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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN Justice PART 7

0403087/2002

BROOKLYN UNION GAS CO.
VS
AMERICAN HOME ASSURANCE CO.

IO. 403087/02

DATE 12-23-04

SEQ 7

SEQ. NO. 007

COMPEL

CAL. NO.

The following papers, numbered 1 to 7 were read on this motion to/for Compel

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	see annexed decision & order
Replying Affidavits	

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision & order.

FILED
MAR 14 2005
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/7/2005

J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 7

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BROOKLYN UNION GAS COMPANY, INC.,
Plaintiff,

against

CENTURY INDEMNITY COMPANY, CERTAIN UNDERWRITERS OF LLOYD'S LONDON, LONDON MARKET INSURANCE COMPANIES, and HOME INSURANCE COMPANY,
Defendants.

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Index Number 403087/2002
Motion Seq. No. 007
Submission Date 12-23-04

DECISION AND ORDER

For Century Indemnity Co.:
Barbara M. Almeida, Esq.
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For Brooklyn Union Gas:
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For the London Defendants:
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Papers considered in review of these motions to compel discovery:

Papers	Numbered
Notice of Motion, Affidavits & Memo of Law.....	1,1a
Affirmation in Opp. & Memo of Law.....	2,2a
Century Brief in Opp.....	3
Affirmation in Reply & Memo of Law.....	4,4a
Plaintiff Affirmation (supplemental).....	5
Affidavits of Bartlett & DeBond.....	6
Confidential materials from Century.....	7

PAUL G. FEINMAN, J.:

In this action, plaintiff seeks insurance coverage from Century Indemnity Company and from Certain Underwriters at Lloyd's London and the London Market Insurance Companies (London defendants) for environmental liabilities it faces at several former manufacturing gas plant (MGP) sites. Plaintiff moves for an order pursuant to CPLR 3124, compelling defendants to comply with its demand for production of corporate designees for depositions, as well as certain documents. Specifically, plaintiff wants a witness or witnesses from each of the defendants who is knowledgeable about the availability of insurance and their respective

company's historical knowledge of risks associated with manufacturing gas plant (MGP) operations, and a witness from the London defendants who can testify as to underwriting practices. The two defendants have joined in their opposition to plaintiff's motion, and their papers make many of the same arguments. This decision will address the defendants' arguments separately, nonetheless.

The London Defendants

Plaintiff served notices of deposition on defendants in 2002 and again in 2004 (Not. of Mot. Ex. F-I), to which the London defendants complied in part and otherwise objected by letters dated August 2, 2002 and May 20, 2004 (Not. of Mot. Ex. L). As concerns the 2002 notice, the London defendants produced two witnesses to testify concerning four topics, questioned the relevance of two topics but suggested the witnesses might be able to answer "general" questions about them (Apiscopa Aff. Ex. C), and objected to four other topics (Not. of Mot. Ex. L). As concerns the 2004 notice, defendants have objected to all four topics.

1. Underwriting Witness

Plaintiff moves to compel the production of a witness to testify concerning underwriting practices, arguing that it particularly needs a witness from London because "the obligations under insurance policies purchased from the London market are divided among numerous entities," and because a witness is needed to interpret the "slips" which indicate the terms of and subscribers to the London policies (Not. of Mot. Tessler Aff. ¶ 12). It notes that in the similar litigation involving a utility company's environmental insurance coverage, *Consolidated Edison Co. v Allstate Insurance Co.*, Index No. 6000142/1998 (Sup. Ct., New York County), the London defendants provided L. Peter Lowsley-Williams who testified concerning general underwriting

practices in the London market (Not. of Mot. Tessler Aff. ¶ 16, Ex. W).

The London defendants assert that they previously produced two claims handlers, Perry Bowen and Daniel DeBond, and that those two witnesses offered some testimony concerning underwriting, and that there is no one remaining with first-hand knowledge of the underwriting of the policies at issue, all of which were apparently underwritten between 1939 and 1965 (London Memo of Law at 4). They argue that because plaintiff had an opportunity to fully question Bowen and DeBond,[1] it should not be allowed to depose one or both of them again. In addition, defendants note that Lowsley-Williams is not a defendant or employed by a defendant in the instant action and that he appeared in *Con Ed* as both an expert witness and a fact witness with knowledge of the placing of Con Ed policies, but that it is not known whether he has knowledge of the underwriting of the Brooklyn Union policies (London Memo of Law at 4).

The London defendants' assertion that they have given Brooklyn Union sufficient opportunity to question witnesses about general underwriting and business practices is unpersuasive. Defendants' counsel's August 5, 2002 letter to plaintiff's counsel states that they were supplying two witnesses who "may be able to answer general questions" involving underwriting, but that "depending on the level of specificity of the questions, London may put forth additional witnesses on those topics [i.e., underwriting and business practices]." At their depositions, both Bowen and DeBond confirmed they would be testifying concerning items 3-7

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[1]Defendants have provided an affidavit by DeBond stating that no one at his firm, B.D. Cooke & Partners, Ltd., which handles claims on behalf of Dominion Insurance Company, has any knowledge or information about underwriting practices during the period of 1939-1965, and because no one does underwriting, there is no source of information concerning how policies were underwritten (DeBond Aff. ¶¶ 1-3).

set forth in Brooklyn Union's Notice of Deposition, dated June 13, 2002 (Not. of Mot. Ex. Y [Bowen Tr. at 8], Z [DeBond Tr. at 7]), none of which concerned underwriting (Not. of Mot. Ex. G). It was explicitly stated at DeBond's deposition that DeBond was "put up" as a claims witness (Apiscopa Aff. in Opp. Ex. D, DeBond Tr. at 8). Defendants' counsel quotes his own words written before the depositions in 2002 to plaintiff's counsel that Bowen and DeBond "*may* also be able to answer general questions . . . regarding the negotiation and underwriting of the policies," and his words after the depositions that Bowen and DeBond provided "some general information" (Not. of Mot. Ex. X, 3/26/04 letter from Firriolo to Tessler, at 2, emphasis added).

It is apparent, however, that plaintiff's counsel never understood that Bowen and DeBond represented plaintiff's sole opportunity to question a witness concerning underwriting. Indeed, during the DeBond deposition, Brooklyn Union's counsel stated, "we talked earlier about arranging for an underwriting witness," to which defendants' counsel replied, "That's right, and we said that you are not waiving your right to request an underwriting witness. . . . ," to which plaintiff's counsel stated, "Right. ... [W]e will need an underwriting witness at some time," to which defendants' counsel stated, "OK." (Apiscopa Aff. in Opp. Ex. D [DeBond Tr. at 8]). All of this shows that the topic of underwriting was never fully addressed in a deposition.

Of more concern is the defendants' assertion that there is no witness available with the first-hand knowledge requested by Brooklyn Union, and in fact that there is no witness with any knowledge of the underwriting of the policies at issue.[2] They provide an affidavit by Gary

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[2]Brooklyn Union seeks a witness to testify about the "underwriting of the London insurance policies at issue in this action, and the identity of all persons that were involved in the underwriting of the policies on behalf of London" (Not. of Mot. Ex. G, Not. of Dep. ¶ 2).

Bartlett, senior claims handler employed at Equitas Management Services Limited, who is responsible for handling Brooklyn Union's claims on behalf of Certain Underwriters at Lloyd's London (Bartlett Aff. ¶ 1). Bartlett affirms that Equitas has been in the business of handling the historic claims and underwriting files from the Lloyd's Syndicates that subscribed to policies earlier than 1992 (Bartlett Aff. ¶ 2), but that Equitas has never underwritten insurance policies (Bartlett Aff. ¶ 3). Bartlett's inquiry "within the London Insurance Market" did not turn up any syndicates involved in this litigation which underwrite insurance policies (Bartlett Aff. ¶ 3). For these reasons, the London defendants contend that plaintiff is actually seeking "expert testimony at [defendants'] expense of somebody who will review the policy slips for [plaintiff] and offer opinions as to any missing or incomplete information," and that this would be "akin to [defendants] paying for Brooklyn Union's expert witness, or requiring [defendants] to locate and produce a non-party witness that Brooklyn Union would be equally able to locate and subpoena itself" (London Memo of Law at 5). They further argue that plaintiff has gained sufficient knowledge concerning the slips, given its parent company KeySpan's litigations against defendants regarding other MGP sites, and does not need a witness to interpret the marks (London Memo of Law at 6).

Brooklyn Union is entitled to a corporate witness who can testify concerning defendants' underwriting practices. The London defendants are directed to produce a witness, whether it be Bowen, who was previously deposed and apparently has some general knowledge of underwriting, Lowsley-Williams or someone of similar background and position,[3] or some other

[3]Lowsley-Williams, director of Janson Green, was as of about 1982 a member of Lloyd's non-marine association, which he described as a group of "all of the syndicates, *all the*

individual with general knowledge of underwriting practices, within sixty (60) days of service of a copy of this decision and order with notice of entry thereof.[4] Although London cannot be required to produce a non-party witness, it is unclear to the court that there are not individuals within "Lloyd's" perhaps, who set overriding policy for the various syndicates, and who could testify concerning underwriting customs and practices in general.

Plaintiff also seeks to compel production of a witness who can testify concerning the evidence plaintiff has found relating to the only missing policy listed in the Fourth Amended Complaint. The evidence is a debit memo concerning Policy No. 28222. Defendants' counsel explained that it was "secondary evidence of a policy issued to Brooklyn Union," but does not indicate placement of the policy in the London Market, nor does it contain information that would allow a witness to testify as to the identity of any subscribers or the terms and conditions of the policy (Not. of Mot. Ex. AA [debit memo]; CC [letter 7/2/04, Apiscopa to Tessler]). Defendants now provide an unsigned, non-notarized affidavit from Gary Bartlett concerning the debit memo [Apiscopa Aff. Ex. E] which, according to defendants' counsel, is a "final" copy; an "identical signed version" was to be provided to plaintiff under separate cover (London Memo of

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underwriters individually who underwrite non marine business at Lloyd's" (Not. of Mot. Ex. W, Lowsley-Williams Tr. at 482, emphasis added).

[4]As pointed out by plaintiff, the London defendants' counsel offered "to review for accuracy" a policy stipulation to be drafted by plaintiff setting forth the policies sold to plaintiff, identifying the participating syndicates and companies for each policy and their respective shares; such an offer tends to undermine the defendants' argument that there is no one with institutional knowledge at least as concerns the ability to understand the information contained in the policy slips (*see,* London Memo of Law at 8; plaintiff Reply Memo at 12 n. 10). (The policy stipulation was never entered into and plaintiff is not seeking the court's intervention concerning its contents. *See*, Not. of Mot. Tessler Aff. ¶ 10; plaintiff Memo of Law at 10-12; London Memo of Law at 6-8; plaintiff Reply Memo at 12).

Law at 11, n. 2). Bartlett affirms that he commissioned an inquiry to locate documentation concerning various policies which plaintiff alleges were issued, that documentation concerning several were found, but nothing has been found concerning this particular policy (Apiscopa Aff. Ex. E, Bartlett Aff., *in passim*). Defendants are directed to provide a *signed and notarized* copy of this affidavit to be filed with the court within fifteen (15) days of service of a copy of this decision and order with notice of entry thereof, and this prong of plaintiff's motion is otherwise denied, based on the affidavit provided.[5]

2. Availability of Insurance

According to Brooklyn Union's counsel, there were three periods of time when plaintiff was not insured: prior to the 1940's, 1971-1982, and the period after 1986 (Brooklyn Union Memo of Law at 21). Brooklyn Union seeks information from defendants about the availability of environmental liability insurance during those periods. Specifically, it seeks information concerning the sale to United States policyholders of insurance policies covering third-party property damage claims prior to 1939; sales of policies to New York policyholders from 1971-1982 that did not contain pollution exclusions; and sales of liability policies to United States policyholders after 1986 that did not contain pollution exclusions (Not. of Mot. Ex. G, Not. of Dep. ¶¶ 8-10).

Both parties rely on *Consolidated Edison Co. of New York v Allstate Ins. Co.*, 98 NY2d 208 (2002), a case of first impression which addressed the allocation of liability in an environmental damages case where there were many policies and policy periods. *Con Ed* held

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[5]This affidavit also appears to satisfy plaintiff's request for an affidavit from defendants regarding their recent searches for missing policies (Not. of Mot. Tessler Aff. ¶ 21).

that based on the particular facts which included an alleged continuous harm spanning many years and implicating several successive insurance policies, and the unambiguous language of the policies themselves, a pro rata allocation was consistent with the policies, rather than joint and several allocation as urged by the plaintiff (98 NY2d at 224). *Con Ed* further noted that there are different ways to prorate liability among successive policies and that courts have also differed on how to treat self-insured retentions, periods of no insurance, and periods where no insurance is available (98 NY2d at 224-225).[6]

The London defendants argue that Brooklyn Union demands information which is not material or necessary, noting that in *Con Ed,* liability was prorated "based on the amount of time the policy was in effect in comparison to the overall duration of the damage" (98 NY2d at 224). Defendants suggest that accordingly, the focus of the trial court will be on the number of years the alleged property damage took place rather than whether liability insurance was available in any particular period (London Memo of Law at 11, 12). However, as noted above, *Con Ed* held only that in that litigation the lower court's proration formula was appropriate given the policies and the issues. It did not hold that this was the only way to prorate liability among successive policies (98 NY2d at 224). Moreover, the Court of Appeals has not yet ruled on the method of allocating liability on a pro rata basis when a policyholder has either failed to purchase insurance or when no insurance coverage was available for purchase, both of which are factors in the

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[6] Moreover, *Con Ed* does not stand for the proposition that pro rata allocation is always to be used, or the only method to be used, but rather that it is to be used in situations involving continuous harm spanning many years, implicating several successive insurance policies, and where the language of the policies provides "indemnification for liability incurred as a result of an accident or occurrence during the policy period, not outside the period" (98 NY2d at 222, 224).

instant litigation.

The London defendants point to two federal cases applying New York law which addressed the issue of the availability of insurance coverage, namely *Sybron Transition Corp. v Security Ins. of Hartford*, 258 F3d 595 (7th Cir. 2001), and *Olin Corp. v Insurance Co. of N. Am.*, 221 F3d 307 (2d Cir. 2000), both of which are referenced in *Con Ed,* 98 NY2d at 221, but neither of which was explicitly relied upon. *Sybron* held that periods of time in which the policyholder was self-insured for asbestos-related liability are to be included in calculating the time subject to the risk (258 F.3d at 599, 600). *Sybron* also noted that the insurer should not be responsible for paying extra for years when the insured chose not to be covered based on the high price of coverage (*Id.*). In contrast, *Olin* held that the inquiry is not into the reasonableness of the policyholder's decision not to acquire insurance, but on whether insurance was generally available (221 F.3d at 326).

Here, Brooklyn Union claims three periods of time when it was not insured for pollution coverage. However, from1971-1982, the New York State Legislature required that all liability insurance policies exclude sudden and accidental pollution (see, London Memo of Law at 15), a fact Brooklyn Union does not dispute. Given this, Brooklyn Union has not established a need for defendants' witness to testify concerning policies written from 1971-1982.[7]

The London defendants suggest that Brooklyn Union can determine through an expert when liability coverage for environmental property damage claims was generally available, as it

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[7]At least one court case has held that because of the legislature's action in shifting the burden to the polluters, the period from 1971-1982 cannot be excluded from the allocation (*see,* Apiscopa Aff. Ex. G, *LILCO v Allianz*, 605715/97, Dec. & Ord.,12/24/03 at 8 [Gammerman, J.]).

is allegedly a matter of historical fact (London Memo of Law at 14).[8] However, the court agrees with plaintiff that the London defendants are the best source of information as to what kinds of insurance were available and sold during the disputed periods. Nonetheless, as concerns the remaining two categories for which plaintiff seeks to compel coverage information, given that plaintiff is a New York-based company and the MGP cites are all in New York, the court agrees that the demands are overly broad in requesting information concerning policies sold in the United States rather than in New York. There is no apparent basis for arguing that there is any relevancy in what insurance was available in other states. Accordingly, plaintiff's demand for a witness to testify concerning the sale of insurance policies covering third- party property damage claims prior to 1939 is limited to sales in New York State. Similarly, information concerning the sales of liability policies after 1986 that did not contain pollution exclusions is limited to New York State (Not. of Mot. Ex. G, Not. of Dep. ¶¶ 8-10). In addition, there is no reason why individual policyholders' identities should be divulged or the actual amount of coverage sold.[9] The London defendants are directed to produce a witness, within sixty (60) days of service of a copy of this decision and order with notice of entry thereof, who is competent to testify

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[8]The London defendants note that *Con Ed v Allstate* states that Con Edison had been issued general liability policies beginning in 1936 (98 NY2d at 215). They further note the existence of expert testimony in other similar litigation, namely the report of James Marshall, Jr., submitted in *LILCO v Allianz.* which states that the New York State Legislature amended the law in 1922 to allow insurers to offer general property damage liability insurance, and that the first comprehensive general liability policy, apparently in the United States, was first drafted in 1940 (Apiscopa Aff. Ex. F, Report of James Marshall, Jr. at 18).

[9]The parties are reminded that certain of this information may be confidential proprietary information, and plaintiff is aware that the Protective Order signed by the parties ensures that any information thus disclosed is protected from general dissemination (Brooklyn Union Memo of Law at 21-22).

concerning the sales of insurance policies covering third-party property damage claims prior to 1939 in New York State, and the sales of liability policies after 1986 in New York State that did not contain pollution exclusions.

3. Defendants' Historical Knowledge of MGP Site Risks

Included among the topics of plaintiff's notices for deposition are those which seek to learn what knowledge the London defendants had concerning the environmental problems associated with MGP sites. Defendants object to providing a witness on the ground of relevance, and also on the ground that the demands are vague, overly broad and burdensome. They argue that because plaintiff bears the burden of proving that the environmental pollution at the former MGP sites is the result of an accident or occurrence, and that insurance policies usually require a fortuitous event,[10] the issue is what plaintiff knew about the problems at the sites, not what the insurers knew (London Memo of Law at 16-17, citing *Con Ed v Allstate*, 98 NY2d at 220). They further argue that even if they were aware of environmental risks relating to the disposal of MGP wastes, it does not mean they were aware that plaintiff was improperly disposing the wastes, nor excuse plaintiff from intentionally polluting the environment (London Memo of Law at 17).

Plaintiff argues that the defendants are likely to argue that it was widely known during the years when the MGP sites were in operation that they caused environmental harm, that plaintiff knew this fact and therefore intended the harms the MGPs caused (Brooklyn Union Reply Memo

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[10]The "requirement of a fortuitous loss is a necessary element of insurance policies based on either an 'accident' or 'occurrence.' The insured has the initial burden of proving that the damage was the result of an 'accident' or 'occurrence' to establish coverage where it would not otherwise exist. . . . Once coverage is established, the insurer bears the burden of proving that an exclusion applies." (*Con Ed v Allstate*, 98 NY2d at 220, citation omitted).

at 9). It argues that it must prove the negative, i.e., that while it operated the MGPs, it was not aware that it was causing environmental property damage (Brooklyn Union Memo of Law at 22). It contends that it is entitled to show that the insurance companies insuring utility companies with MGP sites were also knowledgeable about the plant operations and although experts in assessing risks, did not identify the environmental harms resulting from the plants' operations (Brooklyn Union Memo of Law at 23; Brooklyn Union Reply Memo at 9). Plaintiff therefore moves to compel defendants to provide information as to what they knew about the operation of MGP sites and what conclusions they did or did not draw concerning the environmental impact of those operations, including the issue of "loss control" (Brooklyn Union Memo of Law at 23). It concedes that the knowledge of the insurers is not, in and of itself, sufficient for it to prevail at trial on the question of intentionality, but reasonably argues that such information can help clarify the issues for trial (Brooklyn Union Reply Memo at 10).

CPLR 3101 allows "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a]). The statute is liberally construed so as to give effect to the strong policy favoring full disclosure (*Slabakis v Drizin*, 107 AD2d 45, 46 [1st Dept. 1985]). The words "material and necessary" are to be interpreted liberally to require disclosure of facts which will help prepare for trial by "sharpening the issues and reducing delay and prolixity" (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). Here, where it appears that potential issues before the trier of fact will include the question of when it became understood that MPGs cause pollution damage, and when Brooklyn Union knew or should have known that damage was likely to occur or had occurred, plaintiff should be permitted to inquire into defendant's knowledge.

Plaintiff's 2004 notice of deposition demands a witness to testify concerning the London defendants' loss control practices from 1938-1966,[11] the loss control practices as concerns the MGP sites at issue in this litigation, and the defendants' knowledge in the years 1938-1966 of environmental harm arising out of MGP sites (Not. of Mot. Ex. I, Not. of Dep. ¶¶ 2-4). It also requests a witness who can testify to affiliations or memberships in insurance industry associations from the 1840's to the 1960's which would have addressed insurance issues relating to MGPs (Not. of Mot. Tessler Aff. ¶ 20).

The London defendants argue that as concerns the topic of loss control practices, the scope should be narrowed to focus solely on loss control practices as concerns the MGP sites at issue, rather than on their practices in general from 1938-1966 (London Memo of Law at 17). Plaintiff apparently hopes to counter arguments that it intentionally allowed the MPG sites to pollute the environment, by showing that the state of knowledge at the time was such that neither it nor the insurers understood the risks of harm (Brooklyn Union Memo in Reply at 9). However, it is unclear what relevancy the testimony concerning loss control pertaining to other types of risks would have in this litigation. Therefore, the London defendants are directed to comply with plaintiff's demand to the extent that they shall provide a witness, within sixty (60) days of service of a copy of this decision and order with notice of entry thereof, who can testify to their loss control practices pertaining to *all* MPG sites from 1938-1966, and to the MPG sites at issue in this litigation, as well as to their knowledge in the years 1938-1966 of environmental harm

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[11]Plaintiff explains that loss control refers to investigative activity undertaken by an insurance company to assess the extent of a particular type of risk (Brooklyn Union Memo of Law at 23, citing various articles).

arising from MGP sites.

Finally, as concerns plaintiff's demand for a witness competent to speak on affiliations with or memberships in, from the 1840s to the 1960s, insurance industry associations which would have addressed insurance issues related to manufactured gas plants (Not. of Mot. Tessler Aff. ¶ 20), plaintiff has narrowed this demand from the broader, "[a]ny affiliation with, or membership in, any insurance industry association from the 1840s to the 1960s" (Not. of Mot. Ex. I, ¶ 1). Defendants' opposition papers do not explicitly address this prong of plaintiff's motion, other than in their arguments as to why plaintiff's demands for information concerning defendants' knowledge about environmental risks of MGP sites is irrelevant (London Memo of Law at 16-17). As plaintiff has sufficiently narrowed the scope of its request, this branch of its motion to compel is granted, and the London defendants are directed to make available a witness or witnesses, within sixty (60) days of service of a copy of this decision and order with notice of entry thereof, who shall testify concerning insurance industry affiliations which would have addressed insurance issues related to MGPs.

Century Indemnity

Plaintiff seeks to compel Century to produce witnesses competent to testify on the availability of insurance coverage and on Century's knowledge of the environmental risks posed by MGPs. Plaintiff also seeks a witness to testify concerning affiliations or memberships in industry associations that would have addressed insurance issues relating to MGPs. Plaintiff served notices of deposition on Century in 2002 and again in 2004 (Not. of Mot. Ex. F, H), to which Century complied in part and otherwise objected by letters dated September 5, 2002 and August 2, 2004 (Not. of Mot. Ex. J, K). The August 2, 2004 letter indicated that Century

continued to object to designating a witness to testify about availability of insurance, loss control and knowledge of MGP operations. According to plaintiff, Century also objects to providing a witness concerning Century's affiliations with industry associations (Not. of Mot. Tessler Aff. ¶ 20).

1. Availability of Insurance

For the same reasons as discussed above concerning the London defendants, plaintiff's motion is granted to the extent that Century is directed to provide a witness, within sixty (60) days of service of a copy of this decision and order with notice of entry thereof, who shall testify about the sale of insurance policies covering third- party property damage claims prior to 1939 in New York State, and sales of liability policies in New York State after 1986 that did not contain pollution exclusions (Not. of Mot. Ex. G, Not. of Dep. ¶¶ 8-10), and is otherwise denied. As discussed above, the court sees no reason why individual policyholders' identities need to be divulged or the actual amount of coverage sold, and the parties are reminded that certain of this information may be confidential proprietary information, and plaintiff is aware that the Protective Order ensures that the information disclosed is protected from general dissemination (Brooklyn Union Memo of Law at 21-22).

2. Century's Knowledge of MPG Site Risks

Similarly to the London defendants, Century argues that because plaintiff's burden of proof is to establish the existence of an accident or occurrence, it is plaintiff's knowledge which is paramount, not the knowledge of its insurers (Century Brief in Opp. at 8-9). Century further argues that even if it were true that its Loss Control Department knew nothing about MGP risks, this would not mean that Brooklyn was also unaware of the risks and could satisfy its burden of

proof. Century contends that plaintiff must offer evidence that as a result of Century's alleged lack of knowledge, it failed to take steps to prevent pollution, and that without this link between plaintiff's actions and what Century did or did not know, plaintiff should not be allowed to conduct discovery in these areas.

As noted above, CPLR 3101 allows broad disclosure, "regardless of the burden of proof." There is nothing in the statute to suggest that Brooklyn Union must first "offer evidence" of a fact prior to Century's being required to disclose information. It appears that potential issues before the trier of fact will be when it became understood that MPGs cause pollution and when Brooklyn Union knew or should have known that damage was likely to occur or had occurred. Here, however, Century has recently provided a witness, Joseph Johnson, in response to plaintiff's demands for a witness to testify concerning the underwriting of Brooklyn Union's policies and loss control undertaken in connection with those policies. Century contends that Johnson was also questioned about Century's affiliations with insurance industry organizations in the 1940's and 1950's, and loss control practices by Century in the 1940's and 1950's, and that his testimony satisfies plaintiff's demands (Century Brief in Opp. at 10, citing Johnson EBT, contained in Nathanson Aff. Ex. C).

The excerpts of Johnson's testimony included in the motion papers concern Johnson's memory of the existence of a loss control department at Century which was periodically called upon by Johnson's "special risks" department to investigate various risks potentially being underwritten (Nathanson Aff. Ex. C, Johnson EBT at 58, 66). Johnson stated that to his knowledge and best recollection, he never saw any recommendations from the loss control department concerning environmental issues (Nathanson Aff. Ex. C, Johnson EBT at 70, 111).

He also was questioned concerning his knowledge of various insurance-related organizations (Nathanson Aff. Ex. C, Johnson EBT at 107-109). Plaintiff argues that because Johnson was not himself in the loss control department, his testimony is not sufficient to satisfy plaintiff's demands for a witness to testify concerning Century's loss control practices. Plaintiff's argument is unavailing except as concerns its demand for testimony concerning loss control as pertaining to MPGs and the MGPs at issue in this litigation. Accordingly, for the reasons stated above in the discussion of the London defendants, plaintiff's motion is granted to the extent that Century is directed to produce a witness, within sixty (60) days of service of a copy of this decision and order with notice of entry thereof, who shall testify concerning Century's loss control practices pertaining to *all* MGP sites from 1938-1966 and to the MPG sites at issue in this litigation.

3. Insurance Industry Affiliations

Century produced Joseph Johnson on August 10, 2004, who answered questions concerning Century's affiliations and memberships in insurance industry associations during the 1940's and 1950's (Nathanson Aff. Ex C., Johnson EBT at 107-09, 133). Although Johnson was not designated as a witness on this topic, plaintiff does not sufficiently argue that Century did not meet its obligation with the Johnson deposition, and accordingly, this branch of plaintiff's motion as concerns Century is denied as academic.

It is

ORDERED that plaintiff's motion to compel production of a witnesses to testify concerning the particular topics is granted to the extent that the London defendants are directed to produce a witness within sixty (60) days of the service of a copy of this decision and order with notice of entry thereof, who shall testify concerning their underwriting practices, as

discussed in the body of this decision; and it is further

ORDERED that the London defendants are to file with the court, within fifteen (15) days of service of a copy of this decision and order with notice of entry thereof, a signed and notarized copy of the Gary Bartlett affidavit, an unsigned copy of which is attached as Exhibit E to the Apiscopa Affirmation in Opposition; and it is further

ORDERED that the London defendants are to produce a witness, within sixty (60) days of service of a copy of this decision and order with notice of entry thereof, who shall testify concerning the sales of insurance policies as discussed in the body of this decision; and it is further

ORDERED that the London defendants are to produce a witness, within sixty (60) days of service of a copy of this decision and order with notice of entry thereof, who shall testify concerning their loss control practices pertaining to MGPs and the MGPs at issue, as well as to their knowledge of environmental harms, as discussed in the body of this decision; and it is further

ORDERED that the London defendants are to produce a witness, within sixty (60) days of service of a copy of this decision and order with notice of entry thereof, who shall testify concerning insurance industry affiliations as discussed in the body of this decision; and it is further

ORDERED that Century is to provide a witness, within sixty (60) days of service of a copy of this decision and order with notice of entry thereof, who shall testify concerning the sales of insurance policies as discussed in the body of this decision; and it is further

ORDERED that Century is to produce a witness, sixty (60) days of service of a copy of

this decision and order with notice of entry thereof, who shall testify concerning loss control practices pertaining to MGPs and the MGPs at issue, as discussed in the body of this decision.

This constitutes the decision and order of the court. The court has mailed courtesy copies to counsel.

Dated: March 7, 2005
New York, New York

J.S.C.