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See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

DRUMMOND COAL SALES INC.,
Plaintiff-Appellant-Cross Appellee,
v.
KINDER MORGAN OPERATING LP "C,"
Defendant-Appellee-Cross Appellant.

No. 19-14260
|
February 17, 2021

Appeal from the United States District Court for the Northern District of Alabama, D.C. Docket No. 2:16-cv-00345-SGC

Before GRANT, TJOFLAT, and ED CARNES, Circuit Judges.

Opinion

PER CURIAM:

***1** Drummond Coal Sales Inc. and Kinder Morgan Operating LP "C" agreed to a ten-year contract which would allow Drummond to import its coal through Kinder Morgan's Shipyard River Terminal in Charleston, South Carolina. Drummond committed to importing between 3,111,111 and 4,000,000 tons of coal per year and promised to make shortfall payments if it fell below that minimum tonnage. For eight years, it faithfully made those shortfall payments. In the two remaining years of the contract, though, Drummond stopped paying. The company claimed that (unspecified) new government environmental regulations had dried up the coal market around the Shipyard River Terminal. On that basis, Drummond informed Kinder Morgan that it believed it was excused from performance on the remaining two years of the contract.

Echoing that assertion, Drummond sued, asking the district court to declare it excused from its contract with Kinder Morgan under four different theories: (1) frustration of purpose, (2) force majeure, (3) impossibility, and (4) excused performance based on Kinder Morgan's own material breach, not maintaining sufficient import capacity. For its part, Kinder Morgan filed a counterclaim alleging that Drummond had breached the contract. Both parties voluntarily consented to a magistrate judge conducting all proceedings in the case, including the trial and entry of final judgment, in accordance with 28 U.S.C. § 636(c).

The magistrate judge dismissed Drummond's frustration of purpose, force majeure, and impossibility claims, but allowed the material breach claim to go forward. The magistrate judge later granted summary judgment to Kinder Morgan on that remaining claim and on the counterclaim for breach of contract. Drummond appeals both orders. Kinder Morgan, meanwhile, now argues that those orders did not go far enough—it claims that in addition to forcing Drummond to pay the overdue shortfall fees, the court also should have awarded prejudgment interest.

I.

We review de novo the district court's dismissal for failure to state a claim, "accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003). We also review the grant of summary judgment de novo, considering the evidence in the light most favorable to the nonmoving party. *Tracy v. Fla. Atl. Univ. Bd. of Trs.*, 980 F.3d 799, 804–05 (11th Cir. 2020).

II.

Drummond raises the same issues on appeal that it did before the district court. The magistrate judge addressed those arguments in two thorough and well-reasoned opinions. We conclude that the district court correctly dismissed the first three counts of Drummond's complaint and rightly awarded summary judgment to Kinder Morgan on the remaining claim and counterclaim. We therefore affirm based on the magistrate

judge's decisions, which are attached as Appendix A and Appendix B.

We add that Kinder Morgan has forfeited its argument that it is entitled to prejudgment interest. A party that hopes to "preserve a claim, argument, theory, or defense on appeal" must first present it to the district court "in such a way as to afford the district court an opportunity to recognize and rule on it." *See Gennusa v. Canova*, 748 F.3d 1103, 1116 (11th Cir. 2014) (quotation omitted). Yet in the entire record below, Kinder Morgan only mentioned prejudgment interest four times: in its prayer for relief in its counterclaim, in its initial disclosures, in the conclusion of its motion for summary judgment, and in its motion for oral argument. And in each instance, it said no more than the following: "Kinder Morgan demands judgment against Drummond in the amount of $23,464,407.19, prejudgment interest at the maximum rate allowed by New York law, costs, and such other and further relief as the Court finds appropriate." No substantive argument. And even after the district court entered judgment for Kinder Morgan without awarding prejudgment interest, Kinder Morgan never moved for reconsideration. As a court of appeals, we generally will not address issues that were not presented to the district court. *Blue Martini Kendall, LLC v. Miami Dade County*, 816 F.3d 1343, 1349 (11th Cir. 2016). Kinder Morgan's passing references to its entitlement to prejudgment interest were simply not enough to preserve this issue on appeal.

* * *

***2** The magistrate judge properly determined that Drummond breached its contract with Kinder Morgan and that its performance was not excused for any of the reasons raised. The district court's judgment is thus **AFFIRMED.**

Appendix A

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

MEMORANDUM OPINION AND ORDER [1]

This matter, which concerns a long-term contract to import coal, adds a modern twist to the expression "carrying coals to Newcastle." While the idiom of British origin refers to the futile act of attempting to bring coal to a market saturated with the product of local mines, this case presents additional indicia of futility. Indeed, the complaint describes the act of carrying coal to a Newcastle governed by regulations effectively prohibiting the importation of coal.

The plaintiff, Drummond Coal Sales, filed its complaint on February 26, 2016, seeking declaratory relief. (Doc. 1). The defendant, Kinder Morgan Operating L.P. "C" has moved to dismiss all of Drummond's claims. (Doc. 10). The motion is fully briefed and is ripe for adjudication. (Docs. 16, 20, 32). On June 13, 2017, the undersigned conducted a hearing on the motion. For the reasons that follow, the motion to dismiss is due to be granted in part and denied in part.

I. FACTS

Drummond markets and sells coal directly through its affiliates. (Doc. 1 at 2). Most of the coal is mined in Columbia by a Drummond affiliate. (*Id.* at 2). Kinder Morgan owns the Shipyard River Terminal ("River Terminal") at the Port of Charleston, South Carolina. (*Id.* at 3). On May 13, 2005, Drummond and Kinder Morgan entered into a long-term contract to handle Drummond coal from Columbia to end users—primarily coal-fired power plants—via rail. (*Id.*). The contract consists of multiple components, including a Master Service Agreement and associated schedules. (*Id.*). One of the schedules addresses coal imported through the River Terminal, while another schedule applies to coal delivered to a different Kinder Morgan facility in Newport News, Virginia. (*Id.*). At issue here is the schedule ("Schedule") pertaining to the River Terminal. (*Id.*). [2]

The initial term of the Schedule ran from May 13, 2006, through May 13, 2016. (Doc. 1 at 3). The complaint alleges Kinder Morgan was aware that: (1) the purpose of the Schedule was to import Columbian Coal through the River Terminal for rail delivery to power plants; and

(2) contemporaneously, Drummond was negotiating a rail contract with Norfolk Southern Railway to carry the coal from the River Terminal to various power plants. (*Id.*). Indeed, execution of a contract with Norfolk Southern was a condition for Drummond's performance of the Schedule. (*Id.*).

Under the Schedule, Kinder Morgan agreed to handle up to 4,000,000 tons of coal per year, and Drummond agreed to import a minimum of 3,111,111 tons per year. (Doc. 1 at 4). If Drummond did not deliver the minimum tonnage in a given year, the Schedule provided for shortfall payments to Kinder Morgan. (*Id.*). [3] In the event Drummond could not deliver the minimum tonnage, Kinder Morgan agreed to handle coal from third-parties to be credited against the minimum requirement. (*Id.*). [4]

***3** For several years, Drummond imported coal through the River Terminal and paid any applicable penalties when it failed to deliver the minimum tonnage. (Doc. 1 at 4). However, the complaint alleges:

> Over the last several years [ ] the Environmental Protection Agency (EPA) and various other government agencies have proposed and implemented stringent environmental rules and regulations that greatly impacted the consumption of coal by power plants and other end users in the United States.

(*Id.*). The complaint also asserts that, since 2010, approximately 40% of U.S. coal-fired power plants have been retired. (*Id.* at 5). Drummond contends the recent environmental regulations have been especially harsh on power plants which would have received coal imported through the River Terminal. (*Id.*). In this vein, the complaint alleges "[m]ore than half of the power plants identified in the Norfolk Southern contract have either closed completely or no longer burn coal [and that the] power plants still in operation have substantially reduced their use of coal as a fuel source." (*Id.*).

Drummond further states that, due to new environmental regulations, "the market for imported coal in the relevant area, which was the entire purpose of the Schedule, has essentially ceased to exist" and that, since at least 2011, "Kinder Morgan has not handled a single ton of coal" at the River Terminal. (Doc. 1 at 5). The Schedule requires Drummond to provide Kinder Morgan with periodic, non-binding estimates of the amount of coal it anticipates delivering to the River Terminal; from 2011 through 2015, Drummond estimated it would deliver no coal to the River Terminal. (*Id.* at 5-6). Accompanying these estimates were Drummond's requests that Kinder Morgan would work "to find additional volumes and tonnage to bring through the terminal." (*Id.* at 6).

Each year, Kinder Morgan sent invoices to Drummond regarding the shortfall payments for failure to meet the minimum tonnage. (Doc. 1 at 6). From 2011 through 2014, Kinder Morgan sent shortfall payment invoices totaling $52,422,220.35, which Drummond paid. (*Id.* at 6). The complaint alleges that: (1) from 2011 through 2014, Kinder Morgan handled no coal at the River Terminal from any source; (2) during 2015, Kinder Morgan handled no coal at the River Terminal under the Schedule; and (3) on January 29, 2016, Kinder Morgan sent Drummond an invoice for the 2015 penalty payment in the amount of $13,782,221.73. (*Id.* at 7). A subsequent filing reflects the total outstanding balance is now $23,464,407.19. (Doc. 26 at 2). Finally, the complaint alleges that in 2015, the River Terminal's total annual capacity was only 2,500,000 tons, which is below the minimum tonnage threshold set forth in the Schedule. (Doc. 1 at 11-12).

Based on these allegations, Drummond asserts four claims for declaratory relief: (1) frustration of purpose; (2) force majeure; (3) impossibility or impracticability of performance; and (4) excused performance due to Kinder Morgan's inability to perform. (Doc. 1 at 7-12). On each of these theories, Drummond seeks a declaration that it is not required to satisfy the minimum tonnage requirements or remit the penalty payment for calendar year 2015 or the remaining term of the Schedule. (*Id.* at 8, 10-12).

II. STANDARD OF REVIEW

***4** To survive a motion to dismiss for failure to state a claim on which relief may be granted pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as

true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (*citing Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.* (quoting *Twombly*, 550 U.S. at 557).

"Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the defendant-unlawfully-harmed me accusation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "[L]abels and conclusions," "a formulaic recitation of the elements of a cause of action," and "naked assertion[s] devoid of further factual enhancement" are insufficient. *Id.* (quoting *Twombly*, 550 U.S. at 555, 557) (internal quotation marks omitted).

III. DISCUSSION

The Master Service Agreement includes a choice of law provision for New York law. (Doc. 10-1 at 12). Accordingly, New York law will govern the substantive arguments presented here. Before reaching the merits of the parties' arguments, the court will address Drummond's contention that Kinder Morgan's arguments are inappropriately raised on a Rule 12(b) motion.

A. Propriety of Addressing Arguments on a Motion to Dismiss

Drummond's claims for impossibility and frustration of purpose share the common requirement of pleading that the parties' contract expectations were frustrated or destroyed by unforeseeable events. Drummond contends the question of foreseeability is a fact-intensive inquiry which is inappropriate on a motion to dismiss. (*See* Doc. 16 at 9-11). In a similar vein, the response to the motion to dismiss attacks Kinder Morgan's characterization of Drummond's claims as seeking to avoid contract terms simply because they are no longer profitable. (*Id.* at 13). Drummond contends acceptance of this argument regarding economic viability would require the court to make inferences in favor of Kinder Morgan; Drummond argues such inferences are impermissible on a motion to dismiss because economic considerations are not pled in the complaint. (*Id.*).

It is worth noting that the complaint repeatedly alleges environmental regulations have negatively impacted the market for coal. (Doc. 1 at 4) (environmental regulations have "greatly impacted the consumption of coal"); (*id.* at 5) ("due to these environmental regulations, the market for imported coal in the relevant area ... has essentially ceased to exist"); (*id* at 6) (citing "decimation of the import coal market"). Moreover, two of Drummond's claims explicitly rest, at least in part, on financial arguments concerning the market for imported coal. (*See id.* at 7) (in support of frustration of purpose, alleging the Schedule has "become virtually worthless" to Drummond); (*id* at 10) (in support of impossibility, alleging it "has become commercially impracticable for [Drummond] to meet its minimum tonnage requirements"). Accordingly, accepting the facts alleged in the complaint as true, Drummond's claims are at least partially based on financial considerations due to shifts in the coal market.

***5** As to a determination of foreseeability at the motion to dismiss stage of litigation, Drummond quotes *Lowenschuss v. Kane*, 520 F.2d 255, 265-66 (2d Cir. 1975), holding that:

> Resolution of the defense of impossibility requires an examination into the conduct of the party pleading the defense in order to determine the presence or absence of such fault. In all but the clearest cases this will involve issues of fact that must be resolved by the district court only after the parties have had adequate opportunity to investigate and present their evidence.

(Doc. 16 at 12) (emphasis omitted). At issue in *Lowenschuss* was whether the party pleading impossibility was at fault in bringing about the events alleged to have made performance impossible. Here, Kinder Morgan's motion to dismiss is not premised on an argument that Drummond's actions caused the bottom to drop out of the market for imported coal. It is undisputed that the parties are faultless in this regard. Instead, Kinder Morgan contends Drummond's claims fail as a matter of law. Drummond cites no law excusing a plaintiff from pleading the essential elements of its claims; the undersigned is unaware of any such authority. Likewise, as noted by Kinder Morgan, other courts applying New York law have dismissed similar claims on Rule 12(b) motions. (Doc. 20 at 20) (*citing* *Gander Mountain Co. v. Islip U-Slip, LLC*, 923 F. Supp. 2d 351 (N.D.N.Y. 2013), *aff'd*, 561 F. App'x 48 (2d Cir. 2014) (granting 12(b)(6) motion regarding claim for frustration of purpose where plaintiff failed to plead unforeseeability); *Burke v. Steinmann*, No. 03-1390, 2004 WL 1117891 at *9 (S.D.N.Y. May 18, 2004) (dismissing counterclaims for frustration and impossibility for failure to state a claim)); *see* *Urban Archaeology Ltd. v. 207 E. 57th St. LLC*, 951 N.Y.S.2d 84 (N.Y. App. Div. 2009).

Drummond also notes that the majority of cases relied on by Kinder Morgan addressed motions for summary judgment. Drummond contends this further bolsters its argument that adjudication of its claims on a motion to dismiss is premature. Aside from the fact, noted above, that courts applying New York law have disposed of similar claims on motions to dismiss, it is not surprising that most cases addressing the doctrines of impossibility, frustration, and force majeure arose at summary judgment. These theories are typically presented as defenses to claims for breach of contract and would be addressed on summary judgment in the typical case. The nature of declaratory judgment relief turns this model on its head. But a plaintiff seeking declaratory relief still bears the burden of stating a claim. *See* *Alders v. Afa Corp. of Florida*, 353 F. Supp. 654, 657 (S.D. Fla. 1973), *aff'd,* 490 F.2d 990 (5th Cir. 1974)

Based on the foregoing, the court may properly consider these arguments on a motion to dismiss.

B. Unforeseeability

In determining whether a particular event is foreseeable, New York courts have looked to the sophistication of the parties. *Pleasant Hill Developers, Inc. v. Foxwood Enter., LLC*, 885 N.Y.S. 2d 531, 534, (N.Y. App. Div. 2009); *Urban Archaeology*, 951 N.Y.S.2d 84 (holding on a motion to dismiss that sophistication of the parties foreclosed application of doctrine of impossibility). Here, the complaint indicates the parties are both sophisticated business entities, and Drummond does not dispute Kinder Morgan's characterization of the parties as sophisticated. The Master Service Agreement and Schedule on which the complaint is based further reveal the parties' sophistication.

***6** As Kinder Morgan notes, courts outside of New York have found that regulatory changes are foreseeable as a matter of law. (Doc. 20 at 9) (quoting *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157, 1177 (W.D. Okla. 1989)). Additionally, New York courts considering whether regulatory changes affecting contracts give rise to an impossibility defense have generally answered in the negative. *See* *Pleasant Hill Developers,* 885 N.Y.S.2d at 534 (sophisticated developers claiming impossibility based on amended zoning regulations which prohibited planned development could have foreseen or guarded against possibility of amended zoning regulations); *Rooney v. Slomowitz*, 784 N.Y.S.2d 189, 193 (N.Y. App. Div. 2004) (difficulty in obtaining governmental permits necessary for constructing road were foreseeable); *Beardslee v. Inflection Energy, LLC*, 904 F. Supp. 2d 213, 221 (N.D.N.Y. 2012), *aff'd,* 798 F.3d 90 (2d Cir. 2015) (finding regulatory changes regarding **hydraulic fracturing** were foreseeable).

Here, regardless of whether the EPA regulations at issue were foreseeable *per se*, the inescapable fact is that the Master Service Agreement does contemplate the potential for regulatory agencies to impose new regulations affecting the parties' contract expectations. As noted by Kinder Morgan, paragraph 12 of the Master Service Agreement provides that "regulatory bodies may cause KINDER MORGAN to incur additional cost or expense to comply with applicable Regulations" regarding operation of the River Terminal, including environmental regulations. (Doc. 10-1 at 9). The provision allocates the risks of such costs in excess of $300,000 to Drummond. (*Id*. at 9-10). Drummond contends this provision "has absolutely nothing to do with the severe changes in governmental regulation of coal-fired power

plants, and has no bearing on whether the parties foresaw those changes." (Doc. 16 at 16 n.8).

The Master Service Agreement anticipates that environmental regulations could affect the parties' contract expectations. While it is true that paragraph 12 applied to protect Kinder Morgan against the increased cost of environmental and other possible regulations, its inclusion proves the parties contemplated their impact on the contract. The court accepts Drummond's allegation that it did not foresee the promulgation of certain EPA regulations. But the regulations were not unforeseeable. In light of the authority discussed above, as a matter of New York law, the sophisticated parties here could have anticipated that new environmental regulations could affect the market for imported coal.[5] *See Gen. Elec. Co. v. Metals Res. Grp. Ltd.*, 741 N.Y.S.2d 218, 220 (N.Y. App. Div. 2002) (rejecting impossibility defense based on increase in commodity price, finding that "financial disadvantage to either of the contracting parties was not only foreseeable but was contemplated by the contract, even if the precise causes of such disadvantage were not specified").

As a result, Drummond cannot state a claim for relief under the theories of impossibility and frustration of purpose. *See A & S Transp. Co. v. Cty. of Nassau*, 546 N.Y.S.2d 109, 111–12 (N.Y. App. Div. 1989) ("performance of a contract will be excused if such performance is rendered impossible by intervening governmental activities, but only if those activities are unforeseeable ... [W]hen a governmental action is foreseeable, a contractor may not invoke 'impossibility' to excuse performance").

***7** Drummond also argues that, even if environmental regulations are foreseeable in the abstract, the extent of their impact may be unforeseeable. (Doc. 16 at 14-15). This argument principally relies on *Kolodin v. Valenti*, 979 N.Y.S.2d 587 (N.Y. App. Div. 2014), which concerned a recording contract between a musician and her manager. When the parties' personal relationship soured to the point that they entered into a stipulated order prohibiting any contact, the court found the degree of the schism was unforeseeable and that performance of the contract was no longer possible. *Id.* at 591. Here, the facts are distinguishable from those presented *Kolodin*. Even accepting the allegations in the complaint as true, the fact remains that coal-fired power plants continue to operate in the area serviced by the terminal. This stands in stark contrast to a recording contract in which the musician and her manager were prohibited from having any contact.

For the foregoing reasons, the environmental regulations on which Drummond's claims for impossibility and frustration of purpose are premised were foreseeable as a matter of law. Each of Drummond's individual claims are discussed in more detail below.

C. Impossibility

Under New York law, a party to a contract generally "must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome." *Kel Kim Corp. v. Cent. Markets, Inc.*, 519 N.E.2d 295, 296 (1987). A party's performance of contractual obligations may be excused under the doctrine of impossibility:

> only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract

Kel Kim, 519 N.E.2d at 296. Government action can render performance impossible, but only if the action was not foreseeable. *See A & S Transp. Co.*, 546 N.Y.S.2d at 111–12. Additionally, a party pleading impossibility "must demonstrate that it took virtually every action within its powers to perform its duties under the contract." *Kama Rippa Music, Inc. v. Schekeryk*, 510 F.2d 837, 842 (2d. Cir. 1975). However, impossibility is "applied narrowly, due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances." *Kel Kim*, 519 N.E.2d at 296. Accordingly, impossibility is rarely applied to excuse contractual obligations under New York law. *Lagarenee v. Ingber*, 710 N.Y.S.2d 425, 428 (N.Y. App. Div. 2000).

Here, in addition to its failure to allege unforeseeability—and the necessary conclusion that the risk of new regulations could have been foreseen and addressed in the contract—the complaint fails to allege other critical elements of impossibility. First, the complaint does not plausibly state that the subject matter of the contract has been destroyed. *Kel Kim*, 519 N.E.2d at 296. Neither does the complaint plausibly state that performance of the contract is "objectively impossible." *Id.* Indeed, the complaint notes that coal fired power plants continue to operate in the area that would receive coal from the Terminal. Instead, the complaint states that environmental regulations negatively affected the market for imported coal; it further notes that importing coal would be financially burdensome. Under New York law, financial hardship and market swings do not serve as grounds for eviscerating a contract due to impossibility. *See Metals Resources Group*, 741 N.Y.S.2d 218 (N.Y. App. Div. 2002); *Bank of New York v. Tri Polyta Finance B.V.,* No. 01-9104, 2003 WL 1960587 at *4-*5 (S.D.N.Y. Apr. 25, 2003); *Urban Archaeology,* 951 N.Y.S.2d 84.

Next, as noted by Kinder Morgan, the complaint fails to allege that Drummond exhausted all avenues of performing its contractual duties. As previously noted, the Schedule provides Drummond could cure any shortfall in imported coal by delivering petroleum coke instead. (Doc. 10-1 at 28-29). The complaint is silent as to this provision of the Schedule and to any attempts by Drummond to meet its obligations via petroleum coke. Likewise, Drummond has not responded to Kinder Morgan's arguments regarding substitution of petroleum coke. (*See generally* Doc. 16). Accordingly, Drummond has not pled or otherwise argued "that it took virtually every action within its powers to perform its duties under the contract." *Schekeryk*, 510 F.2d at 842.

***8** Any of the foregoing shortcomings—failure to plead unforeseeability, objective impossibility, or exhaustion of all avenues of performance—would provide independently sufficient grounds for dismissal of the claim for impossibility.[6] Accordingly, Drummond's claim for impossibility is due to be dismissed for failure to state a claim.

D. Frustration of Purpose

The doctrine of frustration of purpose is applied narrowly and only when the frustration is "substantial." *Crown It Services v. Koval–Olsen,* 782 N.Y.S.2d 708, 711 (N.Y. App. Div. 2004). "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." Restatement (Second) of Contracts § 261. Under New York law, the doctrine of frustration of purpose discharges a party's contractual duties where "an unforeseen event has occurred, which, in the context of the entire transaction, destroys the underlying reasons for performing the contract, even though performance is possible." *Sage Realty Corp. v. Jugobanka, D.D.,* No. 95-0323, 1997 WL 370786, at *1–2 (S.D.N.Y. July 2, 1997) (citations omitted). The events justifying application of frustration of purpose must be "virtually cataclysmic" and "wholly unforeseeable" and must "render[ ] the contract valueless to one party." *U.S. v. Gen. Douglas MacArthur Senior Vill.,* 508 F.2d 377, 381 (2d Cir.1974). However, the fact that an event may cause a party to realize lower profits or sustain a loss is insufficient to justify application of frustration. *See Rockland Dev. Assoc. v. Richlou Auto Body, Inc.,* 570 N.Y.S.2d 343 (N.Y. App. Div. 1991); *Tri Polyta Fin.*, 2003 WL 1960587, at *4 (S.D.N.Y. 2003) ("Where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused.") (alterations incorporated) (citations omitted).

As with impossibility, a party claiming frustration must show it could not have "anticipated and guarded against" the frustrating event. *Jugobanka,* 1998 WL 702272 at *4. "[I]f a party could reasonably foresee an event that would destroy the purpose of the contract, and did not provide for the event's occurrence, then that party will be deemed to have assumed the risk." *Id.* at *4 n.4. "If a contingency is reasonably foreseeable and the agreement nonetheless fails to provide protection in the event of its occurrence, the defense of commercial frustration is not available." *Gander Mountain*, 923 F. Supp. 2d at 360, (citing *Jugobanka,* 1998 WL 702272 at *3). As with impossibility, courts applying New York law consider the sophistication of the parties when evaluating a claim of frustration. *Id.*

***9** Given the foregoing conclusion that environmental regulations affecting coal burning power plants were

foreseeable as a matter of law, Drummond's claim for frustration of purpose fails. Moreover, the Schedule allocates risks of a market shift. The Schedule's plain terms operate to protect Kinder Morgan's investments in improvements in the River Terminal by guaranteeing it can collect fees for handling a minimum of 3,111,111 tons of coal per year, either by actually handling the ore or via shortfall payments. In turn, the Schedule protects Drummond by: (1) fixing a price for processing its coal, ensuring its costs would not escalate unexpectedly over the ten-year term of the contract; and (2) providing an alternative means of performing by importing petroleum coke. The contract allocated risks for environmental regulations affecting Kinder Morgan and assigned those risks to Drummond. Drummond is a sophisticated entity with unquestioned experience entering into contracts of this nature. Here, the contract was silent as to the risks of environmental regulations affecting Drummond. By this silence Drummond assumed those risks as a matter of New York law.

For the foregoing reasons, Drummond's claim invoking frustration of purpose is due to be dismissed for failure to state a claim.

E. Force Majeure

Like the doctrines of impossibility and frustration of purpose, force majeure clauses excusing nonperformance due to circumstances beyond the control of the parties are narrowly construed under New York law. *Kel Kim*, 519 N.E. 2d at 296-97. Generally, performance will only be excused if the contract includes the specific event that actually prevents performance. *Id.*; *Beardslee,* 904 F. Supp. 2d at 220 ("a force majeure clause must include the specific event that is claimed to have prevented performance"). When examining force majeure clauses, New York courts do not give expansive meaning to events included in the clauses; "they are confined to things of the same kind or nature as the particular matters mentioned." *Kel Kim*, 519 N.E. 2d at 297.

Here, the Master Service Agreement defines a force majeure event as one outside the parties' control and including:

> without limitation, any act of God or of a public enemy or terrorist act, labor troubles, strikes, lockouts, riots, nonavailability of machinery, embargoes, blockades or interventions or expropriations by government or governmental authorities, interference by civil or military authorities or other civil unrest, [or] failure or delay of manufacturers or suppliers to deliver machinery or equipment ....

(Doc. 10-1 at 6). Kinder Morgan contends the complaint fails to state a claim under the force majeure clause because: (1) the environmental regulations were foreseeable; (2) narrowly construed, the clause does not enumerate events similar in nature to environmental regulations; and (3) the environmental regulations did not force or prohibit importation of coal, but instead merely prompted Drummond's decision to stop importing coal through the River Terminal. (Doc. 10 at 17-19). Each argument is addressed in turn.

As an initial matter and as noted by Drummond, unforeseeability is not a requirement of the force majeure clause at issue here. *Starke v. United Parcel Service, Inc.,* 898 F. Supp. 2d 560, 568-69 (E.D.N.Y. 2012), *aff'd*, 513 F. App'x 87 (2d Cir. 2013) (refusing to read an unforeseeability requirement into a force majeure clause that was silent as to foreseeability of triggering events). Accordingly, that environmental regulations were foreseeable does not foreclose force majeure relief.

Next, Drummond relies on a pared-down reading of the provision defining a force majeure event as "without limitation, any ... interventions ... by government or governmental authorities [or] interference by civil authorities." (Doc. 10-1 at 6; *see* Doc. 16 at 23). Drummond contends environmental regulations affecting coal constitute a "government intervention" or an "interference by civil authorities" triggering the force majeure clause. (Doc. 16 at 23). Kinder Morgan argues the narrow construction applied to force majeure events forecloses such an expansive interpretation. (Doc. 20 at 17-18).

***10** Under New York law regarding interpretation of force majeure clauses:

> When the event that prevents performance is not enumerated, but the clause contains an expansive catchall phrase in addition to specific events, "the precept of *ejusdem generis* as a construction guide is appropriate"—that is, "words constituting general language of excuse are not to be given the most expansive meaning possible, but are held to apply only to the same general kind or class as those specifically mentioned."

Team Mktg. USA Corp. v. Power Pact, LLC, 839 N.Y.S.2d 242, 246 (N.Y. App. Div. 2007) (citing *Kel Kim*, 516 N.Y.S.2d at 806); *see Bers v. Erie R.R. Co.*, 225 N.Y. 543, 546 (N.Y. App. Div. 1919) ("when a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words are restricted to those of the same kind (*ejusdem generis*))" (citation omitted). Accordingly, while the clause at issue here lists force majeure events "without limitation," whether a particular event triggers the clause must be determined in light of the specifically enumerated events.

Drummond contends environmental regulations constitute government "interventions" or "interference by civil or military authorities." (*See* Doc. 16 at 23). Applying a broad construction of the terms, this interpretation is probably correct. However, applying *ejusdem generis* to the contract language at issue here, the general terms "intervention" and "interference" are preceded by more specific events, including embargoes and blockades. Likewise, both the terms "intervention" and "interference" are followed by the phrase "or other civil unrest." (Doc. 10-1 at 6). Accordingly, the force majeure clause's inclusion of interventions or interferences as triggering events is qualified by the surrounding terms, which arise in the context of civil unrest or military conflicts. Moreover, the complaint does not allege that the market for coal is subject to an embargo or blockade. Simply put, environmental regulations do not constitute force majeure events under the circumstances presented here. *See Walk-In Med. Centers, Inc. v. Breuer Capital Corp.*, No. 84-0730, 1986 WL 2818, at *4 (S.D.N.Y. Feb. 24, 1986) (appropriate to apply *ejusdem generis* where it was "unlikely that the parties could have intended the phrase 'adverse market conditions' to swallow up specified material events affecting the securities markets, thereby allowing [a party] to terminate its firm commitment underwriting agreement whenever the market declined").

Finally, Kinder Morgan contends that, "where government regulations merely trigger a party's *decisions* to act, rather than force or prohibit certain actions, a force majeure clause will not apply." (Doc. 10 at 18). In support of this argument, Kinder Morgan relies on *Macalloy Corp. v. Metallurg., Inc.*, 728 N.Y.S.2d 14, 14-15 (N.Y. App. Div. 2001). In *Macalloy*, the plaintiff sought declaratory relief under a contract which included a "plant shutdown" as a force majeure event. The appellate court affirmed the trial court's grant of summary judgment for the defendant, finding that the plaintiff voluntarily shut down its plant "due to financial considerations brought about by environmental regulations." In affirming, the appellate court held these circumstances did not constitute a force majeure event and that "financial hardship is not grounds for avoiding performance under a contract." 728 N.Y.S.2d at 14-15.

***11** In response, Drummond contends the reasoning in *Macalloy* is not applicable here because the environmental regulations have led the end users of coal to shut down power plants or switch to other fuel sources. (Doc. 16 at 23-24). Drummond contends it has no control over third-parties' decisions to shut down or cease using imported coal. (*Id.* at 24). Drummond's invocation of the force majeure clause is based on power plants' decisions to "substantially reduce or eliminate their use of coal." (Doc. 1 at 9). However, the issue here is Drummond's performance. To that end, Drummond seeks to be excused from its contractual duties due, at least in part, to financial considerations caused by environmental regulations. Accordingly, *Macalloy* is instructive and provides an independent basis on which to dismiss Drummond's claim for relief under the force majeure clause.

For the foregoing reasons, Drummond's claim for force majeure is due to be dismissed for failure to state a claim.

F. Excused Performance

The complaint alleges Drummond is excused from performing because, in 2015, the River Terminal was unable to handle the minimum volume of coal required under the Schedule. The arguments regarding this claim have evolved over the course of the briefing. Initially, Kinder Morgan moved for dismissal of Drummond's claim for excused performance on two related grounds: (1) it is a breach

of contract claim masquerading as a declaratory judgment claim; and (2) the contract provides for monetary damages for Kinder Morgan's alleged breach, making declaratory relief inappropriate. (Doc. 10 at 19-20). After Drummond's response to these arguments, Kinder Morgan argued for the first time on reply that the complaint: (1) does not allege a material breach by Kinder Morgan; and (2) reveals no justiciable controversy because relief would not alter Drummond's future conduct. (Doc. 20 at 18-19). After the court ordered further briefing, Drummond filed a sur-reply arguing the complaint describes an actual justiciable controversy. (Docs. 31-32). Each argument is addressed in turn.

As an initial matter, the availability of an alternative remedy does not foreclose relief under the Declaratory Judgement Act, which provides declaratory relief is available "whether or not further relief is or could be sought." 28 U.S.C. § 2201(a); *see* FED. R. CIV. P. 57 ("The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate.").

Turning to Kinder Morgan's arguments raised for the first time in reply, they rely on the complaint's allegation that Drummond will not deliver any additional coal to the River Terminal. (Doc. 20 at 18-19). Under these circumstances, Kinder Morgan contends any breach alleged in the complaint is immaterial and that declaratory relief would not alter Drummond's decision to cease importing coal through the River Terminal. (*Id.*). Kinder Morgan's arguments rely on *Orlander v. Staples, Inc.,* 802 F.3d 289, 298 (2d Cir. 2015), in which the court noted that a plaintiff relying on a defendant's breach to discharge further performance must allege a "material breach." Kinder Morgan further argues that any breach alleged in the complaint is immaterial because it did not injure Drummond. As Kinder Morgan would have it, because Drummond imported no coal and stated it would not do so, Kinder Morgan's alleged inability to provide the full terminal capacity set forth in the Schedule was harmless. (Doc. 20 at 19) (citing *Reyelt v. Danzell*, 533 F.3d 28, 32 (1st Cir. 2008)).

Drummond's sur-reply notes that a material breach provides one—but not the only—justification for rescinding a contract. (Doc. 32 at 9) (quoting *Babylon Associates v. Suffolk Cty.,* 475 N.Y.S.2d 869, 874 (N.Y. Div. App. 1984) (party seeking rescission "must allege fraud in the inducement of the contract; failure of consideration; an inability to perform the contract after it is made; or a breach of the contract which substantially defeats the purpose thereof"). Drummond relies on the complaint's allegations that Kinder Morgan did not have the required capacity at the River Terminal to show it was unable to perform the contract. These allegations, accepted as true, are sufficient to state a claim under New York law.

***12** Turning to the Declaratory Judgement Act's requirement of an actual controversy, the Supreme Court has noted:

> The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment .... It is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case.

Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941) (citation omitted). Whether a claim presents a sufficiently real and immediate controversy is examined on a case-by-case basis. *Muller v. Olin Mathieson Chemical Corp.,* 404 F.2d 501, 504 (2d Cir. 1968).

Here, the complaint alleges that on January 29, 2016, Kinder Morgan sent Drummond an invoice for the 2015 shortfall payment in the amount of $13,782,221.73. Subsequently, Kinder Morgan has noted that the shortfall payments due

from Drummond total $23,464,407.19. (Doc. 26 at 2). Drummond has not paid the outstanding invoices. Under these circumstances, the court concludes Drummond's claim for excused performance alleges a sufficiently immediate, actual controversy between adversarial parties. *See State Farm Fire & Cas. Co. v. Silver Star Health and Rehab*, 739 F.3d 579, 583-84 (11th Cir. 2013) (affirming district court's declaration that plaintiff did not owe amounts reflected in outstanding bills).

For the foregoing reasons, Kinder Morgan's motion to dismiss is due to be denied as to Drummond's claim for excused performance.

IV. CONCLUSION

For all of the foregoing reasons, Kinder Morgan's motion to dismiss is **GRANTED IN PART** and **DENIED IN PART.** (Doc. 10). Specifically, the motion is **GRANTED** as to Drummond's claims for frustration of purpose, force majeure, and impossibility, and those claims are **DISMISSED** for failure to state a claim; the motion is **DENIED** as to Drummond's claim for excused performance.

This memorandum opinion and order triggers the running of the deadlines set forth in the Scheduling Order. (Doc. 25).

DONE this 25th day of July, 2017.

STACI G. CORNELIUS

U.S. MAGISTRATE JUDGE

Appendix B

MEMORANDUM OPINION [1]

This matter concerns a contract dispute. Presently pending are the cross-motions for summary judgment filed by the plaintiff/counter-defendant, Drummond Coal Sales, Inc. (Doc. 54), and the defendant/counter-plaintiff, Kinder Morgan Operating L.P. "C" (Doc. 50). [2] As discussed below, Drummond's motion is due to be denied, and Kinder Morgan's motion is due to be granted in its entirety.

I. PROCEDURAL HISTORY

***13** Drummond filed its complaint on February 26, 2016, seeking declaratory relief on four grounds: (1) frustration of purpose; (2) force majeure; (3) impossibility or impracticability of performance; and (4) excused performance due to Kinder Morgan's inability to perform. (Doc. 1 at 7-12). The court subsequently dismissed all but the excused performance claim for failure to state a claim. (Doc. 33). Thereafter, Kinder Morgan answered and filed a counterclaim for breach of contract. (Doc. 34). The instant cross-motions for summary judgment followed. Accordingly, the only claims before the court are Drummond's declaratory relief claim for excused performance and Kinder Morgan's breach of contract claim.

II. STANDARD OF REVIEW

Under Rule 56(c) of the *Federal Rules of Civil Procedure*, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party asking for summary judgment always bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings or filings which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323. Once the moving party has met its burden, Rule 56(e) requires the non-moving party to go beyond the pleadings and by his own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial. *See id.* at 324.

The substantive law identifies which facts are material and which are irrelevant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the non-movant. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *See id.* at 249.

III. FACTS

Drummond markets and sells coal directly through its affiliates. (Doc. 1 at 2). Most of the coal is mined in Columbia by a Drummond affiliate. (*Id.*). Kinder Morgan owns the Shipyard River Terminal ("River Terminal") at the Port of Charleston, South Carolina. (*Id.* at 3). In 2005, Drummond and Kinder Morgan began discussing the possibility of importing coal through the River Terminal. (Doc. 73 at 8). Prior to these discussions, the River Terminal was used to export coal and cement; importing coal required overhauling the facility. (Doc. 73 at 8).

On May 13, 2005, Drummond and Kinder Morgan entered into a long-term contract ("Contract") to unload Drummond coal from vessels at the River Terminal so it could be delivered to end-users, effective from May 13, 2006, through May 13, 2016. (Doc. 52-2; Doc. 52-3). The Contract consists of multiple components, including a Master Service Agreement ("MSA") and associated schedules. (*Id.*). At issue here is the schedule ("Schedule") pertaining to the River Terminal. (Doc. 52-2 at 24-35; Doc. 52-3 at 1-11). Under the Schedule, Kinder Morgan agreed to handle up to 4,000,000 tons of coal per year, and Drummond agreed to handle a minimum of 3,111,111 tons per year, all at an agreed rate per ton. (Doc. 1 at 4; Doc. 52-2 at 24-27, 34). On Halloween of each year, Drummond was required to provide Kinder Morgan with an "Annual Volume Nomination" ("Nomination"), specifying (or nominating) the amount of coal it would deliver the following calendar year. (Doc. 52-2 at 28). If Drummond failed to deliver the minimum tonnage in a year, it was required to make shortfall payments. (*Id.*).

***14** The Schedule also required Kinder Morgan to make certain improvements to the River Terminal so it could handle Drummond's coal. (Doc. 52-2 at 24-25). Among the required improvements was construction of facilities at a dock called "Berth #2," including installation of cranes "capable of discharging at least 20,000 tons of" Drummond's coal per day. (Doc. 52-2 at 24). Kinder Morgan hired engineers to design Berth #2 to comply with the specifications in the Schedule. (Doc. 73 at 9). Kinder Morgan installed cranes capable of discharging 25,000 tons of coal per day, exceeding the requirements in the Schedule. (*Id.*).

Regarding the maximum guaranteed volume, the Schedule provides:

> KINDER MORGAN agrees (i) to provide the services set forth in this Schedule on a pro rata basis up to 4,000,000 Tons of Commodity per calendar year through Berth # 2, provided that [Drummond] delivers such Commodity to the Terminal each calendar quarter at a [specified] rate ....

(Doc. 52-2 at 25-26). The Schedule further provides:

> All of KINDER MORGAN's obligations under this Schedule are conditioned on (a) [Drummond] providing the [Nominations, and] (b) [Drummond] providing adequate quality and quantity of Commodity as contemplated by this Schedule ....

(Doc. 52-2 at 26).

Drummond never delivered the minimum annual tonnage. (Doc. 73 at 10). From 2006 through 2010, Drummond delivered smaller amounts of coal annually and paid the applicable shortfalls. (*Id.*) Kinder Morgan processed all of the coal Drummond did deliver. (*Id.*). From 2011 until the end of the Contract, Drummond did not deliver any coal to the River Terminal. (*Id.*). In 2012, because it did not intend to deliver any coal to the River Terminal in the foreseeable future, Drummond told Kinder Morgan it wanted to relocate the two cranes Kinder Morgan installed at Berth #2 to a Drummond facility in Columbia. (*Id.*; Doc. 52-4). Kinder agreed, and on May 29, 2012, the parties executed a Side Letter Agreement modifying the MSA and the Schedule. (Doc. 52-4). The Side Letter Agreement relieved Kinder Morgan of its obligation to provide cranes at Berth #2. (*Id.* at 2-3). If Drummond did import any coal through the River Terminal: (1) either it or Kinder Morgan would lease two floating cranes at Drummond's expense; or (2) Drummond would deliver the

coal in self-unloading vessels. (*Id.* at 3). The Side Letter Agreement also specified Drummond remained obligated to deliver the minimum tonnage or make the shortfall payments set forth in the Schedule. (*Id.* at 3).

By 2014, Drummond no longer needed the cranes in Columbia but still did not anticipate delivering coal to the River Terminal. (Doc. 73 at 11). Drummond sent the cranes to a Kinder Morgan Facility in Baltimore, Maryland. (*Id.*; Doc. 52-5 at 3). Accordingly, the parties executed a Restated Side Letter Agreement on August 22, 2014. (Doc. 52-5). The Restated Side Letter Agreement restates the provisions in the original Side Letter Agreement relieving Kinder Morgan of its obligations to provide cranes at the River Terminal and specified that, if Drummond imported coal through the River Terminal: (1) either it or Kinder Morgan would lease floating cranes at Drummond's expense; or (2) Drummond would deliver the coal in self-unloading vessels. (*Id.* at 3). The Restated Side Letter Agreement also reiterated: (1) Drummond's obligations to Kinder Morgan under the Schedule were not "altered or reduced"; and (2) all "payments due under the Schedules shall continue to be made pursuant to the Schedules." (*Id.* at 3, 6). Without the cranes, Kinder Morgan's capacity to unload coal at the River Terminal was reduced to zero. (Doc. 73 at 11; Doc. 55-10 at 50).

***15** In 2014, as it had in previous years, Drummond made the required shortfall payment to Kinder Morgan. (Doc. 73 at 11). From 2011 to 2014, Drummond paid $52,422,220.35 in shortfall payments. (Doc. 60-1). Drummond nominated no coal for 2015 or 2016. (Doc. 73 at 11). On January 29, 2016, Kinder Morgan sent Drummond an invoice for the 2015 shortfall payment in the amount of $13,782,221.73. (Doc. 1 at 7). A subsequent filing reflects the outstanding 2015 and 2016 shortfall payments total $23,464,407.19. (Doc. 26 at 2). On February 26, 2016, Drummond sent Kinder Morgan a letter stating it would not make the 2015 shortfall payment. (Doc. 55-1 at 3) Drummond's letter contended unspecified "governmental environmental regulations [had] caused the potential customers for import coal to either cease or substantially reduce their use of coal." (*Id.*). Drummond further contended these developments constituted a force majeure event which would likely persist and prevent it from performing in 2016. (*Id.*). The letter is silent regarding the capacity of the River Terminal. (*Id.*). On the same day, Drummond filed the instant lawsuit. (Doc. 1).

Kinder Morgan's website states the River Terminal has the capacity to handle 2,500,000 tons annually. (Doc. 54-1 at 3). Kinder Morgan has never handled even 2,000,000 tons of coal in a single year at Berth #2, much less the 4,000,000 tons specified in the Schedule. (*Id.*). Kinder Morgan did not designate an affirmative expert witness in this case, but Drummond did. Instead, Kinder Morgan designated a rebuttal expert to comment on the testimony of Drummond's expert. (*Id.* at 3-5). [3]

IV. DISCUSSION

Under New York law, [4] "the initial interpretation of a contract is a matter of law for the court to decide," including "the threshold question of whether the terms of the contract are ambiguous." *Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's*, 136 F.3d 82, 86 (2d. Cir. 1998). Where a contract is unambiguous, disputes as to its terms are properly resolved on summary judgment. *Adirondak Transit Lines, Inc. v. United Transp. Union*, 305 F.3d 82, 85 (2d. Cir. 2002). Regarding the parties' burdens of proof, Drummond bears the burden of showing it is entitled to declaratory relief terminating the Contract; Kinder Morgan bears the burden of showing Drummond breached the Contract. Each claim is addressed in turn.

A. Drummond's Claim for Declaratory Relief

Before addressing the merits, it is necessary to clear up some confusion regarding the nature of Drummond's claim —confusion to which it appears this court has contributed. At the motion to dismiss stage, Kinder Morgan argued in its reply that Drummond failed to state a claim for excused performance because the complaint: (1) did not allege a material breach by Kinder Morgan; and (2) revealed no justiciable controversy because relief would not alter Drummond's future conduct. (Doc. 20 at 18-19). Because these arguments were presented for the first time in Kinder Morgan's reply, the court ordered further briefing. (Doc. 31). Drummond filed a sur-reply which, among other arguments, contended a material breach provides but one avenue for excusing performance. (Doc. 32 at 9). In support of this argument, Drummond quoted *Babylon Associates v. Suffolk Cty.*, 475 N.Y.S.2d 869, 874 (N.Y. App. Div. 1984), for the following proposition:

> In order to justify the intervention of equity to rescind a contract, a party must allege fraud in the inducement of the contract; failure of consideration; an inability to perform the contract after it is made; or a breach of the contract which substantially defeats the purpose thereof.

***16** (Doc. 32 at 9). In denying the motion to dismiss Drummond's claim for excused performance, the court quoted *Babylon* and summarized Drummond's argument as asserting "a material breach provides one—but not the only—justification for rescinding a contract." (Doc. 33 at 26).

Kinder Morgan's opposition to Drummond's motion for summary judgment seizes on the court's language and contends Drummond cannot show entitlement to rescission. (Doc. 67 at 6-7).[5] In reply, Drummond has explicitly forsaken any claim for rescission, emphasizing its only remaining claim seeks termination of the Contract. (Doc. 65-1 at 8-9; *see* Doc. 66-1 at 21). Accordingly, further discussion of rescission is unnecessary. *See Sinco, Inc. v. Metro-N. Commuter R. Co.*, 133 F. Supp. 2d 308, 311 n.4 (S.D.N.Y. 2001) ("Several cases conflate the terms 'rescission' and 'termination,' which refer to conceptually distinct doctrines.").

Under New York law, the right to terminate a contract "is available only where one party has materially breached the contract." *Sinco*, 133 F. Supp. 2d at 311 (quoting *ESPN, Inc. v. Office of the Comm'r of Baseball,* 76 F. Supp. 2d 383, 392 (S.D.N.Y.1999)); *see Am. Railcar Indus., Inc. v. Gyansys, Inc.*, No. 14-8533, 2015 WL 5821636, at *2 (S.D.N.Y. Sept. 9, 2015); *VFS Fin., Inc. v. Falcon Fifty LLC*, 17 F. Supp. 3d 372, 379 (S.D.N.Y. 2014). "Where a breach is material, the party is justified in refusing to go on, and thus the law provides that party with the right to terminate." *ESPN,* 76 F. Supp. 2d at 392. Termination is an "extraordinary remedy" to be permitted only when the breach goes to "the root of the agreement." *Septembertide Pub., B.V. v. Stein & Day, Inc.,* 884 F.2d 675, 678 (2d Cir.1989). Additionally, "a party who terminates in response to a material breach presumably does so because it can no longer derive a worthwhile benefit from its contractual relationship." *ESPN*, 76 F. Supp. 2d at 392.

"A breach is material if it defeats the object of the parties in making the contract and 'deprives the injured party of the benefit that it justifiably expected.' " *ESPN,* 76 F. Supp. 2d at 392 (quoting *Farnsworth on Contracts* § 8.16 (3d ed. 1999)) (alteration incorporated); *see also Babylon*, 475 N.Y.S.2d at 847 (defining material breach as one "so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract").[6] Put another way, a breach is only material if it "go[es] to the root of the agreement between the parties [and] is so substantial that it defeats the object of the parties in making the contract." *Frank Felix Assocs., Ltd. v. Austin Drugs, Inc.,* 111 F.3d 284, 289 (2d Cir. 1997) (quotation marks omitted). "Conversely, a breach is not material, and the aggrieved party is not excused from performance of its obligations, if the breaching party has substantially performed [its] end of the contract." *Barbagallo v. Marcum LLP,* 925 F. Supp. 2d 275, 287 (E.D.N.Y. 2013). While the questions of the materiality of a breach or the substantiality of performance are often questions of fact, they can be resolved as a matter of law "where the inferences are certain." *Merrill Lynch & Co. v. Allegheny Energy, Inc.,* 500 F.3d 171, 186 (2d Cir. 2007).

***17** Here, the inferences are certain. The root or object of the Contract was to import Drummond's coal via the River Terminal. The Contract assured Drummond that Kinder Morgan would move up to 4,000,000 tons of coal but also assured—through shortfall payments—Kinder Morgan would not be left on the hook for start-up costs if Drummond delivered less coal than anticipated. It is undisputed that during the relevant time-period Drummond nominated and delivered no coal to the River Terminal.

Under these circumstances, any inability to process 4,000,000 tons of coal annually at the River Terminal was not "so substantial that it defeat[ed] the object" of importing Drummond's coal through the facility. *Frank Felix Assocs.,* 111 F.3d at 289. It is also difficult to imagine how any diminished capacity deprived Drummond of the benefit it could have reasonably expected from 4,000,000 tons of capacity under these circumstances. *See Falcon Fifty*, 17 F. Supp. 3d at 380 (citing *Hadden v. Consol. Edison Co. of N.Y.,* 312 N.E.2d 445 (1974); and quoting Restatement (Second) of

Contracts § 241 (1981) ("the extent to which the injured party will be deprived of the benefit which he reasonably expected" is relevant to materiality)). All of the foregoing is particularly true here, where Drummond had removed the cranes from the River Terminal, eliminating its coal-handling capacity entirely. Indeed, the Side Letter Agreements explicitly stated: (1) Drummond would be responsible for providing cranes or self-unloading vessels for any future deliveries; and (2) the remaining provisions of the Schedule—including the shortfall payments—remained in effect. Moreover, the undisputed fact that Kinder Morgan processed every bit of coal Drummond did deliver under the Contract shows it substantially performed. *Barbagallo,* 925 F. Supp. 2d at 287. In light of the undisputed facts of this case, any lack of capacity at the River Terminal alleged by Drummond was not a material breach.

Supporting the conclusion that decreased coal-handling capacity would not constitute a material breach is the fact that it did not motivate or alter Drummond's behavior. First, Drummond's February 26, 2016 letter was entirely silent as to the Terminal's capacity; instead, it rested solely on a claim of force majeure due to environmental regulations. Next, Drummond's corporate representative testified the capacity of the River Terminal was unimportant or irrelevant to Drummond from 2010 through 2016 because it was unable to sell coal it imported into the U.S. (Doc. 55-9 at 55). Drummond's corporate representative also answered affirmatively when Kinder Morgan's counsel stated: (1) the capacity of the River Terminal "didn't matter" once the cranes were removed; and (2) Drummond did not question the annual capacity of the River Terminal until it was discussing the situation with counsel "sometime in 2016." (*Id.* at 63, 71). Drummond's corporate representative further testified Drummond "operated its business just as if" the River Terminal's annual capacity was 4,000,000 tons. (*Id.* at 75).

Finally, any diminished capacity was not a material breach because Kinder Morgan's obligation to handle any coal was preconditioned upon Drummond's nomination and delivery of coal. New York law defines a condition precedent as "an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises." *MHR Capital Partners LP v. Presstek, Inc.*, 912 N.E.2d 43, 47 (N.Y. 2009) (quoting *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.,* 660 N.E.2d 415 (N.Y. 1995)). Courts applying New York law have held contractual provisions including the terms "provided" and "on condition that" create conditions precedent. *Nat'l Fuel Gas Dist. Corp. v. Hartford Fire Ins. Co.,* 814 N.Y.S.2d 436, 437 (N.Y. App. Div. 2006); *Ginett v. Computer Task Group,* 962 F.2d 1085, 1100 (2d Cir. 1992). Express conditions must be literally performed. *Presstek,* 912 N.E.2d at 47.

***18** Here, the Schedule unambiguously created conditions precedent. Kinder Morgan promised to process up to 4,000,000 tons annually "provided that" Drummond delivered coal at a specified rate and "conditioned on" Drummond's: (1) nomination of a certain amount of coal; and (2) delivering a sufficient quality and quantity of coal. (Doc. 52-2 at 25-26). Because Drummond nominated and delivered no coal in 2015 and 2016, Kinder Morgan did not have an obligation to move any Drummond coal in those years, much less 4,000,000 tons. [7]

For the foregoing reasons there are no genuine issues of material fact, and Kinder Morgan is entitled to judgment as a matter of law on Drummond's claim for declaratory relief.

B. Breach of Contract

The elements of breach of contract under New York law are familiar: (1) the existence of a contract between the parties; (2) the plaintiff's performance of its obligations under the contract; (3) the defendant's breach of the contract; and (4) resulting damages to the plaintiff." *Diesel Props S.r.l. v. Greystone Bus. Credit II LLC,* 631 F.3d 42, 52 (2d Cir. 2011). Here, the undisputed facts show Kinder Morgan has established the elements of a breach of contract. As to performance, the undisputed fact that Kinder Morgan processed every piece of coal Drummond delivered to the River Terminal satisfies this element.

However, Drummond contends Kinder Morgan must also show it was "ready, willing, and able to perform" its obligation of handling 4,000,000 tons of coal per year. (Doc. 54-1 at 6-8; Doc. 65-1 at 9-14). Because Kinder Morgan did not designate an affirmative expert witness to opine on the River Terminal's annual capacity to process coal, Drummond contends it cannot show it was ready, willing, and able to perform under the Schedule. (Doc. 54-1 at 8-11; Doc. 65-1 at 17-20). Kinder Morgan's response relies on *Am. List Corp. v. U.S. News & World Report, Inc.*, 549 N.E.2d 1161 (N.Y. 1989), in which New York's highest court held the

non-repudiating party was not required to "prove its ability to perform the contract in the future." (Doc. 67 at 8-9). Drummond, in turn, relies on *Pesa v. Yoma Dev. Grp., Inc.*, 965 N.E.2d 228, 230-31 (N.Y. 2012), which it claims clarified that the non-repudiating party bears the burden of proving its ability to perform. (Doc. 65-1 at 9-14).

In *Am. List*, the contract at issue ran for a ten-year term. Under the contract the plaintiff, American List Corp. ("Am. List"), agreed to provide the defendant, U.S. News & World Report, Inc. ("U.S. News"), with mailing lists of names each year; U.S. News would pay Am. List at an agreed rate per name up to a maximum number of names. To finance Am. List's start-up costs, U.S. News agreed to pay a larger fee per name during the first five years of the contract. The parties performed under the contract for the first eighteen months, until U.S. News was purchased by another entity; the new owner subsequently cancelled the contract. Am. List sued for breach of contract, seeking the balance owed on the contract. Under these circumstances, the appellate court held Am. List was not required to show its ability to perform for the more than eight years remaining on the contract. *Am. List*, 549 N.E.2d at 1165.

***19** In *Pesa*, New York's highest court noted inconsistencies in lower court decisions regarding whether a non-repudiating party in an anticipatory breach case was required to show it was ready, willing, and able to perform. 965 N.E.2d at 231. The instrument at issue was a real estate contract. *Pesa* held that, while the non-repudiating party was not required to tender performance, it was required to show the ability and intention to perform. *Id. Pesa* also clarified that the non-repudiating party bore this burden. *Id.* In reaching this conclusion, the court explained its decision in *Pesa* was not inconsistent with *Am. List*:

> This allocation of the burden of proof is not inconsistent with our decision in *American List Corp. v. U.S. News & World Report*, 549 N.E.2d 1161 (1989). That case involved the repudiation by a magazine of a contract to rent mailing lists from a list supplier "over a 10–year period" (*id.*). We held that "[t]he nonrepudiating party need not ... prove its ability to perform the contract in the future" (*id.*). In context, this meant that the plaintiff would not be forced to meet the perhaps impossible burden of showing what its financial condition would have been for many years to come. No comparable burden falls on the non-repudiating party in a case like this one. These buyers need only show that they would and could have closed the transaction if the seller had proceeded to a closing as the contract required.

Pesa, 965 N.E.2d at 230-31 (parallel citations omitted).

As an initial matter, it is not even clear the doctrine of anticipatory breach applies here. While Drummond initiated this lawsuit when the Contract was still in effect, Kinder Morgan did not file its counterclaim for breach of contract until August 8, 2017—more than a year after the Contract expired. (Doc. 34). Of course, Kinder Morgan's counterclaim would relate back to Drummond's complaint for statute of limitations purposes under Rule 15; but by the time Kinder Morgan asserted breach of contract, Drummond's refusal to make the shortfall payments was an actual breach, not an anticipatory one.[8] By August 8, 2017, Kinder Morgan did not have even a theoretical duty to handle Drummond's coal because the Contract had expired. Moreover, Kinder Morgan's counterclaim alleges a breach of contract, not an anticipatory breach. (Doc. 34 at 6-8).

Additionally, anticipatory breach is plainly inapplicable to the extent Kinder Morgan's counterclaim is based on Drummond's failure to make the 2015 shortfall payment. The theory of "anticipatory breach is applicable to bilateral contracts which contemplate some future performance by the nonbreaching party." *Am. List*, 549 N.E.2d at 1164 (citing *Long Is. R.R. Co. v. Northville Indus. Corp.*, 362 N.E.2d 558 (N.Y. 1977)). Here, Drummond "repudiated" the contract on February 26, 2016, when it claimed a force majeure event: (1) relieved it of the duty to make the 2015 shortfall payments; and (2) would likely persist through 2016. While the term of the contract did not expire until May 13, 2016, the parties' obligations in 2015 were already certain. Drummond neither nominated nor delivered any coal in 2015, and Kinder Morgan did not owe any future performance on its 2015 obligations by the time Drummond repudiated. Accordingly, the Contract did not "contemplate some future performance by the nonbreaching party" regarding obligations arising in 2015. *Id.*; *see also* 1 *Williston on Contracts* § 1:19 (4th ed.) ("a contract is not executory merely because it has not been fully performed by payment, if all acts necessary to give rise to the obligation to pay have been performed.").

***20** However, even if the doctrine of anticipatory breach applies to Kinder Morgan's affirmative claim for breach of

contract, the rule articulated in *Am. List* applies here. Notably, *Pesa* did not overturn *Am. List*; indeed, it noted the two cases were consistent. *Pesa* 965 N.E.2d at 230-31. *Pesa* reasoned that forcing the non-repudiating plaintiff in *Am. List* to show the ability to perform would have placed a "perhaps impossible burden of showing what its financial condition would have been for many years to come." *Id.* While *Pesa* held that the non-repudiating party in that case had the duty to show the ability and intent to perform, the holding's rationale was grounded in practical considerations: execution of the contract at issue there contemplated a one-time consummation. *Id.* ("No comparable burden falls on the non-repudiating party in a case like this one. These buyers need only show that they would and could have closed the transaction if the seller had proceeded to a closing as the contract required.").

Here, for the same reasons that Drummond's claim for declaratory relief fails, requiring Kinder Morgan to show it was ready, willing, and able to perform would amount to a perhaps impossible burden. Fist, Drummond had removed the cranes from Berth #2, reducing the River Terminal's coal-handling capability to zero. Under the Side Letter Agreements, the capacity of the River Terminal to process coal was dependent on the capacity of whatever cranes Drummond would have provided, had it decided to deliver any coal in 2015 and 2016. It is difficult to imagine how Kinder Morgan could sufficiently show its ability to move any particular amount of coal under these doubly-hypothetical circumstances. Next, Kinder Morgan's obligation to handle coal at the River Terminal was preconditioned on Drummond's: (1) nomination of a specific tonnage; (2) delivery of coal at a certain rate; and (3) delivery of a sufficient quantity of coal of a sufficient quality. How Kinder Morgan could show it was ready, willing, and able to perform under Schedule when its performance was dependent on Drummond's actions remains to be seen. Under these circumstances, the rationale of *Am. List* applies, and Kinder Morgan is not required to show it was ready, willing, and able to perform. Relieved of this burden, Kinder Morgan has shown Drummond breached the Contract here.

For the foregoing reasons, there are no genuine issues of material fact and Kinder Morgan is entitled to judgement as a matter of law on its counterclaim for breach of contract.

V. CONCLUSION

For all of the foregoing reasons, Drummond's motion for summary judgment is **DENIED** and Drummond's claim for excused performance is due to be dismissed with prejudice. (Doc. 54). Kinder Morgan's motion for summary judgment is **GRANTED** and judgment will be entered on its breach of contract claim in the amount of $23,464,407.19. (Doc. 54). A separate order will be entered. The Clerk of Court is **DIRECTED** to file this Memorandum Opinion and the Accompanying Final Judgment **UNDER SEAL**.

DONE this 27th day of September, 2019.

STACI G. CORNELIUS U.S. MAGISTRATE JUDGE

All Citations

--- Fed.Appx. ----, 2021 WL 613748 (Mem)

Footnotes

1 The parties have unanimously consented to magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c). (Doc. 17).

2 Although not attached to the complaint, the court can consider the Master Service Agreement and Schedule, which were attached to Kinder Morgan's motion, on a motion to dismiss because the documents are central to Drummond's claims and Drummond has not challenged their authenticity. *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005).

3 The Schedule reveals that, in the event Drummond could not deliver the minimum tonnage of coal, it could meet its obligations by substituting petroleum coke for coal. (Doc. 10-1 at 28-29).

4 The Schedule also reveals that Kinder Morgan agreed to make certain improvements to the River Terminal to accommodate the expected volume of imported coal. (Doc. 10-1 at 27-28).

5 While Drummond makes a passing request to amend the complaint (Doc. 16 at 11, n.4) to include a specific allegation that the unspecified environmental regulations were unforeseeable, any such amendment would be futile. Amending the complaint to add an explicit allegation of "unforeseeability" in the complaint would amount to a conclusory statement. In light of the circumstances of this case and the authority discussed above, new environmental regulations were foreseeable as a matter of law.

6 Kinder Morgan's reply also presents compelling arguments citing non-controlling law calling into question whether the doctrine of impossibility could ever apply to a contract like the one at issue here, where Drummond can perform its duties in one of two ways: (1) importation of the minimum tonnage of coal and/or petroleum coke; or (2) by making shortfall payments when it did not meet the minimum requirements. (*See* Doc. 20 at 12-13). However, because Kinder Morgan raised these arguments for the first time on reply, and because the claim for impossibility is due to be dismissed for other reasons, these arguments will not be considered.

1 The parties have unanimously consented to magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c). (Doc. 17).

2 The publicly-available briefs and exhibits omit materials subject to the confidentiality stipulation and protective order. (Doc. 39; *see* Docs. 47-48, 51, 52, 56-58, 61-62). The parties have also filed sealed, unredacted copies of the material. (Docs. 54-55, 65-68, 73).

3 The parties have presented substantial amounts of evidence and associated narrative not reflected in the foregoing recitation. This is particularly true with regard to Drummond, which has presented significant evidence and argument concerning the testimony of its affirmative expert and Kinder Morgan's rebuttal expert. In light of the governing law the experts' testimony—and any other facts omitted from the foregoing recitation—are immaterial. *See Anderson,* 477 U.S. at 248.

4 As noted at the motion to dismiss stage, the MSA includes a choice of law provision for New York law. (Doc. 52-2 at 12; *see* Doc. 33 at 7). Accordingly, New York law governs the substantive issues presented here.

5 Kinder Morgan makes the same argument in its motion, contending Drummond cannot succeed on a rescission claim. (*E.g.* Doc. 73 at 20-24).

6 To the extent Drummond relies on *Babylon* for the proposition that a party seeking termination may allege inability to perform—as opposed to material breach—that case speaks in terms of rescission. 475 N.Y.S.2d at 874. Drummond has expressly abandoned any claim for rescission. Additionally, courts discussing the remedy of termination under New York law appear to draw little distinction between a "failure to perform" and a "material breach." *Falcon Fifty LLC*, 17 F. Supp. 3d at 379 ("Under New York law, a party's performance under a contract is excused where the other party has substantially failed to perform its side of the bargain or, synonymously, where that party has committed a material breach.").

7 Drummond notes it could assign some of its River Terminal capacity to third-parties and contends reduced capacity at the River Terminal implicates the illusory promises doctrine. (Doc. 66-1 at 24-25; Doc. 65-1 at 16-17) (citing Doc. 52-2 at 11). Drummond's argument regarding illusory promises on these facts (Doc. 65-1 at 16-17) is misplaced in light of the undisputed fact that—assuming cranes were procured—the River Terminal had the capacity to at least partially perform by handling coal. *See M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (2015) ("a promise that is 'partly' illusory is by definition not illusory").

8 Under the Schedule, Drummond's yearly shortfall payments were due 30 days after Kinder Morgan delivered an invoice. (Doc. 52-2 at 28). Here, Kinder Morgan sent the invoice for the 2015 shortfall on January 29, 2016. (*See* Doc. 1 at 7). It appears the invoice for the 2016 shortfall payment was delivered sometime before April 12, 2017, nearly four months before Kinder Morgan filed its counterclaim here. (*See* Doc. 26 at 2).

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