41) page reply affirmation. However, the plaintiffs fail to support their claims with any competent evidence. A summary judgment motion unsupported by probative evidence in an admissible form amounts to nothing more than sheer conjecture and speculation. Further, an attorney's affirmation which fails to demonstrate his personal knowledge is without evidentiary value and insufficient to support summary judgment (*see Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Moreover, the Court finds that the record is replete with questions of fact, including, among other things, whether the plaintiffs suffered any damages or injuries. Additionally, much like their summary judgment application in the *Robert Nicholson, Jeff Mattera, Donald Watson, and Jack*

Meltzer v KeySpan Corp., KeySpan Energy Corp., KeySpan Gas East Corp., with regard to their cause of action sounding in strict liability, the plaintiff failed to offer evidence that the defendant's engaged in abnormally dangerous activities (*see Nicholson v KeySpan Corp., et al*, 65 AD3d 1025, 885 NYS2d 106 [2d Dept 2009]). Accordingly, those portions of the plaintiffs' motion wherein they seek partial summary judgment is denied.

The Court finds the plaintiffs' request for the appointment of a Judicial Hearing Officer to aid the Court with discovery issues to be premature at best and is denied, without prejudice. Likewise, the plaintiffs' request for the appointment of various Special Masters as experts to provide expert testimony on the issues related to health risks, property damage, environmental damage as well as economic damage also is denied without prejudice. At best, the plaintiffs' request for the appointment of Special Masters is premature. Further, the plaintiffs does not offer any basis or authority for this Court to direct the defendants to pay for the costs of these experts. Notwithstanding the foregoing, the plaintiffs may retain any expert of their choosing to provide competent expert testimony and evidence regarding the foregoing in this matter.

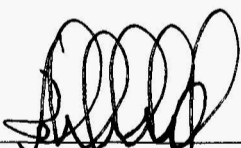
The branch of the plaintiff's cross-motion which seeks an order directing the defendants to pay the cost of a toxicologist to serve as a Special Master, to evaluate and report whether the plaintiff, Aristea Mousis', continued occupancy of her home located at 58 North Clinton Avenue, is dangerous to her health is denied. At the outset, the plaintiff offers no legal basis that would authorize the court to direct a party to pay the costs and fees associated with an expert or special master on behalf of their adverse. Moreover, it appears that the Ms. Mousis' residence and property located at 58 North Clinton Avenue, has been tested by the defendant's in April 2008. This assessment showed that that MGP related chemicals were not detected in the indoor air samples taken, above indoor air background concentrations. Her home and property were again tested by the SCDHS in or around October 2013. This round of testing appears to have demonstrated that the indoor air quality in her home is not being adversely impacted by the soil vapor contamination under the house. The DEC and NYSDOH have apparently also came to the same conclusion that there is no intrusion of contaminated soil vapor in the home. Additionally, the plaintiffs offer no competent evidence to the contrary. Accordingly, there is no basis for the relief requested.

The various issues informally raised in the papers in support and opposition to the instant motion and cross motion are denied, without prejudice to raising these issues, if necessary, in proper pleadings (*see e.g., Meyers v Rosen*, 69 AD3d 1095, 893 NYS2d 354 [3d Dept 2010]).

All other relief requested and not specifically addressed herein has been considered by the Court and is denied as being without merit.

The foregoing constitutes the order of the court.

DATED: 8/7/14



THOMAS F. WHELAN, J.S.C.