

Century Indem. Co. v Brooklyn Union Gas Co.

2008 NY Slip Op 33402(U)

December 15, 2008

Supreme Court, New York County

Docket Number: 603405/2001

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

BROOKLYN UNION GAS COMPANY,
Plaintiff,

INDEX NO. 403087/02

- v -

MOTION DATE 6/26/08

MOTION SEQ. NO. 017

AMERICAN HOME ASSURANCE COMPANY et
al.,
Defendants.

MOTION CAL. NO. 15

The following papers, numbered 1 to 8 were read on this motion to compel
(and papers submitted in Motion Seq. Nos. 15 and 16, Index No. 603405/2001):

- Notice of Motion
- Webb Affirm. – Exhibits A, B
- Tessler Affirm. – Exhibits A-G
- Nathanson Opp. Aff. – Exhibits A-E
- Altlerl Opp. Affirm. – Exhibit A
- Tessler Reply Affirm – Exhibits 1-8
- Webb Suppl. Affirm. – Exhibits A-K
- Webb Third Affirm. – Exhibits A-G

FILED

DEC 18 2008

COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED	
1-3	
4-5	
6	
7, 8	

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

Cross-Motion: Yes No

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

Dated: 12/15/08
New York, New York

MICHAEL D. STALLMAN
J.S.C.
[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
CENTURY INDEMNITY COMPANY,

Plaintiff,

Index No. 603405/2001
Action No. 1

- against -

BROOKLYN UNION GAS COMPANY et al.,

Defendants.

-----X
BROOKLYN UNION GAS COMPANY,

Plaintiff,

Index No. 403087/2002
Action No. 2

- against -

AMERICAN HOME ASSURANCE

Defendants.

FILED

DEC 18 2008

Decision and Order

**COUNTY CLERK'S OFFICE
NEW YORK**

-----X
HON. MICHAEL D. STALLMAN, J.:

The two actions, joined for trial, involve a dispute over environmental insurance coverage. In Action No. 1, Century Indemnity Company (Century) moves for an order compelling production of various documents, including certain documents asserted as privileged, and production of originals, microfilm and/or best legible copies of certain documents previously produced (Motion Seq. No. 015). Brooklyn Union Gas Company (Brooklyn Union) moves for an order compelling Century to produce documents (Motion Seq. No 016). Brooklyn Union has made the identical motion in Action No. 2 (Motion Seq. No. 17) This decision addresses all three motions in both actions.

BACKGROUND

The extensive background of Action No. 1 and 2 is detailed in the Court's prior decision and order dated May 7, 2007. On July 9, 2001, Century commenced Action No. 1 against Keyspan Corporation (Keyspan), Brooklyn Union, and nine insurance companies, seeking, among other things, a judgment declaring that Brooklyn Union's costs incurred in connection with the defense, investigation, and cleanup of 15 former manufactured gas plant (MGP) sites are not covered under excess liability insurance policies that Century issued to Brooklyn Union and its predecessors. That same day, Brooklyn Union commenced Action No. 2 against Century and seven other insurance companies in Supreme Court, Kings County, seeking a judgment declaring that the costs incurred are covered under excess liability policies issued by Century and other insurers. By stipulation so-ordered March 4, 2002, Action No. 2 was transferred to New York County, and was joined for trial with Action No. 1.

On June 30, 2006, Brooklyn Union filed the note of issue, certifying trial readiness with respect to only four MGP sites: Citizens Works, Clifton Works, Coney Island Works, and Greenpoint Works. Webb Suppl. Affirm., Ex A.¹ Brooklyn Union believed that the filing applied to both actions, because it mistakenly believed the actions were consolidated. However, the note of issue was accepted for filing only in Action No. 1; the note of issue was not accepted in Action No. 2.

¹ By stipulation dated June 2005, which Justice Soto so-ordered, the parties agreed to complete expert witness disclosure only as to these four sites, and agreed to conference with the Court as to a schedule for trial(s) on the four sites. The parties also agreed that, after the completion of those trials, they would confer with the Court as to a schedule to supplement fact discovery and for expert discovery and trials on the remaining sites. What issue or issues, as to which site or sites, can be conveniently tried must await further conference and court direction.

In October 2006, Century moved for summary judgment in its favor disclaiming coverage on the ground of late notice. By decision and order dated May 7, 2007, this Court denied Century's motion. In August 2007, Century moved to renew and reargue its motion for summary judgment, which was denied by decision and order dated October 30, 2007.

Meanwhile, at a conference on July 12, 2007, the Court persuaded the parties to stipulate that the note of issue should be vacated, and the stipulation was made on August 30, 2007. These motions arise from discovery disputes that were not resolved at court conferences.

I.

As a threshold matter, Brooklyn Union argues that Century's motion for discovery should be denied because of excessive, unexplained delay. Had Century promptly complained of the inadequacy of Brooklyn Union's discovery responses, such as illegible documents that were produced, Brooklyn Union contends that it might have been able to address the concerns without undue burden or expense. In support of its argument, Brooklyn Union cites cases where discovery demands were denied because they were raised after filing of the note of issue.

However, those cases are inapplicable because the note of issue in Action No. 1 has been vacated. Moreover, the note of issue applied only to four MGP sites, and not the entire action. The note of issue was never accepted for Action No. 2. Therefore, discovery would still be ongoing in both actions. Brooklyn Union itself is seeking additional document production from Century, on the issue of notice, which pertains to all sites. See Section II, infra. Discovery as to experts and document production with respect to expert discovery has continued even after the note of issue was filed. For all these reasons, it was appropriate that the note of issue in Action No. 1 was vacated. To the extent that Brooklyn Union is arguing that Century waived its right to demand discovery

when the note of issue was filed, that argument is not persuasive. Technically speaking, whatever discovery Century would have waived when the note of issue was filed in Action No. 1 would not have barred Century from seeking the discovery in Action No. 2, where no note of issue was filed.

Thus, Brooklyn Union's argument of delay is without merit. "There are no time restrictions for making a motion to compel." 2 Barr, Altman, Lipshie, Gerstman, New York Civil Practice Before Trial § 31:72, at 31-12 (2006).

A.

Century seeks the following documents related to the investigation and remediation of the Citizens Works site: 1) drafts, working copies, and markups of site consultants' reports; 2) Brooklyn Union's internal memoranda and correspondence, including communications with its site consultants, and 3) draft correspondence to regulatory agencies or other parties involved with the site. The general demand for these documents were contained in Joint Supplemental Interrogatories dated December 5, 2001, at Interrogatories 29-30 and 42-43. See Firriolo Aff., Ex 1. In its response dated December 31, 2001, Brooklyn Union raised only 14 general objections. Elkind Opp. Aff., Ex 1. In an exchange of letters between Century's and Brooklyn Union's counsel, Brooklyn Union agreed to produce non-privileged documents in Brooklyn Union's "custody, control, or possession that are in any way related to . . . the sites at issue in both [Action No. 1 and Action No. 2]. . . ." Nathanson Reply Aff., Ex A. However, Brooklyn Union clarified that document production would be subject to objections interposed in a response to another insurer dated January 7, 2002 (see Firriolo Aff., Ex 2), and to the protections of the CPLR. Nathanson Reply Aff, Ex A.

According to Brooklyn Union, it supplemented its document production 15 times, without complaints from Century. Elkind Opp. Aff. ¶4, See Opp. Mem. at 4 [table]. Brooklyn Union asserts

that it reached an oral agreement with Century's prior counsel that supplementation of discovery would be limited only to additional site reports, and communications with the New York State Department of Environmental Conservation (NYSDEC). Elkind Aff. ¶ 15. Brooklyn Union admits that it did not produce "memoranda and correspondence solely circulated internally to Brooklyn Union employees" (Bell Opp. Aff. ¶ 8), but it claims that the internal documents "would not provide Century with meaningful information about the condition or cleanup of the sites or the drafting of environmental reports." *Ibid.* Brooklyn Union also argues that the requests are unduly burdensome. See generally *id.* ¶ 6. Century contends that internal Brooklyn Union drafts and memoranda may disclose the reasons why, in Century's view, Brooklyn Union had "limited" its consultants' investigation and analysis of historical operations of the sites.

CPLR 3101 (h) provides, in pertinent part:

"A party shall amend or supplement a response given to a request for disclosure promptly upon the party's thereafter obtaining information that the response was incorrect or incomplete when made, or that the response, though correct and complete when made, no longer is correct and complete, and the circumstances are such that a failure to amend or supplement the response would be materially misleading."

Brooklyn Union contends that it is required to supplement its response only if the failure to supplement would be materially misleading, which it maintains would not be the case for draft versions of documents. However, the "materially misleading" standard applies to an initial response which was correct and complete when made. Century has indicated to Brooklyn Union that its initial response was incomplete when made, because the response did not include the documents which Century is seeking on this motion. The Court is not persuaded that Brooklyn Union's initial response was complete and correct.

As Brooklyn Union indicates, Century's belief that Brooklyn Union's investigation and analysis is "limited" or "unusual" is not in itself a valid basis to compel production of Brooklyn Union's draft documents and internal memoranda. Nevertheless, drafts and working copies of the consultants' reports could be relevant to the issue of notice to Brooklyn Union of the conditions of the Citizens Works site, which might not appear in the final version. Brooklyn Union's markups of the drafts could be relevant to show the effect of the information upon Brooklyn Union, that is, its state of mind with respect to any information which could constitute actual notice. Internal memoranda, i.e., communications among Brooklyn Union's own employees, could indicate a course of action or decisions that Brooklyn Union has made in response to knowledge, if any, of possible contamination at its MGP sites.

However, the Court does not compel production of any drafts of Brooklyn Union's correspondence to regulatory agencies or to other parties involved with the Citizens Works site. By their nature, these draft documents have not been adopted as official statements by Brooklyn Union.

Therefore, this branch of Century's motion is granted, and Brooklyn Union must produce the following non-privileged documents in its possession, custody, or control related to the investigation and remediation of the Citizens Works site: 1) drafts, working copies, and markups of site consultants' reports; and 2) correspondence (excluding drafts of correspondence) with any third-parties, including communications with its site consultants; and 3) internal memoranda.

The Court is not persuaded that the document production would be unduly burdensome upon Brooklyn Union. Should the document production prove to be voluminous, Brooklyn Union may make the documents available for inspection and copying in lieu of producing copies of all the documents to Century.

B.

Century seeks production of 35 documents that Brooklyn Union had withheld as privileged, identified in Exhibit B to Lawrence Nathanson's letter dated November 28, 2007 to Erin Webb. See Nathanson Affirm., Ex 1. Upon reviewing a privileged document which Brooklyn Union inadvertently disclosed to Century, Century was concerned that the description of withheld documents listed in Brooklyn Union's privilege log was not accurate, and that the document could be produced in redacted form. Nathanson Aff. ¶¶ 10-11² According to Century, Brooklyn Union refused requests either to produce the documents, to provide a better description of the documents, or to produce the documents in redacted form. Nathanson Affirm. ¶ 13. At the Court's request, Brooklyn Union submitted a copy of the privileged documents for in camera inspection, an alternative proposed by Century.

² Brooklyn Union claims that it requested return of the inadvertently produced privileged document and others on September 13, 2002 (Elkind Opp. Affirm., Ex 2), and points out that an attorney for Century reviewed one of those documents before return it, which apparently prompted Century to seek Court review of the documents. Apparently inadvertent disclosure of documents claimed to be privileged, and their review by recipients, has been studied by bar association ethics committees. See Assn of Bar of City of NY Comm on Prof'l Jud. Ethics Formal Op. 2003-2004, 2003 WL 23789274, at *10 (2003) ("A lawyer who receives such a communication [an inadvertent communication containing confidences or secrets] should promptly notify the sender and refrain from further reading or listening to the communication and should follow the sender's directions regarding or return of the communication."); see NY Cty Law Assn Comm on Prof'l Ethics, Formal Op. 730 (2002), 2002 WL 31962702, at *4 ("The Committee believes that a lawyer has an ethical obligation to refrain from reviewing inadvertently disclosed privileged information.").

However, Brooklyn Union has not sought any relief based on the actions of Century's counsel, though it cites one case where the attorneys were sanctioned. Am. Express v Accu-Weather, Inc., 1996 WL 346388, at *3 (SD NY 1996). Thus, the Court need not address this issue further, provided that Century not use or rely on the inadvertently produced privileged documentation.

The Court has reviewed the documents listed in Exhibit B to Nathanson's letter.³ The privilege asserted was attorney-client, work product, or both in some instances. Although Century disputes the description of the documents, the Court concludes that Brooklyn Union validly asserted the attorney-client privilege as to all the documents, except BU 086654 through BU 086659 and CD 005521 through CD 005526. The Court does not find that any of the documents should be disclosed in a redacted form. "So long as the communication is primarily or predominantly of a legal character, the privilege is not lost merely by reason of the fact that it also refers to certain nonlegal matters." Rossi v Blue Cross and Blue Shield of Greater N.Y., 73 NY2d 588, 594 (1989). The full content and context of the documents indicate that their purpose is to convey legal advice to Brooklyn Union, and so the documents in their entirety are exempt from discovery. Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371, 379 (1991). As to BU 086654-086659 and CD 005521-005526, which are copies of the same document, they are privileged as attorney work product.

C.

Century seeks production of Executive Conference Reports for the years 1951-1952, 1955, and 1969-1971. Century claims that the years 1951 and 1952 are particularly important in that, in October 1951, Brooklyn Union was convicted in federal court of discharging oil into the Gowanus Canal. Altieri Affirm. ¶ 9; See Altieri Suppl. Affirm., Ex 12. Century believes that the executive conference reports would reflect any remediation activities that Brooklyn Union undertook at the Citizens Works site. Ibid.

In opposition, Keyspan initially stated that Brooklyn Union's Executive Conference meeting

³ By letter dated December 8, 2008 to the Court, Brooklyn Union indicated that the privilege log incorrectly listed ten pages as privileged which were previously produced to Century, BU 084917 to BU 084926.

minutes for 1952, 1969, 1970, 171 were previously provided. Tamborski Opp. Aff. ¶ 5. Keyspan also stated that, after two searches, it could not find any of Brooklyn Union's Executive Conference meeting minutes for 1951 and 1955. *Ibid.* Webb. Opp. Affirm. (2/8/08) ¶ 14. Keyspan later stated that it located documents for 1955, but was mistaken about having previously produced Conference meeting minutes for 1952. Tamborsky Aff. (5/20/08) ¶¶ 6-7. Keyspan still claimed it was unable to find any Executive Conference meeting minutes for 1951. *Id.* ¶ 5. As it now stands, Brooklyn Union was able to locate and produce several pages from the 1951 and 1952 Executive Conference meeting minutes. Webb Third Affirm. ¶ 7.

Century maintains that the 1951 Conference meeting minutes were once in Brooklyn Union's possession, in that, in 1991, an insurance archeologist which Brooklyn Union hired, Insurance Archaeology Group, reportedly found the 1951 Conference meeting minutes in a vault of the Union Trust Company Bank in Danbury, Connecticut.⁴ *See* Altieri Reply Affirm., Ex 1. Accordingly, Century argues that Brooklyn Union must either produce the documents, or make knowledgeable witnesses available for deposition to explain the documents' disappearance.

The Court is satisfied that Brooklyn Union met its obligation to search for the missing Executive Conference meeting minutes.⁵ A Keyspan manager states that, in 1991, bank officials instructed Brooklyn Union to remove all documents in the Danbury vault, and that he personally

⁴A 1951 memo indicates that Brooklyn Union had made arrangements "to store essential and vital records (originals or duplicates) in a storage vault at the Danbury National Bank, Danbury Conn." Altieri Suppl. Affirm., Ex 2.

⁵ In supplemental papers, Century argues that Brooklyn Union had a duty to preserve evidence stored at the Danbury bank vault. Suppl. Mem., at 8. The Court's ruling should not be construed as a ruling on the issue of Brooklyn Union's duty to preserve evidence, because Century's motion was a motion to compel discovery and not for sanctions based on spoliation.

gave to, or placed the documents into a bin for Mr. William Lampeter to file in Brooklyn Union's warehouse in Canarsie. Shaefer Aff. ¶ 4; Shaefer Suppl Aff. ¶ 3. Keyspan has reviewed index books for the warehouse in Carnasie, at another facility in Hicksville, which did not list the Executive Conference meeting minutes for 1951 and 1952. Tamborski Opp. Aff. (5/20/08) ¶ 4. To the extent that Brooklyn Union may have kept documents at a storage facility maintained by "Iron Mountain" storage (Altieri Suppl. Affirm. ¶ 24), Brooklyn Union has agreed to search the Iron Mountain warehouse. Responding Suppl. Brief, at 7.

The Court declines to order the deposition of any potential witnesses pertaining to the whereabouts of the missing Executive Conference minutes. A document suggests that Brooklyn Union was still in possession of the 1951 minutes, or some portion of it, in March 1996. Altieri Suppl. Affirm., Ex 19. However, Century was aware that only some pages of the 1951 and 1952 Executive Conference meeting minutes were produced in 2002-2003. Webb Third Affirm. ¶ 7, Webb Third Affirm., Ex C. Now, more than 5 years later, Lampeter apparently died on November 27, 2005. Webb Suppl. Affirm., Ex K. The person who entrusted the documents to Lampeter was deposed on July 9, 2003. Webb Third Affirm., Ex A.

However, the Court will permit a deposition of an individual identified as "D Campbell," or a deposition of any individual who had been employed in the Contract & Legal Services Section in May 1994 who is currently employed with Brooklyn Union. If either "D Campbell" or persons in the Contract & Legal Services Section who were employed in May 1994 are no longer employed with Brooklyn Union, then Brooklyn Union should provide their last known address to Century, provided that this information is still in the possession, custody, or control of Brooklyn Union. As Century points out, if it is true that Brooklyn Union removed its documents from the Danbury bank

vault in 1991, then it is curious that there is a routing slip from the "Contract & Legal Services Section" dated May 31, 1994 indicating that copies of a document be routed to "[X] COMPTROLLER - for Danbury," received by an individual who signed as "D Campbell." Altieri Suppl. Affirm., Ex 6.

Brooklyn Union believes that outdated routing slips were used, because the routing slip in question bears a Bates stamp indicating that the document was located in the Carnasie facility. Responding Suppl. Brief, at 5. This explanation, however, is not based on personal knowledge. The discrepancy might be explained by the recipient of the document transmitted, or the sender of the document. Thus, the Court will permit a deposition of either "D. Campbell" or any individual who had been employed in the Contract & Legal Services Section in May 1994, who was aware of practices in transmitting documents.

Aside from these individuals, the Court does not believe that any further depositions of Brooklyn Union could yield useful information as to the whereabouts of the 1951 Executive Conference meeting minutes, given Century's opportunity to question those persons who were most familiar with the whereabouts of the documents, and the affidavits submitted on these motions.

D.

Century also seeks an order compelling Brooklyn Union to provide legible copies of documents previously produced that are illegible or only partially legible, which are identified in Exhibit 4 to Altieri's affirmation in support of Century's motion. Brooklyn Union opposes the production, arguing that Century waited many years before bringing the illegibility issues to its attention. Opp. Mem., at 21. Brooklyn Union claims that the originals have since been refiled among Keyspan's records, and that it would be unduly burdensome for Brooklyn Union to attempt

to locate the originals. Tamborski Opp. Aff. ¶¶ 7-11.

As discussed above, both actions are now in the pre-note of issue stage of discovery, and there is no time limit in which to make a motion to compel. It is not disputed that the illegible documents may be relevant to the issues of the actions, because the documents sought include maps and drawings of the Citizens site. As Century indicates, any undue burden in relocating the original is of Brooklyn Union's own making. In essence, Brooklyn Union did not maintain any legible documents exchanged during litigation in a manner which allowed either party reasonable access to the litigation documents. Inasmuch as Brooklyn Union claims that its own staff would divert their time to this search (Tamborski Opp. Aff. ¶11), it has the resources to engage temporary staff to assist with the search. Assuming that the documents are still in its control, only Brooklyn Union has the ability to produce them in legible form. If documents are not legible, they are useless to the parties and the Court. Any party charged with disclosure has a continuing responsibility to make the documents available in legible form.

Therefore, this branch of Century's motion is granted, and the Brooklyn Union is directed to produce legible copies of the documents listed in Exhibit 4 to Altieri's affirmation in support of Century's motion within 90 days.

II.

In its motions in Actions No. 1 and 2, Brooklyn Union seeks to compel Century to produce four categories of documents, within 30 days of the Court's decision. The parties have resolved the discovery dispute as to three of the document categories.⁶ The only documents that Brooklyn Union

⁶By letter dated April 28, 2008, Brooklyn Union informed the Court that Century would produce all aerial photographs of the Citizens site in its possession. By stipulation dated June 4, 2008, the parties resolved the discovery issues pertaining to documents that Century obtained

now seeks relate to documents Century submitted and alluded to in its motion to renew and reargue the Court's decision denying Century summary judgment in its favor.

In its motion for renewal and reargument, Century claimed that it assembled a "library of research papers, speeches, and reports industry-related materials that were distributed to AGA [American Gas Association] Task Force members and attendees at gas industry conferences." *Tessler Affirm.*, Ex G, at 4. These materials were offered for the purpose of demonstrating "the extent of knowledge available to an MGP industry insider like Brooklyn Union between 1994 and 1993." *Ibid.* Century refers to these documents as "state of the art materials."

Given that Century offered some of these materials in support of renewing and rearguing the issue of late notice, Century cannot argue that these materials are neither relevant, material nor necessary to the issue of notice. Century admittedly does not claim that publicly available documents are themselves privileged; rather, Century argues that the selection of certain documents from a larger collection is privileged as work product. Century also argues that it would be extremely unfair that it must freely produce documents which it went to its expense to obtain from industry sources.

The Court is not persuaded that Century's selection of particular documents from publicly available sources in itself constitutes work product. The fact that Century culled documents which are relevant does not make those documents privileged. Neither is the Court persuaded that disclosure of the publicly available documents would disclose any mental or thought processes of Century's attorneys. To the extent that it could be argued that a legal strategy could be gleaned based on the information being offered at trial, production of the materials themselves will not disclose

through FOIA/FOIL requests, and pertaining to Century's "Claims Handling" documents.

whether those materials will be offered, or the portions of those materials Century would use at trial .

In any event, under the “at issue” doctrine, “privilege is a shield and must not be used as a sword.” American Re-Insurance Co. v U.S. Fidelity & Guar. Co., 40 AD3d 486, 492 (2007). Where a party places the subject matter of a normally privileged communication or document at issue, or, where invasion of the privilege is required to determine the validity of the claim or defense and the application of the privilege would deprive the adversary of vital information, fairness requires the finding of waiver. See G.D. Searle & Co. v Penne & Edmonds L.L.P., 308 AD2d 404 (1st Dept 2003)]; New York TRW Tit. Ins. Inc. v Wade's Canadian Inn and Cocktail Lounge, Inc., 225 AD2d 863 [3d Dept 1996]; Bank Brussels Lambert v Credit Lyonnais (Suisse SA), 210 FRD 506 [SDNY 2002]). That the document may contain information relevant to the issue of timeliness of notice does not mean that the document itself is at issue. See Long Is. Light. Co. v Allianz Underwriters Ins. Co., 301 AD2d 23, 33 (1st Dept 2002).

Here, Century cannot assert that the documents as privileged and yet offer them as evidence on the issue of whether Brooklyn timely notified Century. By submitting “state of the art materials” in support of its motion to renew and reargue, Century has placed those documents at issue. Production of these documents is unnecessary, as they were served in the prior motion.⁷ For those “state of the art materials” to which Century alluded but were not included in the motion, Century must produce these materials or make them available for inspection and copying within 90 days, or be precluded from offering any of these materials into evidence at trial. See Glasburgh v Port Auth. of N.Y. & N.J., 193 AD2d 441, 441-42 (1st Dept 1993) (affirming decision precluding the production

⁷ According to Brooklyn Union, Century has already produced some of the “state of the art materials” in connection with depositions of its experts. Tessler Reply Affirm. ¶ 10.

of documents into evidence not produced pursuant to three prior court orders).

CONCLUSION

Accordingly, it is hereby

ORDERED that Century Indemnity Company's motion to compel (Motion Seq. No 15 in Index No. 603405/2001) is granted to the extent that, within 90 days, Brooklyn Union shall produce:

- non-privileged documents in its possession, custody, or control related to the investigation and remediation of the Citizens Works site that are 1) drafts, working copies, and markups of site consultants' reports; and 2) correspondence (excluding drafts of correspondence) with any third-parties, including communications with its site consultants; and 3) internal memoranda
- legible copies of the documents listed in Exhibit 4 to the affirmation of John Altieri dated January 23, 2008 in support of Century's motion to compel discovery

and Century's motion is otherwise denied; and it is further

ORDERED that Brooklyn Union Gas Company's motions to compel (Motion Seq. No. 16 in Index No. 603405/2001 and Motion Seq No. 017 in Index No. 403087/2002) are granted to the extent that, within 90 days, Century Indemnity Company must produce the "state of the art materials"/"library of research papers, speeches, and reports industry-related materials that were distributed to AGA [American Gas Association] Task Force members and attendees at gas industry conferences," or be precluded from offering any of these materials into evidence at trial, and the

remainder of the motions are otherwise denied as academic in light of the parties' stipulation.

Copies to counsel.

Dated: December 15, 2008
New York, New York

ENTER:



J.S.C.

MICHAEL D. STALLMAN
J.S.C.

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