SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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CENTURY INDEMNITY COMPANY,

Plaintiff,

- v -

BROOKLYN UNION GAS COMPANY et al.,

Defendants.

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INDEX NO. 603405/2001

MOTION SEQ. NO. 037 045

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 037) 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 901, 1122

were read on this motion to EXCLUDE EVIDENCE AT TRIAL.

The following e-filed documents, listed by NYSCEF document number (Motion 045) 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 847, 848, 849, 850, 851, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1100, 1101, 1102, 1122

were read on this motion for PRECLUSION.

O'Melveny & Myers LLP, New York, NY (Jonathan Rosenberg and Leah Godesky of counsel), and Los Angeles, CA (Daniel Petrocelli and Craig P. Bloom of counsel), for plaintiff.
Covington & Burling LLP, Washington, D.C. (Jay T. Smith, Eric Bosset, and Michael Lechliter of counsel), and San Francisco, CA (Gretchen Hoff Varner of counsel), for defendant Brooklyn Union Gas Company.

Gerald Lebovits, J.:

This decision addresses two pretrial motions in limine filed by parties to the insurance-coverage litigation between Brooklyn Union Gas Company and Century Indemnity Company. This litigation stems from Brooklyn Union's government-mandated cleanup of the Gowanus Canal to remediate environmental harm from former manufactured-gas plants (MGPs).

Brooklyn Union, along with two dozen or so other companies named by the federal government as parties potentially responsible for the Gowanus Canal cleanup, entered into a private dispute-resolution process intended to allocate the significant costs involved in designing the environmental remedy for the Canal. As part of this process, Brooklyn Union and the other parties to this process participated in an arbitration-like proceeding before a neutral decision-maker called an allocator.

Based on submissions and testimony from the parties, the allocator applied equitable principles to arrive at an apportionment of remedial-design costs based on his assessment of each party's respective responsibility for the pollution now driving the need for (and costs of) the government-mandated cleanup of the Canal. The allocator's final determination, memorialized in a 2019 written decision, imposed 55.57% of the remedial-design costs on Brooklyn Union.[1] (*See* NYSCEF No. 1122 at 1, 15, 72-77 [redacted version of allocation decision]; *see id.* at 6 n 3 [description of equitable factors considered by allocator].)

In motion sequence 045, Century moves to have this court grant issue-preclusive effect in the upcoming trial to findings made by the allocator in his decision. In motion sequence 037, Brooklyn Union moves to exclude the allocation decision from evidence at trial altogether.

Century's motion is denied. Brooklyn Union's motion is granted.

DISCUSSION

I. Century's Motion to Apply Issue Preclusion to Factual Findings in the Allocation Decision (Mot Seq 045)

Century's motion seeks to preclude Brooklyn Union from relitigating "Four Factual Findings" assertedly made in the allocation decision. (NYSCEF No. 817 at 1 [reply mem. of law].) In opposing this motion, Brooklyn Union makes two arguments that apply to all four findings. Those arguments are addressed below in Section I.A. The parties' arguments with respect to each finding individually are dealt with in Section I.B. This court concludes that none of the findings in question satisfies the requirements of issue preclusion. The motion is denied.

A. Brooklyn Union's Across-the-Board Challenges to Issue Preclusion

1. Whether a finding in the allocation decision must be decisive of this action

It is undisputed that issue preclusion in New York has at least four elements: (i) "[T]he issues in both proceedings are identical"; (ii) "the issue in the prior proceeding was actually litigated and decided"; (iii) "there was a full and fair opportunity to litigate in the prior proceeding"; and (iv) "the issue previously litigated was necessary to support a valid and final judgment on the merits." (*Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015].) Brooklyn Union, citing the Court of Appeals's decision in *Kaufman v Eli Lilly & Co.* (65 NY2d 449, 456 [1985]), contends that a party seeking to invoke issue preclusion must also satisfy a *fifth* element: that the issue decided in the prior proceeding also be decisive of the second action.[2] (*See* NYSCEF No. 811 at 15-16.) None of the allocation findings at issue on this motion will resolve

[1] Brooklyn Union's share of those costs in 2019 exceeded $8 million. (*See* NYSCEF No. 1019 at 30.)

[2] *Kaufman* frames issue preclusion as having "but two requirements which must be satisfied before the doctrine is invoked." (65 NY2d at 455.) This difference is merely one of phraseology: The "two requirements" given in *Kaufman* encompass the five elements discussed above. (*See id.* at 455-456.)

the upcoming trial. Therefore, Brooklyn Union contends, they cannot be accorded preclusive effect. (*See id.*) This court disagrees.

Brooklyn Union is correct that the Court of Appeals stated in *Kaufman* that issue preclusion is warranted only if the party seeking preclusion demonstrates that the issue is decisive of the later action. (*See* 65 NY2d at 455.) But a year before *Kaufman*, the Court of Appeals concluded in *Ryan v New York Telephone Co.* (62 NY2d 494, 500-501 [1984]) that decisiveness in this sense is *not* required for issue preclusion.[3]

Since then, two different lines of Court of Appeals precedent have developed. Neither line acknowledges the other. One line requires decisiveness. The other does not.[4] (*Compare e.g. Conason*, 25 NY3d at 17 [four elements], *with Howard v Stature Elec., Inc.*, 20 NY3d 522, 525 [2013] [five elements].) The Appellate Division, First Department, also has two lines of conflicting precedent.[5] (*Compare e.g. Gjonaj Realty & Mgt. Corp. v Capacity Group of NY LLC*, 173 AD3d 534, 535 [1st Dept 2019] [referring to the "requisite identity of issue which has necessarily been decided in the prior action and is decisive of the present action"] [internal quotation marks omitted]), *with Rojas v Romanoff*, 186 AD3d 103, 108-109 [1st Dept 2020] [stating that issue preclusion applies "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) the issue was necessary to support a valid and final judgment on the merits"].)

In the current action, this distinction is not academic. Applying the five-element *Kaufman* test warrants denial at this point of Century's motion at this point: This court does not see how the findings for which Century seeks preclusion could decide the current coverage action. Nor does Century contend otherwise.[6] On the other hand, applying the four-element *Ryan* test entails

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[3] *Ryan* does note that the issue "must be the point actually to be determined in the second action or proceeding such that a different judgment in the second would destroy or impair rights or interests established by the first." (62 NY2d at 501 [internal quotation marks omitted].) This statement could be taken to be imposing a version of the "decisiveness" element discussed in *Kaufman*. That said, appellate decisions since *Ryan* have treated the case as establishing only a four-element/no-decisiveness framework for issue preclusion. (*See e.g. Rojas*, 186 AD3d at 108-109; *Stewart Family LLC v Stewart*, 184 AD3d 487, 491 [1st Dept 2020]; *Alamo v McDaniel*, 44 AD3d 149, 153 [1st Dept 2007]; *accord Lowes v Anas*, 195 AD3d 1579, 1581 [4th Dept 2021]; *Calder v 731 Bergan, LLC*, 83 AD3d 758, 759 [2d Dept 2011].)

[4] This conflict has confused federal courts, also. (*See Curry v City of Syracuse*, 316 F3d 324, 332-333 & n 4 [2d Cir 2003] [reversing district court's holding granting issue-preclusive effect to a prior administrative determination, because that determination was not decisive of the claim in the later action, and suggesting that in using the four-element preclusion framework, the district court "erroneously applied the federal law of collateral estoppel rather than New York law"].)

[5] The parties did not brief this issue; and the court's own research has not found cases or commentary addressing the inconsistency in either the Court of Appeals's or the Appellate Division's issue-preclusion precedent.

[6] Century argues instead that because the issues for which it seeks preclusion are factual findings rather than legal conclusions, those findings need not be decisive under *Kaufman* and cases

rejecting Brooklyn Union's decisiveness-based challenge to preclusion and going on to consider Brooklyn Union's other categorical and individualized arguments against Century's motion.

This court concludes that it must apply the four-element *Ryan* test. The court must follow "the most recent controlling authority." (*Vaughan v Leon*, 94 AD3d 646, 649 n 2 [1st Dept 2012].) And the Court of Appeals's 2015 decision in *Conason* and the First Department's 2021 decision in *Rojas*, both employing the four-element *Ryan* test, came after the most recent decisions of those courts using the five-element *Kaufman* test (*Howard* in 2013; *Gjonaj Realty* in 2019, respectively).[7]

2. Whether Brooklyn Union had a full and fair opportunity to litigate in the allocation proceeding

As discussed above, issue preclusion requires a full and fair opportunity to litigate the issue in question. Brooklyn Union argues on two grounds that it lacked a full and fair opportunity to litigate any of the findings for which Century seeks preclusion. This court is unpersuaded.

First, Brooklyn Union argues that a full-and-fair-opportunity was absent because a provision in the allocation agreement stated that the decision would not have binding effect in any later dispute over allocating *cleanup* costs (as opposed to remedial-design costs). (*See* NYSCEF No. 811 at 17.) But the First Department decision in *Feinberg v Boros*, cited by

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following it. (*See* NYSCEF No. 817 at 10-11.) Century does not cite any authority for this proposition.

[7] Had it instead been unclear which Court of Appeals and First Department precedent controlled, this court would have had to "fashion a decision which it deem[ed] to be appropriate and consistent . . . with the overall objective sought to be achieved" by issue-preclusion doctrine. (*Vidal v Maldonado*, 23 Misc 3d 186, 213 [Sup Ct, Bronx County 2008] [discussing what courts should do when the Appellate Division renders conflicting decisions].) In that scenario, this court would have adopted the four-element/no-decisiveness test.

The fundamental preclusion inquiry is whether to permit a party to relitigate an issue "in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results." (*Simmons v Trans Express Inc.*, 37 NY3d 107, 112 [2021] [internal quotation marks omitted].) To condition preclusion on an issue resolved in one action's being not simply material but *decisive* in a second action would not serve these policy aims.

A decisiveness requirement is not necessary to ensure that the party sought to be precluded has at least one full and fair opportunity to litigate an issue before it is definitively resolved against them. Nor is it fair to require the party seeking to apply preclusion to litigate an issue twice notwithstanding that the issue was resolved and necessary to support a final judgment the first time. Moreover, permitting relitigation of a fully contested issue whose resolution underlies the first judgment would waste litigant and judicial resources, and would risk inconsistent results. The existing four elements of issue preclusion set forth in *Conason* and similar decisions are sufficient to further the doctrine's fairness- and efficiency-related aims without adding a fifth.

Brooklyn Union, holds that the weight to be given this type of ex ante limitation provision depends on the extent to which it "accurately reflects . . . the parties' expectations not to fully litigate issues" in the arbitration proceeding. (99 AD3d 219, 228 [1st Dept 2012].) Here, the extensive and vigorous litigation among the parties to the allocation proceeding (including Brooklyn Union) indicates that the limitation provision did not reflect the parties' intention to contest issues in the proceeding in only a partial or limited fashion.

Second, Brooklyn Union contends that the full-and-fair-opportunity element of issue preclusion requires an opportunity to appeal the allocation decision. (*See* NYSCEF No. 811 at 17-18.) Neither Brooklyn Union nor Century cites New York precedent that addresses a challenge on this ground to the preclusive effect of an arbitration (or arbitral-type) award. Nor has this court's research uncovered any precedent on this point. This court concludes that Brooklyn Union's argument is creative but unavailing.[8]

Brooklyn Union's position cannot be reconciled with the realities of arbitration and arbitration-related preclusion jurisprudence as they exist in New York. As Century points out (*see* NYSCEF No. 817 at 16), CPLR 7511 stringently limits the right of a party to an arbitration proceeding to challenge the ultimate decision or award. A court may not vacate or modify an arbitral award based on the arbitrator's mistake of law, or for that matter an arbitrator's erroneous failure to grant issue-preclusive effect to a prior arbitral ruling. (*See* CPLR 7511 [b]; *see also e.g. Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336-337 [2005] [mistake of law]; *Matter of Falzone v New York Cent. Mut. Fire Ins. Co.*, 15 NY3d 530, 534-535 [2010] [erroneous failure to apply collateral estoppel].)

Additionally, New York's arbitration-related preclusion caselaw comprises a vast body of precedents, now dating back decades. (*See e.g. Clemens v Apple*, 65 NY2d 746 [1985]; *Matter of Am. Ins. Co. v Messinger*, 43 NY2d 184 [1977].) And this court has found no hint in those precedents that CPLR 7511's limits on review of arbitral awards denies the parties to an arbitration a full and fair opportunity to litigate for preclusion purposes. To hold at this late date that the strict limits on challenges to an arbitrator's decision deprive the parties to the arbitration of a full and fair opportunity to litigate would work an avulsive change to New York's preclusion jurisprudence. This court sees no reason to take that leap.

To the contrary, *Clemens* and other decisions articulating full-and-fair-opportunity factors in the arbitral-preclusion context do not include the availability of subsequent review as one of those factors. Instead, these cases list criteria such as the "'nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the

[8] Century asserts that Brooklyn Union's contention is meritless because the parties to the allocation agreement did not waive their right to appeal or otherwise seek review of the allocator's final decision. (*See* NYSCEF No. 817 at 15-16.) This assertion merely begs the question. The cases cited by Century to support its assertion involved challenges to arbitral determinations by petitions brought under CPLR article 75 or CPLR article 78. (*See id.*) Century does not identify a comparable procedural vehicle here that would enable the parties to the allocation agreement to raise a challenge to the allocator's decision in the first place.

actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the difference in the applicable law and the foreseeability of future litigation.'" (*Clemens*, 65 NY2d at 748, quoting *Ryan*, 62 NY2d at 501; *Rozewski v Trautmann*, 151 AD3d 1945, 1945-1946 [4th Dept 2017] [same]; *Altamore v Friedman*, 193 AD2d 240, 245 [2d Dept 1993] [same]; *but see Allstate Ins. Co. v Toussaint*, 163 AD2d 444, 445 [2d Dept 1990] [holding, in the preclusion context, that the availability of a CPLR article 75 proceeding constitutes "judicial recourse, albeit limited," for a party "dissatisfied with the arbitrator's determination"].) This is not to say that this list of factors should necessarily be taken as exhaustive. But again, the absence from these decisions of (un)availability of subsequent review as a relevant consideration cuts against Brooklyn Union's argument.

Brooklyn Union relies on a decision of the Appellate Division, Second Department, that considers the effect of the lack of appellate review in the context of a *judicial* proceeding. (*See* NYSCEF No. 811 at 17, citing *Matter of JP Morgan Chase Bank, N.A. (Kyle)*, 135 AD3d 762, 763 [2d Dept 2016].) As Century contends (*see* NYSCEF No. 817 at 16), that decision involved a scenario in which parties were "involuntarily deprived" by happenstance of their appellate rights. (*See Matter of JP Morgan Chase Bank*, 135 AD3d at 763 [explaining that the parties against whom preclusion was sought "were unable to obtain appellate review" of determinations made in a guardianship proceeding, as the "proceeding abated upon the death of the alleged incapacitated person before a final judgment could be entered"].[9])

Here, on the other hand, Brooklyn Union (and the other parties to the allocation proceeding)— sophisticated parties represented by sophisticated counsel—chose to prepare and enter into an agreement that did not provide for review of the allocator's decision. That careful, deliberate choice undermines Brooklyn Union's analogy to cases such as *Matter of JP Morgan Chase Bank.* (*See Clemens*, 65 NY2d at 749 [emphasizing that the parties against whom preclusion was sought "freely chose the arbitration forum, although a judicial forum was, and remained, available at the time arbitration was sought"]; *Messinger*, 43 NY2d at 191 [holding that given "the voluntary election by two insurance companies to proceed as they did," they "waived any procedural rights which they might otherwise have had" and "accepted the arbitration proceeding as they chose to conduct it"]; *cf. Tydings v Greenfield, Stein & Senior, LLP* (11 NY3d 195, 200 [2008] [distinguishing for preclusion purposes between a scenario in which "the losing party in the first lawsuit could have appealed but did not" from one in which the losing party tried "but was unable to get an appellate ruling on the issue"].)

In short, for preclusion purposes, the absence of a right to challenge the allocator's decision (either by appeal or CPLR 7511 petition to vacate) did not deprive Brooklyn Union of a full and fair opportunity to litigate the findings now at issue.

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[9] *See also e.g. Tydings v Greenfield, Stein & Senior, LLP* (11 NY3d 195, 199-200 [2008]); *Thomas v City of New York* (173 AD3d 633, 635 [1st Dept 2019]); *Urias v Daniel P. Buttafuoco & Assocs., PLLC* (120 AD3d 1339, 1342-1343 [2d Dept 2014]); *Zimmerman v Tower Ins. Co. of N.Y.* (13 AD3d 137, 139-140 [1st Dept 2004]).

B. Brooklyn Union's Finding-Specific Challenges to Issue Preclusion

Having rejected Brooklyn Union's across-the-board challenges to issue preclusion, this court must consider whether preclusion is warranted for one or more of the four findings at issue, considered individually. The court concludes that preclusion is warranted for none of these findings.

1. The starting date of operations at the Citizens and Fulton MGPs

The allocation decision's party-specific analysis of Brooklyn Union's share of remedial design costs stated that the Citizens MGP began operating in "approximately 1859," and that the Fulton MGP began operating in "approximately 1879." (NYSCEF No. 1122 at 72.) Century now contends that these statements constitute a factual finding that operations at these two MGP sites began in 1859 and 1879, respectively—rather than 1860 and 1880, as contended by Brooklyn Union—and that this finding should preclude Brooklyn Union from contending at trial for the later start dates.[10] (*See* NYSCEF No. 790 at 14; NYSCEF No. 817 at 1.) The allocator's statement about the starting date of MGP operations is not entitled to issue-preclusive effect.

As an initial matter, the allocation decision does not clearly reflect what the allocator in fact *found* about MGP start dates. In particular, the decision does not explain the extent of uncertainty (and thus the breadth of the possible date range) that the allocator intended to convey by his use of "approximately"—whether it should be understood to mean, say, "1859, plus or minus three months," or "1859, plus or minus three years." Because the start dates that Brooklyn Union has given differ from Century's preferred dates only by one year, the (lack of) precision on this point that the allocator perceived in the record before him is significant for preclusion purposes. Yet the allocation decision leaves the matter ambiguous. Absent greater clarity on what the allocator found, that finding is not entitled to preclusive effect.

Additionally, issue preclusion applies only if the issue in question was "material to the first action or proceeding and *essential to the decision rendered therein*." (*Ryan*, 62 NY2d at 500 [emphasis added].) That is, the "finding must be one 'from which the resolution of the ultimate legal issue necessarily follows.'" (*Church v New York State Thruway Auth.*, 16 AD3d 808, 810 [3d Dept 2005], quoting *Hinchey v Sellers*, 7 NY2d 287, 293 [1959].) Century has not established that the allocator's finding about MGP start dates (whatever the finding was) was necessary for—or even relevant to—his ultimate determination that Brooklyn Union should bear 55.57% of remedial-design costs.[11]

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[10] The starting date of MGP operations at these sites—and thus the total length of those operations—is potentially relevant to pro rata allocation of the losses for which Brooklyn Union now seeks coverage from Century. (*See Century Indem. Co. v Brooklyn Union Gas Co.*, 2022 NY Slip Op 22026, at *2 [Sup Ct, NY County 2022] [discussing pro rata allocation].)

[11] The allocator's consideration of the Citizens and Fulton MGPs suggests that what he deemed material was merely that these MGPs had "a lengthy duration of operations" (NYSCEF No. 1122 at 72, 75), not those operations' precise length or starting point.

2. Brooklyn Union's discharges "without preventive measures" or "adequate corrective actions."

The second finding for which Century seeks issue preclusion is the allocator's statement, in the "Additional Equitable Factor(s)" step of his analysis," that "[t]here was knowledge" by Brooklyn Union "of the extensive discharges to the Canal over an extended period of time without preventive measures and/or adequate corrective actions taken." (NYSCEF No. 1122 at 76.) Here, too, issue preclusion is inappropriate: It is not possible to tell from the decision what the allocator actually found—nor the role this finding played in the allocator's ultimate determination.

That is, the position laid out in Brooklyn Union's submissions to the allocator (and the reports of its expert witness in this action, Dr. Neil Shifrin) is that although Brooklyn Union actively tried to recapture and recycle tar generated during the gas-manufacturing process, some tar nonetheless remained in wastewater that Brooklyn Union's MGPs then discharged into the Gowanus Canal. (*See e.g.* NYSCEF No. 1092 at 35-40 [Brooklyn Union response to allocator questions]; NYSCEF No. 590 at 13-17 [rebuttal report of Dr. Shifrin].) The allocator's decision could be read, as Century asserts (*see* NYSCEF No. 790 at 11), as rejecting Brooklyn Union's argument that it sought to recapture tar and prevent it (to the extent feasible) from being discharged into the Canal. Alternatively, though, it could be read as deeming significant the fact that Brooklyn Union continued to discharge MGP wastewater into the Canal despite knowing that its filtering efforts could not remove all tar and oil contamination from that wastewater. Those are quite different findings, with different implications for the upcoming trial. And Century has not established *which* of these two conclusions the allocator actually reached.

The allocation decision also does not indicate how much of a role these findings played in the allocator's ultimate remedial-design costs determination. The decision states only that as "additional equitable factors," considered in Step 4B of the allocator's analysis, the discharges in question "served to increase [Brooklyn Union's] percentage share." (NYSCEF No. 1122 at 76.) It does not, however, reflect *by how much* these factors increased Brooklyn Union's ultimate cost allocation; or, for that matter, how much weight the allocator gave to equitable factors considered at Step 4B for other parties to the proceeding.

3. Brooklyn Union's realizing economic benefit from continued discharges

The third finding is the allocator's statement, again in the "Additional Equitable Factor(s)" step of the analysis, that Brooklyn Union realized "economic benefit . . . from avoiding the costs associated with such preventive measures and corrective actions." (NYSCEF No. 1122 at 76.) Century's argument that this finding should be accorded preclusive effect is subject to similar objections as the without-preventive/corrective-measures finding.

One cannot tell from this brief statement in the allocator's decision whether he found that Brooklyn Union had (i) realized cost savings from not taking *any* measures aimed at preventing or limiting tar and oil discharges into the Canal; or (ii) realized cost savings from not taking measures sufficient to prevent tar and oil discharges *entirely* (because such measures would have been more costly, or even cost prohibitive, relative to the steps that Brooklyn Union did take).

Nor can one discern whether the allocator had concluded that Brooklyn Union had affirmatively decided against trying to prevent tar discharges due to that course being cheaper than the alternative; or merely that, seen in hindsight, Brooklyn Union benefitted economically from the absence of sufficient prevention measures.[12] Again, given this material ambiguity in the allocator's decision, Century has not established for preclusion purposes what the allocator did (and did not) decide.[13]

4. The proportion of coal-tar-based sediment contamination resulting from Brooklyn Union's discharges

One aspect of the allocation decision concerned the proportion of polycyclic aromatic hydrocarbons (PAHs)—a significant contaminant of concern in the sediment layers beneath the Gowanus Canal—that could be attributed to Brooklyn Union's operations. The allocator concluded that 91% of PAH contamination from coal-tar waste in the Canal's soft sediments was attributable to Brooklyn Union's operations and that Brooklyn Union was responsible for 94.9% of coal-tar PAH contamination in the Canal's native sediments. (*See* NYSCEF No. 1122 at 77.) Century now asks this court to accord issue-prelusive effect to the allocator's PAH finding.[14] This request is without merit as well.

The allocator's coal-tar-PAH finding, unlike the prior two findings, is specific and unambiguous. But Century has not demonstrated that this finding was *essential* to the allocator's bottom-line determination of remedial-design costs, such that it is now entitled to preclusive effect. (*See Church*, 16 AD3d at 810; *Behren v Papworth*, 35 AD2d 798, 798 [1st Dept 1970] [denying preclusive effect to a trial judgment when "neither the relief demanded" in the first action "nor the facts necessary to establish liability" in that action "would necessarily involve a finding" on the question to be decided in the second action]; *Miller v Moore*, 101 AD3d 1510, 1511 [3d Dept 2012] [holding that a jury's answer in plaintiff's favor to a verdict-form interrogatory was not entitled to preclusive effect in a later trial, because the court later granted defendants' motion for directed verdict on the cause of action to which the jury's finding pertained].)

Here, the allocation decision reflects that the decision's apportionment of remedial-design liability was based on a multistep process that took into account a range of equitable

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[12] Century characterizes the allocator as having "found that discharging tar and oil into the Gowanus Canal was cheaper than properly disposing of it or cleaning it up, *so* Brooklyn Union kept on dumping." (NYSCEF No. 790 at 2 [emphasis added])—in other words, that Brooklyn Union deliberately refrained from taking necessary prevention or remediation measures. This court is not aware of a basis in the record for this characterization.

[13] Additionally, as with the preventive/corrective-measures finding, it is impossible to tell how much the allocator's cost-avoidance conclusion, as a Step 4B equitable factor, affected the ultimate share of remedial-design costs that he allocated to Brooklyn Union.

[14] At four places in its opening memorandum of law on this motion, Century described the allocator as having found that Brooklyn Union was responsible for more than 90% of *all* PAH contamination in the Canal sediments, not just coal-tar-related PAHs. (*See* NYSCEF No. 790 at 2, 9, 11, 14.) That description is inaccurate. (*See* NYSCEF No. 1122 at 77.)

considerations. (*See* NYSCEF No. 1122 at 7-11 & n 3, 15.) But the decision does not specify the manner or extent to which a conclusion at any particular step (or the application of any particular factor) affected the ultimate allocation. To the contrary, the allocator cautioned that the process's analytical steps "are *not* purely sequential"[15] (*id.* at 11 [emphasis added]), that the process is not "formulaic" or "a purely quantitative exercise guided by scientific/technical certainty" (*id.*), and that the "equitable factors analysis is . . . rarely susceptible to precise quantification" (*Id.* at 15). Consistent with these caveats, the decision does not discuss how the various factors considered by the allocator led to his assigning a given share of remedial-design liability to a given party.

In short, the record reflects that the allocator found Brooklyn Union responsible for more than 90% of coal-tar PAHs in the Gowanus Canal sediments. (*See id.* at 77.) The record also reflects that the allocator ultimately assigned Brooklyn Union 55.57% of remedial-design liability. The connection between these two conclusions, however—and the extent to which the one is necessary to support the other—remains obscure. In these circumstances, the coal-tar-PAH finding is not entitled to preclusive effect.[16] (*See Union Carbide Corp. v Affiliated FM Ins. Co.*, 101 AD3d 434, 435 [1st Dept 2012] [holding that a jury verdict was not entitled to issue-preclusive effect because it was "impossible to discern exactly which facts, or acts of plaintiff, played a part in the jury's decision, or upon exactly which portion of the jury instruction (i.e., malice, oppression or fraud) the jury based its punitive damages award"]; *Hurlburt v Chenango County Dept. of Social Servs., Children's Div.*, 63 AD2d 805, 806 [3d Dept 1978] [explaining that "[w]here it is impossible to determine from a general verdict in favor of a defendant which of several issues was the determinative factor of the jury's verdict, that verdict may not be the basis of collateral estoppel"]; *Manard v Hardware Mut. Cas. Co.*, 12 AD2d 29, 30 [4th Dept 1960] [same].)

Century's motion for this court to accord preclusive effect to the allocation decision's four findings is denied.

II. Brooklyn Union's Motion to Exclude the Allocation Decision (Mot Seq 037)

In motion sequence 037, Brooklyn Union moves to exclude the allocation decision from being introduced into evidence at trial. The motion is granted.

A. Brooklyn Union's Argument that the Allocation Decision is Inadmissible Hearsay

Brooklyn Union argues first that the allocation decision should be excluded because the decision's contents are inadmissible hearsay. This court largely agrees. Century wishes to introduce the allocation decision at trial, not simply to establish that the allocator assigned Brooklyn Union a 55.57% share of the remedial-design costs, but also to prove the truth of the

[15] Instead, "information derived from one step [was] compared and contrasted with information resulting from another step for purposes of assuring consistency" and evaluating how to apply the relevant equitable factors. (NYSCEF No. 1122 at 11.)

[16] This case thus differs from scenarios like those in *Tydings* (*see* 11 NY3d at 198) and *Malloy v Trombley* (50 NY2d 46, 50-53 [1980]), in which the trial court announced two alternative holdings, each independently sufficient on their face to support the court's judgment.

factual statements underlying that disposition. The hearsay rule bars this attempt to introduce out-of-court statements to prove the truth of the matter asserted.[17] (*See Matter of Brownstone*, 289 AD2d 97, 98 [1st Dept 2001].)

1. Century's response that the allocation decision is admissible as a business record

Century argues that the allocation decision is admissible under CPLR 4518's business-records exception to the hearsay rule. Century's argument is unpersuasive. CPLR 4518 makes admissible a writing recording an "act, transaction, occurrence or event" upon a showing that the writing "was made in the regular course of any business and that it was the regular course of such business to make it" at the time or within a reasonable time after the act or occurrence being recorded. (CPLR 4518 [a]; *see also e.g. Briar Hill Apts. Co. v Teperman*, 165 AD2d 519, 521 [1st Dept 1991] [discussing the dual nature of this requirement].) The allocation decision does not satisfy these conditions.

Century contends that Brooklyn Union's extensive participation in the process of designing the cleanup remedy for the Gowanus Canal (and dividing up remedial-design costs) constitutes a "business" such that the allocation decision was issued in the regular course of that business. (*See* NYSCEF No. 584 at 15.) Brooklyn Union, however, did not issue the decision—the allocator did. That Brooklyn Union received and retained the allocator's decision in the regular course of Brooklyn Union's business is not itself sufficient to qualify the decision as a business record. (*See Lodato v Greyhawk North Am., LLC*, 39 AD3d 494, 495 [2d Dept 2007].)

To invoke the business-records exception under these circumstances, Century must instead provide an appropriate foundation establishing either that (i) the circumstances under which the *allocator* drafted and issued the decision satisfy each of the exception's conditions (*see Corsi v Town of Bedford*, 58 AD3d 225, 230-232 [2d Dept 2008]); or (ii) Brooklyn Union incorporated the allocation decision into its own records or has routinely relied on the contents of the allocation decision in the regular course of its business (*see State v. 158th St. & Riverside Dr. Hous. Co.*, 100 AD3d 1293, 1296-1297 [3d Dept 2012]).[18] Century has not attempted to support admissibility of the decision on either ground. Moreover, given the unusual, single-shot character of the allocation decision, and the extent to which the relevance of the decision to Brooklyn Union's operations lies in the decision's bottom-line cost allocation rather than in the decision's underlying reasons, this court is skeptical that Century *could* have made out the necessary showing, had it tried to do so.[19]

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[17] The allocation of the 55.57% share might itself constitute an act of independent legal significance (akin to legally binding terms appearing in a contract document), making *that* part of the allocator's decision not hearsay. (*See Wesco Ins. Co. v Rutgers Cas. Ins. Co.*, 2022 NY Slip Op 00749 [1st Dept 2022].) But admitting the decision's ultimate bottom-line allocation on that ground would not warrant admitting the decision's contents as well.

[18] *See also Olson v Brenntag N. Am., Inc.* (2020 NY Slip Op 51315[U], at *36 [Sup Ct, NY County Nov. 11, 2020] [discussing these evidentiary issues].)

[19] That Brooklyn Union provided the allocator's decision to Century in the same production as Brooklyn Union's own invoices and billing records does not, as Century suggests (*see* NYSCEF

Century asserts that New York courts treat the contents of arbitration decisions as relevant and admissible in later judicial proceedings. (*See* NYSCEF No. 584 at 10-11, 14.) None of the nonbinding precedents that Century cites for this proposition, though, squarely holds that the contents of an arbitration decision are admissible for their truth[20]—much less admits an arbitral decision into evidence over a hearsay objection like the one Brooklyn Union raises here.[21]

Century also cites several federal-court decisions for the proposition that relevant information from arbitral decisions is admissible for truth in later judicial proceedings. (*See id.*) But only one of the five cited decisions admitted an arbitrator's decision over a hearsay objection. (*See Via v Taylor*, 2002 WL 311115613 [D Del Sept. 11, 2002].) That decision did so with little explanation and without clarifying whether the court was admitting the decision under the Federal Rules of Evidence's hearsay exception for "records of regularly conducted activity," or instead the Rules' "residual exception for [hearsay] evidence which serves the interests of justice" (which does not have a counterpart in New York law). (*Id.* at *3-*4.)

The other federal decisions relied on by Century addressed the particular context of labor arbitrations pursuant to a collective-bargaining agreement—a frequent, recurring activity conducted under preexisting rules in which it was the routine practice of the proponent of the evidence to have recorded the decision, unlike Century's proffer of the allocation decision in this

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No. 584 at 15), indicate that the decision is equivalent for hearsay purposes to those invoices/billing records.

[20] Three of the four decisions cited by Century are decisions of other justices of the New York State Supreme Court, and thus not binding authority here. The fourth is a decision of the Appellate Term, Second Department, which does not bind this court, either. (*See Kattan v 119 Christopher LLC*, 2020 NY Slip Op 51469[U], at *3-*4 [Sup Ct, NY County Dec. 11, 2020] [discussing this issue].)

[21] In *Acosta v Giuffre*, the court did not consider the arbitration decision for its truth, but only to assess defendants' claim- and issue-preclusion arguments. (*See* 2005 NY Slip Op 30322[U], at *4-*5 [Sup Ct, Kings County Aug. 24, 2005].) In *Uberto, Ltd. v Supcoff*, the court's analysis of the arbitration decision was limited to the decision's disposition—not its underlying factual contentions. (*See* 2019 WL 2156407, at *10 [Sup Ct, NY County May 17, 2019], *rev'd on other grounds* 187 AD3d 560 [1st Dept 2020].) The portion of *Uberto* cited by Century, which discusses some of the arbitration decision's substance, is describing the parties' arguments, not giving the court's own analysis. (*See id.* at *7.) *Wharton v Town of North Hempstead* stated in dictum, relying only on federal authority, that "the arbitral decision may be admitted as evidence"; but the Appellate Term then explained that the trial court in the action had not "rel[ied] on the arbitral decision," and affirmed the trial-court's order without relying on the arbitral decision. (22 Misc 3d 83, 85, 86-87 [App Term, 2d Dept, 9th & 10th Jud Dists 2009].) And in *Clary v Starrett City, Inc.*, the trial court held first that the arbitral decision was entitled to issue-preclusive effect, and only then went on to discuss the arbitrator's opinion for its truth, without mentioning the issue of hearsay. (*See* 2007 NY Slip Op 31927[U], at *6-*9 [Sup Ct, Kings County June 28, 2007].)

case.[22] Three of those four decisions took as given that that the arbitral decision should be admissible, without addressing the issue of hearsay.[23] In the fourth, the opponent of admitting the arbitrator's decision did not raise hearsay as an argument for exclusion.[24]

Thus, even setting aside the point that these five decisions were rendered under federal law rather than New York law, they do not persuade this court that it should alter its conclusion on the hearsay issue.[25]

2. Century's other arguments for admitting the allocation decision over Brooklyn Union's hearsay objection

Century asserts that the allocation decision is admissible for its truth "to provide context and counterweight to the site-specific environmental reports that Brooklyn Union had a hand in drafting." (NYSCEF No. 584 at 16.) This assertion overstates the scope of the evidentiary rule on which Century is relying. Although a court may permit introduction of "*otherwise inadmissible* evidence" for explanatory background purposes (*see People v Garcia*, 25 NY3d 77, 86-87 [2015] [emphasis added]), doing so "is a delicate business." (*People v Resek*, 3 NY3d 385, 389 [2004]). It is undertaken only to provide the jury with information needed to understand the circumstances under which those acts and events occurred—lest "the jury . . . wander helpless, as in a maze, were the decisive occurrences not placed in some broader, expository context." (*People v Green*, 35 NY2d 437, 441-442 [1974]; *accord Garcia*, 25 NY3d at 86-87; *Resek*, 3 NY3d at 389-390; *People v Tosca*, 98 NY2d 660, 661 [2002].) And for this very reason, when this type of explanatory evidence comes in, it is not being admitted for its truth, as Century seeks to do with the allocation decision. (*See People v Morris*, 21 NY3d 588, 592 [20143]; *Resek*, 3 NY3d at 389; *Tosca*, 98 NY2d at 661.)

Century argues that the allocation decision is admissible because Century's experts may "rely on the Allocation Decision in rendering future expert opinions, and explain to the jury how the document supports their conclusions." (NYSCEF No. 584 at 18.) But as Century itself concedes, an expert may "rely on out-of-court material" only if "it is of a kind accepted in the

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[22] *See Alexander v Gardner-Denver Co.* (415 US 36 [1974]); *Barrentine v Arkansas-Best Freight Sys., Inc.* (450 US 728 [1981]); *McDonald v City of W. Branch* (466 US 292 [1984]); *Graef v Chemical Leaman Corp.* (106 F3d 112 [5th Cir 1997]).

[23] *See Gardner-Denver* (415 US at 60 & n 21); *Barrentine* (450 US at 743 n 22); *City of W. Branch* (466 US at 292 n 13).

[24] *See* Br. for Appellee, *Graef v Leaman Chemical Corp.* (1996 WL 33425447, at *25-*30).

[25] Century asserts that Brooklyn Union "acknowledges the admissibility of prior fact-finding, because it seeks to admit evidence of a judge's findings during a 1951 sentencing hearing on Brooklyn Union's guilty plea for polluting the Gowanus Canal." (NYSCEF No. 584 at 3-4; *see also id.* at 17-18.) That Brooklyn Union may take this position on admissibility of the 1951 sentencing hearing does not mean this court is constrained to agree with it. In any event, the 1951 sentencing-hearing statements in question, and the arguments for and against their admissibility, are not before this court on the current motion. This court declines to express an advance opinion on that issue absent a proper record.

profession as reliable in forming a professional opinion." (*Hambsch v New York City Transit Auth.*, 63 NY2d 723, 726 [1984].) Century has not undertaken here to establish that the allocation decision—a ruling in an adversarial arbitral proceeding—meets this "professional reliability" exception. Moreover, even if Century did demonstrate that its experts could properly rely on the allocation decision in forming their opinions, that showing would only make those *opinions* admissible. Century would still then have to establish that it would be necessary—and appropriate—to admit the *decision itself* as basis hearsay to enable the jury to evaluate those expert opinions properly. (*See People v Goldstein*, 6 NY3d 119, 126 [2005]; *cf. State v Floyd Y.*, 22 NY3d 95, 107-108 [2013].) It has not attempted to do so.

Century also contends that the allocation decision is "admissible for the non-hearsay purpose of impeaching Brooklyn Union's witnesses," given the testimony that Century anticipates those witnesses giving at trial. (NYSCEF No. 584 at 18.) This type of witness impeachment would be proper only if the witness first accepts the allocation decision as authoritative on the subject of the witness's testimony. (*See Matter of Yazalin P.*, 256 AD2d 55, 55-56 [1st Dept 1998]; *Labate v Plotkin*, 195 AD2d 444, 445 [2d Dept 1993] [reversing jury verdict due to undue prejudice stemming from improper impeachment of an expert witness using texts not accepted as authoritative].) Century has not provided a reason to think that Brooklyn Union's witnesses have accepted—or are at all likely to accept—the allocation decision as authoritative.

B. Brooklyn Union's Argument that the Allocation Decision is Inadmissible as Irrelevant and Prejudicial

Brooklyn Union contends, in the alternative, that even if no hearsay bar exists, the allocation decision should be excluded as irrelevant and prejudicial. Although this court does not agree with Brooklyn Union that the decision is necessarily irrelevant, the court concludes that the decision's probative value is outweighed by its potential to unfairly prejudice Brooklyn Union and to confuse the jury.

1. The allocation decision's relevance to the coverage determination to be made by the jury at trial

The allocation decision's potential relevance and probative value is substantially limited by the differences between the legal standard applied by the allocator and the legal standard guiding the jury's fact-finding at trial. In determining how to allot remedial-design costs among the participants to the allocation proceeding, the allocator used the standards governing "allocation of liability in the context of CERCLA contribution."[26] (NYSCEF No. 1122 at 14; *see also id.* at 1-4 [determining whether any party is entitled to the equivalent of summary judgment under the standards governing CERCLA-contribution actions].) CERCLA provides that a court hearing an action for contribution among potentially responsible parties "may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." (42 USC § 9613 [f] [1].) This provision confers the court with broad discretion in "choos[ing]

[26] CERCLA is short for the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 USC § 9601 et seq.

which factors are pertinent . . . for the case before it," and in "determin[ing] how much weight to place on any given equitable factor before the court." (*MPM Silicones, LLC v Union Carbide Corp.*, 966 F3d 200, 236 [2d Cir 2020] [internal quotation marks omitted].)

The equitable factors chosen by the allocator included (i) a "remedy cost driver analysis" based on the "degree to which a party's waste is likely to have contributed to the contamination which is driving the remedy at the Canal"; (ii) the "degree to which the parties have differentially contributed to the remedy driving contamination in" different geographic areas of the Canal; the "degree to which different contaminants of concern . . . are differentially contributing to the costs of the remedy"; (iv) whether a "party's waste generating and/or disposal activities were conducted in violation of applicable law"; and (v) the "economic benefit realized in the past or currently by the parties as a result of . . . [a]voided costs on account of waste disposal, directly or indirectly, to the Canal." (NYSCEF No. 1122 at 6-7 n 3.) These factors are aimed in significant part at the *effect* of each potentially responsible party's conduct on pollution in the Gowanus Canal, as that effect is understood—and must be remedied—today.[27]

The coverage question for which Century seeks to introduce the allocation decision at trial, on the other hand, is whether the environmental harm for which Brooklyn Union is now being held liable was *expected* or *intended* by Brooklyn Union during the period of MGP operations. (*See Century Indem. Co. v Brooklyn Union Gas Co.*, 2022 NY Slip Op 50103[U], at *2-*5 [Sup Ct, NY County Feb. 17, 2022] [discussing this coverage question].) That is a different inquiry: in some ways narrower (because it requires intent, not merely effect); in some ways broader (because if intent is present, the extent of the effect is immaterial to whether coverage exists).

Century argues that the allocator's findings and conclusions are nonetheless relevant to insurance-coverage related issues that the jury will be determining at trial. (*See* NYSCEF No. 584 at 11-14.) The connection between the two is weaker and more distant than Century contends.

a. The applicable test for one of the required conditions of coverage

In arguing that the allocator's decision is relevant, Century claims that the correct standard for assessing whether the losses for which Brooklyn Union now seeks coverage were expected or intended is whether Brooklyn Union knew that "the Three MGPs' operations gave rise to a 'substantial probability of damage' to the Gowanus Canal." (NYSCEF No. 584 at 13; *see also id.* at 4.) Century argues that "this inquiry directly implicates the Neutral's determination that Brooklyn Union knew during the operations era that the Three MGPs were

[27] The applicable equitable factors, therefore, do not necessarily turn on the extent to which each potentially responsible party is culpable for the environmental harms that must be remedied now. And the allocator does not appear to have applied the violation-of-applicable-law factor (which does incorporate a culpability inquiry) to Brooklyn Union. (*See* NYSCEF No. 1122 at 72-77.) For this reason, this court is skeptical of Century's description of the allocation decision as determining Brooklyn Union's "share of fault"—rather than share of responsibility—"for the Gowanus Canal contamination." (NYSCEF No. 584 at 19.)

polluting the Gowanus Canal, but took no corrective or preventive action because it was cheaper to keep polluting." (NYSCEF No. 584 at 13.) As discussed above, though (*see* Subsection I.B.3, *supra*), the record does not establish that the allocator made this determination. More fundamentally, this court does not agree that "substantial probability of damage" is the correct expected-or-intended test.

The "substantial probability of damage" formulation derives from a passage in an Appellate Division, Third Department, decision in which the Court (citing a federal decision applying Minnesota law) observed that "it has been stated that personal injuries or property damages are expected if the actor knew or should have known there was a substantial probability that a certain result would take place." (*County of Broome v Aetna Cas. & Sur. Co.*, 146 AD2d 337, 340-341 [3d Dept 1989], citing *Auto–Owners Ins. Co. v. Jensen*, 667 F2d 714, 719-720 [8th Cir 1981].)

It appears, however, that this statement might not have been necessary to the ruling in *County of Broome* to begin with.[28] And there is room to doubt that later appellate decisions took the statement as having established a different, broader standard for when property damage will be found to have been "expected." Thus, in *Utica Fire Ins. Co. of Oneida County v Shelton*, the Second Department quoted this language from *County of Broome*, but then went on directly to articulate a different test: "The question is whether the damages flow directly and immediately from an intended act, thereby precluding coverage, or whether the damages accidentally arise out of a chain of unintended though expected or foreseeable events that occurred after an intentional act." (226 AD2d 705, 706 [2d Dept 1996].)

To the extent one considers this *County of Broome* statement (i) to have been part of holding in that case, rather than dictum, and (ii) to define a test for when property damage is expected (and thus not accidental), it conflicts with decisions of both the Court of Appeals and the First Department. Those precedents teach that "[a] person may engage in behavior that involves a calculated risk without expecting that an accident will occur—in fact, people often seek insurance for just such circumstances." (*Continental Cas. Co. v Rapid-Am. Corp.*, 80 NY2d 640, 649 [1993], citing *Allstate Ins. Co. v Zuk*, 78 NY2d 41, 46 [1991].) An insured's choice to take this calculated risk despite its awareness of the possibility that its conduct "could cause injuries and that claims could be filed" does not, without more, "amount to an expectation of damage" for coverage purposes. (*Union Carbide*, 101 AD3d at 435.[29]) Rather, as the Second

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[28] The record in that case reflected, for example, that Broome County had permitted continued dumping at its landfill for a decade after having been put on notice by state and local agencies that dumping was causing the pollution problems for which the county was later sued—to the point that Broome County's own county attorney had advised it against giving "reports from the County Health Department . . . to the State since such information could be used to close the landfill." (*County of Broome*, 146 AD2d at 341.)

[29] *Cf. City of Johnstown v. Bankers Std. Ins. Co.* (877 F2d 1146, 1151 & n 1 [2d Cir 1989] [suggesting that to the extent *County of Broome* expanded the meaning of "expected or intended" to encompass "any damage that was, objectively speaking, substantially probable, that interpretation appears to conflict" with the existing understanding of that term under New York precedent]).

Department explained in *Shelton*, the proper test asks whether the damage at issue flowed directly and immediately from an intentional act or is connected to that act only through an ensuing chain of intended (if foreseeable) events. (*See* 226 AD2d at 706; *see also Century Indemnity Co. v Brooklyn Union Gas Co.*, 2022 NY Slip Op 50103[U], at *3 [Sup Ct, NY County Feb. 17, 2022] [discussing the expected-or-intended standard].)

Century asserts that in *Consolidated Edison Co. of NY v Allstate Ins. Co.* (98 NY2d 208 [2002] [*Con Ed*]), the Court of Appeals endorsed a jury instruction that had employed a "substantial probability of damage" test. (*See* NYSCEF No. 584 at 4.) This court does not read *Con Ed* so broadly.[30] There, the insured challenged questions on the verdict sheet, which asked the jury, "Was the property damage the result of an accident" or an "occurrence?" (98 NY2d at 220.) In rejecting this challenge, the *Con Ed* Court quoted from the portion of the jury charge in which the trial judge (Ira Gammerman, J.) "instructed the jury that there 'can be accidental results of intentional acts, thus, the term 'accident' or, in this case, 'occurrence' might apply even where the resulting damage was unintended, even though the acts that caused the damage were, in fact, intentional." (98 NY2d at 220-221.) The Court of Appeals held that (i) the verdict-sheet questions were proper, and (ii) any error that did result from the questions was harmless because the trial judge's "relevant instruction on the issue, given twice, was an indisputedly accurate statement of the law." (*Id.* at 221.)

It is true, as Century contends, that Judge Gammerman's instruction, as read twice to the jury, included the statement that "if the operator of the plant was aware of a substantial probability of damage as a result of the manner in which the plant was operated you may find that the damage was intentionally caused and was therefore not accidental." (NYSCEF No. 607 at Tr. 990.) But Judge Gammerman had previously told the jury, "[t]he fact that an insured takes a calculated risk does not in and of itself amount to an expectation of damage," and that the jury could "find intent, if you conclude that the operator of the plant knew that damages would flow directly and immediately from the acts of its employee." (*Id.* at Tr. 989-990.) The "substantial probability" language on which Century now hangs its hat is best understood as functioning in this charge merely to rephrase—not to alter—the existing expected-or-intended test. In any event, the *Con Ed* Court did not indicate whether it intended to endorse the "substantial probability of damage" formulation, in particular, rather than the earlier passage from the instruction *Con Ed* had quoted.

b. The allocation decision's relevance to the jury's coverage determination under that test

That "substantial probability of damage" is not the standard governing the expected-or-intended inquiry does not alone defeat the relevance of the contents of the allocator's decision. As Century contends, the allocator's conclusion that Brooklyn Union "knew that the Three

[30] Century also describes this jury instruction as setting forth the "definitive legal standard for whether a policyholder expected or intended property damage in an MGP case." (NYSCEF No. 584 at 4.) But nothing in the caselaw, or for that matter in the *Con Ed* jury instruction itself, suggests that a distinct version of the expected-or-intended test applies in coverage actions related to MGP-based environmental harm (or other industrial-pollution cases), in particular.

MGPs were contaminating the Gowanus Canal but did nothing to stop it" is relevant to whether Brooklyn Union intended to cause the environmental harm to the Canal for which Brooklyn Union is now being held liable. (NYSCEF No. 584 at 2.) At the same time, the added probative value of this conclusion is limited.

That is, as Century's opposition papers discuss, it is undisputed that Brooklyn Union's MGPs discharged tar-and-oil contaminated wastewater into the Canal through pipes designed for that purpose. (*See* NYSCEF No. 584 at 5 n 7 [citing reports and testimony to that effect by Brooklyn Union's expert, Dr. Neil Shifrin].[31]) The dispute with respect to Brooklyn Union's wastewater discharges has instead been the extent to which Brooklyn Union (successfully) attempted to filter out and separate tar and other contaminants from that wastewater. (*See e.g.* NYSCEF No. 590 at 13-15 [rebuttal report of Dr. Shifrin, contesting the opinions on that point of Century's experts].) The allocator's conclusion that extensive discharges occurred does not discuss that point. And as discussed above (*see* Subsection I.B.2, *supra*), the allocator's conclusion that the discharges occurred "without preventive measures and/or adequate corrective actions taken" (NYSCEF No. 1122 at 76) is facially ambiguous on whether the allocator was assessing Brooklyn Union's (lack of) prevention or adequate correction by current standards or by the standards that prevailed during the period of MGP operations. That ambiguity, although not material to the allocation decision, is significant here, given that the expected-or-intended inquiry focuses on Brooklyn Union's knowledge and intent when the pollution occurred.

Century also argues that the allocation decision is relevant because it undermines arguments that Brooklyn Union's expert witnesses will likely make at trial about the relative and absolute extent to which Brooklyn Union polluted the Gowanus Canal during MGP operations. (*See* NYSCEF No. 584 at 11-12.) The probative value of the allocation decision in this area, too, is lower than Century suggests.

Century has identified what it believes to be five contradictions between "Brooklyn Union's Contention" and "The Neutral's Finding." (*Id.*) Three of those five rely on Century's characterization of reports prepared by Brooklyn Union's expert, Dr. Shifrin. This court, having reviewed the cited portions of Dr. Shifrin's reports, is skeptical that the reports are contradicted by the allocator's decision in these three respects.[32]

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[31] Indeed, Brooklyn Union did not argue during the allocation proceeding that it had refrained from such discharges. It contended that because *all* the parties to the allocation proceedings had discharged pollutants into the Canal, it would be unfair to single out Brooklyn Union. (*See* NYSCEF No. 1096 at 25.)

[32] Thus, for example, Century describes Brooklyn Union as contending that its "MGP operations were no different in terms of pollution potential than other industries that operated adjacent to the Gowanus Canal"—contrary to the allocator's finding that Brooklyn Union caused the vast majority of coal-tar-related pollution in Canal sediments that now must be remedied. (NYSCEF No. 584 at 12.) But the passage from Dr. Shifrin's report to which Century cites for this contention is not articulating Dr. Shifrin's own opinion. Rather, it is describing (and quoting from) the findings of two 1920s governmental reports to show historical understandings of Gowanus Canal pollution. (*See* NYSCEF No. 587 at Rept. 106-107.)

The fourth putative contradiction is limited to the year in which MGP operations began at the Citizens and Fulton sites—whether it was 1860 and 1880, respectively (as Brooklyn Union contends), or "approximately 1859" and "approximately 1879," respectively (as the allocator states) (NYSCEF No. 1122 at 72, 75). As discussed above (*see* Subsection I.B.1, *supra*), the decision does not specify what degree of uncertainty is connoted by the allocator's use of "approximately." The basis for the allocator's choice of dates does not appear in the decision. (*See id.*) And Century has not identified a reason why other evidence of the start date of MGP operations at these sites is unavailable.

The fifth putative contradiction is based on statements in the executive summary of a 2012 "Remedial Investigation Report" that a consultant retained by Brooklyn Union prepared in connection with remediation-related efforts being directed by the New York State Department of Environmental Conservation (DEC). (*See* NYSCEF No. 584 at 12 [Century mem. of law]; NYSCEF No. 598 [report].) Century does not articulate a basis to think Brooklyn Union will call the consultant to testify at trial, or otherwise rely on this decade-old report summary at trial.

Again, this discussion is not meant to suggest that nothing in the allocator's decision could potentially be relevant to the jury's coverage determination—merely that the connection between the two, as articulated on this motion, is much weaker than Century would have it. And the resulting limits on the probative value of the allocation decision is significant, given the potential for undue prejudice to Brooklyn Union and confusion to the jury from introducing the decision.

2. The risk of unfair prejudice to Brooklyn Union from admitting the allocation decision

Relevant evidence may be excluded if its probative value is outweighed by the risk of undue prejudice. (*See Mazella v Beals*, 27 NY3d 694, 709 [2016].) Admitting the contents of the allocation decision into evidence would pose a substantial risk of unfair prejudice to Brooklyn Union.

A risk exists, for example, that the jury would, in practice, struggle to distinguish between (i) the question resolved in the allocation proceeding, concerning the effect of Brooklyn Union's MGP operations on the present need for and costs of cleanup of environmental harm to the Gowanus Canal; and (ii) the questions that the jury must answer, concerning what environmental harm Brooklyn Union expected or intended to commit when it operated MGPs 50 or 100 years ago. Conflating these two questions would unfairly prejudice Brooklyn Union by tending to suggest that because we now know that Brooklyn Union's actions caused significant

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Also, as in its briefing of the issue-preclusion motion, Century erroneously claims on this point that "Brooklyn Union's MGP discharges caused *more than 90%* of the PAH pollution in the Gowanus Canal" (NYSCEF No. 584 at 12 [emphasis in original])—not, as the allocator found, more than 90% of coal-tar-based PAH pollution. (*See* NYSCEF No. 1122 at 77 [drawing this distinction]; *see also* Subsection I.B.4, *supra* [discussing this issue]).

environmental harm to the Canal, Brooklyn Union *must* have expected or intended that harm at the time.

This concern is exacerbated by the fact that the findings that Century seeks to introduce will come in the form of a neutral decisionmaker's formal post-hearing decision. The allocation decision's very nature thus risks its being given excessive weight by the jury. (*Cf.* NYSCEF No. 584 at 1 [Century's mem. of law, characterizing "what the neutral presiding over the Allocation Proceeding (the 'Neutral') had to say" about Brooklyn Union's MGP operations].) This concern about juries giving excessive weight to prior arbitral (and judicial) decisions has led federal courts regularly to hold that those decisions should be excluded from evidence.[33]

Century contends that arbitral decisions "have a greater tendency to mislead the jury" when they resolve "*tangential* issues," and that courts are more likely to admit evidence from a prior arbitration if the issue in that arbitration "bears directly on the question presented to the jury." (NYSCEF No. 584 at 19-20 [emphasis in original].) It is not clear that judicial concern about juries giving excessive weight to prior decisions is limited to circumstances in which those decisions addressed tangential issues. (*See e.g. Wilmington*, 793 F2d at 919 [noting that the arbitration decision addressed an issue that was interrelated with the issue to be decided at trial, involved similar elements of proof, and would be addressed by the parties at trial using much of the same evidence as the arbitration].) Regardless, given the differences in purpose and applicable legal standards, this court does not agree with Century that evidence from the allocation proceeding will bear directly on the question before the jury in the upcoming trial.

Introducing evidence from the allocation decision also would require the parties to spend considerable time explaining the nature of the allocation proceeding, the issues resolved in that proceeding, and how they do—and do not—relate to the issues to be decided by the jury. The parties also might seek to introduce witnesses to rebut, and to defend, the allocator's conclusions. (*See* NYSCEF No. 575 at 9-10 [Brooklyn Union opening mem. of law].) And all this time and effort would be spent addressing a proceeding that was held for a different purpose under

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[33] *See e.g. Barranco v 3D Sys. Corp.* (952 F3d 1122, 1127-1128 [9th Cir 2020] [affirming exclusion of prior arbitral award]); *United States v Sine* (493 F3d 1021, 1033-1035 [9th Cir 2007] [holding that trial court should have excluded contents of prior judicial decision]); *Arlio v Livey* (474 F3d 46, 53 [2d Cir 2007] [reversing jury verdict due to erroneous admission of irrelevant and prejudicial testimony from prior arbitration]); *Faigin v Kelly* (184 F3d 67, 80 [1st Cir 1999] [affirming exclusion of prior judicial order and collecting similar cases]); *Wilmington v J.I. Case Co.* (793 F2d 909, 918-919 [8th Cir 1986] [affirming exclusion of prior arbitral award and arbitration transcript]); *Drummond Coal Sales, Inc. v Norfolk So. Ry. Co.* (2019 WL 3307850, at *7 [WD Va July 22, 2019] [granting in part motion to exclude evidence relating to prior action and collecting cases]); *Amobi v Brown* (317 F Supp 3d 29, 34, 37-38 [D DC 2018] [excluding prior judicial and arbitral decisions]); *Kirouac v Donahoe* (2013 WL 5952055, at *7-*8 [D Me Nov. 6, 2013] [excluding prior arbitral decision]).

different legal standards. Century contends that doing so would "be time well-spent." (NYSCEF No. 584 at 19.) This court is not persuaded.[34]

Accordingly, for the foregoing reasons, it is

ORDERED that Century's motion to bar Brooklyn Union from relitigating four findings from the allocation decision (mot seq 045) is denied; and it is further

ORDERED that Brooklyn Union's motion to exclude the allocation decision from evidence at trial (mot seq 037) is granted.

3/11/2022
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[34] At oral argument on this motion, counsel for Century asserted that it will not be possible to have a fair trial in this action should the court keep the allocator's decision from the jury. This court disagrees.