

Brooklyn Union Gas Co. v Century Indem. Co.
2022 NY Slip Op 30523(U)
February 17, 2022
Supreme Court, New York County
Docket Number: Index No. 403087/2002
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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

Justice

-----X

INDEX NO. 403087/2002

BROOKLYN UNION GAS COMPANY,

MOTION SEQ. NO. 027 042 043

Plaintiff,

- v -

CENTURY INDEMNITY CO and MUNICH REINSURANCE
AMERICA INC,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 027) 193, 194, 195, 196, 197, 198, 199

were read on this motion to EXCLUDE EVIDENCE AT TRIAL.

The following e-filed documents, listed by NYSCEF document number (Motion 042) 272, 273, 274, 277, 279, 280, 281

were read on this motion to EXCLUDE EVIDENCE AT TRIAL.

The following e-filed documents, listed by NYSCEF document number (Motion 043) 275, 276, 278, 282

were read on this motion to EXCLUDE EVIDENCE AT TRIAL.

Covington & Burling LLP, Washington, D.C. (Jay T. Smith, Eric Bosset, and Michael Lechlitter of counsel), and San Francisco, CA (Gretchen Hoff Varner of counsel), for plaintiff.

O'Melveny & Myers LLP, New York, NY (Jonathan Rosenberg and Leah Godesky of counsel), and Los Angeles, CA (Daniel Petrocelli and Craig P. Bloom of counsel), for defendant Century Indemnity Company.

Ford Marrin Esposito Witmeyer & Gleser, LLP, New York, NY (Michael L. Anania and John A. Mattoon of counsel), and *BatesCarey LLP*, Chicago, IL (Robert J. Bates, Jr. and Maryann C. Hayes of counsel), for defendant Munich Reinsurance America, Inc.

Gerald Lebovits, J.:

This decision addresses pretrial motions in limine filed by the parties in insurance-coverage litigation between, among others, Brooklyn Union Gas Company and Century Indemnity Company. The litigation chiefly concerns the extent to which excess insurance policies that Brooklyn Union purchased from Century's corporate predecessor provide coverage for the costs of government-mandated remediation by Brooklyn Union of the Gowanus Canal and other sites contaminated by the operation of manufactured-gas plants (MGPs).

In this action, Brooklyn Union will bear the burden to establish at trial that the costs of cleanup are covered under the policies because Brooklyn Union did not expect or intend the significant environmental harm that it must now pay to remedy. (*See Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 219 [2002] [*Con Ed*] [holding, in case involving a materially similar insurance policy, that the insured bears the burden of proof on this issue].)

In motion sequences 042 and 043, Century and defendant Munich Reinsurance America, Inc., seek to preclude Brooklyn Union from arguing and introducing evidence at trial that even if Brooklyn Union intentionally discharged pollution into the Gowanus Canal while operating its MGPs, it did not then expect or intend to cause the specific form of environmental harm that it is now remediating. In the second motion (motion sequence 027), Brooklyn Union seeks to preclude Century from introducing evidence of past prosecutions brought against Brooklyn Union during the period of MGP operations, which Century contends is probative on whether Brooklyn Union expected or intended to cause the environmental harm at issue.¹

These related motions are consolidated for disposition. Century and Munich Re's motions are granted in part and denied in part. Brooklyn Union's motion is granted.

DISCUSSION

I. Century's Motion to Limit the Scope of Permissible Arguments About What Brooklyn Union "Expected or Intended" While the Century Policies were in Effect (Mot Seqs 042 and 043)

On Century's motion, Century asks this court to "preclude Brooklyn Union from offering evidence or argument that it could not have expected or intended to cause property damage because it could not have anticipated the modern environmental regime under which it is being held liable." (NYSCEF No. 930 at 2.) Century contends that preclusion is required. According to Century, it is irrelevant under New York law that an MGP operator intending to cause damage to property either "did not anticipate what it would be required to pay for the property damage that it intentionally caused," or that the "property damage the MGP operator expected or intended to cause was of a different nature than the damage for which it is now being held liable." (*Id.* at 1-2.) As thus formulated, Century's contention is, essentially, that Brooklyn Union should be precluded from making two different arguments about what Brooklyn Union did (or did not)

¹ The litigation among Brooklyn Union, Century, and Munich Re comprises two separate actions before this court: this action and *Century Indemnity Co. v Brooklyn Union Gas Co.*, Index No. 603405/2001. The motions in limine filed in the two actions overlap almost completely. The NYSCEF citations given below correspond to the *Century Indemnity* docket, in which the motions to preclude on the subjects at issue here are motion sequence 044 (Century's motion) and motion sequence 035 (Brooklyn Union's motion).

In this docket, motion sequence 042 is Century's motion to preclude. Motion sequence 043 is Munich Re's motion to preclude, which adopts and incorporates by reference Century's arguments made in motion sequence 042. (For convenience, this court refers here to defendants collectively as "Century.") Motion sequence 027 is Brooklyn Union's motion to preclude.

“expect or intend” during the period in which it was operating the MGPs at issue. This court considers those two arguments in turn.

A. Century’s Request to Preclude Arguments that Brooklyn Union Did Not Anticipate the Legal Regime under Which it is Now Being Held Liable

Century asks this court to bar Brooklyn Union from arguing to the jury (or introducing evidence) that Brooklyn Union did not “expect or intend” the damage for which it is now being held liable because that liability stems from a legal regime that did not exist when the MGPs were operating. (*See* NYSCEF No. 930 at 2-3.) On this point, Century is straightforwardly correct that it is legally “irrelevant whether Brooklyn Union could have anticipated CERCLA or otherwise misjudged the *level or type of liability* that would result from Brooklyn Union’s actions.”² (*Id.* at 3 [emphasis in original].) The relevant question in this context is whether the damage to property resulting from Brooklyn Union’s conduct was intended or unintended—not the legal basis for, and extent of, liability for that damage. (*See Con Ed*, 98 NY2d at 220-221.) Nor does Brooklyn Union contend otherwise.

Brooklyn Union may not, therefore, argue to the jury or introduce evidence (through its expert witness, Dr. Neal Shifrin, or otherwise) that Brooklyn Union did not expect or intend the damage at issue based merely on the fact that the applicable *legal* regime changed after the MGPs had ended their operations³; or that Brooklyn Union did not fully appreciate the severity of the harm it was causing.

B. Century’s Request to Preclude Arguments that Brooklyn Union Did Not Anticipate the Specific Environmental Harm for Which it is Now Being Held Liable

Century also asks this court to bar Brooklyn Union from arguing that it did not expect or intend “the specific nature of the damage” that its conduct caused. (NYSCEF No. 930 at 5.) Century contends, for example, that it would not be permissible for Dr. Shifrin to testify that Brooklyn Union did not expect or intend the “type of damage being addressed today” due to the fact that “the scientific knowledge and understanding . . . that drive concerns today over chemical contamination in the environment simply did not exist” at the time of MGP operations.” (*Id.* at 3 [quoting Dr. Shifrin’s expert report dated Jan. 13, 2017].) This much broader preclusion request is denied.

² CERCLA is the federal Comprehensive Environmental Response, Compensation, and Liability Act (commonly known as Superfund), which Congress enacted in 1980.

³ To the extent Century contends that Dr. Shifrin’s expert reports show that his trial testimony would be limited to a version of this change-in-legal-regime argument (*see e.g.* NYSCEF No. 930 at 5-6 [opening mem. of law]; NYSCEF No. 953 at 1-2 [reply mem. of law]), this court disagrees.

1. The distinction between intending to commit an act and expecting or intending the resulting harm

Assessing for coverage purposes whether an injury is expected or intended requires considering both whether the insured's act that caused the injury was intended *and* whether the insured intended the injury itself. (See *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 649 [1993].) As reflected in Justice Ira Gammerman's jury instructions in *Con Ed* on which Century itself relies, an insured's losses may be found to be unexpected or unintended (and thus a covered "occurrence") even when "the acts that caused the damage were . . . intentional," as long as "the resulting *damage* was unintended." (*Con Ed*, 98 NY2d at 220-221 [emphasis added].)

In this context, New York law draws a distinction between damage that is "the intended result" of the insured's intentional act, "flow[ing] directly and immediately" from that act; and damage "arising out of a chain of unintended though foreseeable events that occurred after the intentional act." (*Salimbene v Merchants Mut. Ins. Co.*, 217 AD2d 991, 994 [4th Dept 1995] [internal quotation marks omitted].) The former type of damage is "expected and intended"; the latter type of damage is not. (See *e.g. General Acc. Ins. Co. v Zazynski*, 229 AD2d 920, 921 [4th Dept 1996] [affirming the denial of summary judgment to an insurer because a question of fact existed about whether damage to the insured's house due to an arson committed next door had been intended by the arsonist].)

For this reason, Justice Saliann Scarpulla's jury instructions in the 2014 trial in the *KeySpan Gas East Corp. v Century Indemnity Co.* litigation, cited by Century, emphasized that KeySpan, as the plaintiff-insured, had "the burden of proving that the specific third-party property damage from its waste disposal practices for which it was being held liable was accidental and not intentional."⁴ (NYSCEF No. 947 at Tr. 2483 [transcript of instructions given to jury].) The jury in *Olin Corp. v Insurance Co. of N. Am.* (972 F Supp 189, 194 [SD NY 1997]), drew a similar distinction. There, the jury found that although Olin had intended injury to the soil of its pesticide plant by dumping pesticide components into that soil, Olin had *not* intended a further injury to the groundwater under the plant stemming from the "groundwater flowing through contaminated soil, picking up some amount of contamination, and flowing on." (*Id.*) The district court held that given the jury's finding, Olin had coverage for the costs of mandated remediation of damage to the groundwater; but lacked coverage for costs to remediate the soil. (See *id.* at 195-196.)

⁴ Century argues that this language from Judge Scarpulla's charge does not support Brooklyn Union's position because the charge conference in that case putatively made clear that Judge Scarpulla used the language in question due to the particular trial record in that case, "which involved MGP contamination in waterways adjacent to the MGP sites that [the insured] was not required to clean up." (NYSCEF No. 953 at 11 & n 16.) But the charge-conference transcript reflects that even absent that unusual liability issue, Judge Scarpulla would still have charged the jury that KeySpan bore the burden to prove that the "*specific* property damage that resulted from its waste disposal practice" was accidental and not intentional. (NYSCEF No. 964 at Tr. 2228 [emphasis added].)

Applying this framework to the present case, the question is not, as Century suggests, merely “whether Brooklyn Union expected or intended to cause *property damage*,” but whether Brooklyn Union expected or intended the particular *type* of property damage for which it is now being held liable. (NYSCEF No. 930 at 4 [emphasis in original].) Brooklyn Union may properly argue, and introduce evidence intended to show, that even if Brooklyn Union intended one form of environmental harm (for example, harm to the water of the Gowanus Canal by dumping wastewater contaminated with tar and oil residue), it did not intend the assertedly different form of harm that it is now being required to remediate (for example, damage to the sediments *under* the Canal).⁵

2. Century’s objections to permitting Brooklyn Union to draw that distinction in this case

Century raises several challenges to the permissibility of Brooklyn Union drawing a distinction between forms of harm that Brooklyn Union did, and did not, intend to cause during MGP operations. None of Century’s challenges is persuasive.

Century emphasizes, for example, the Court’s statement in *Con Ed* that the “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.” (NYSCEF No. 930 at 4, quoting *Con Ed*, 98 NY2d at 220.) But that statement related only to which party (the insured or insurer) bore the burden of proof on whether the damage at issue was intended or not. The statement did not address or resolve the question of how to tell when damage *is* intended. And, as discussed above, *Con Ed* then went on to approve the trial court’s charging the jury that for these purposes there “can be accidental results of intentional acts.”⁶ (*Con Ed*, 98 NY2d at 220 [internal quotation marks omitted].)

Century argues that if “Brooklyn Union’s theory were correct, then there would *always* be coverage for environmental damage caused before the 1970s or 1980s, even when it is undisputed that the policyholder intended to cause property damage.” (NYSCEF No. 930 at 5.) As the discussion in *Olin* cited above reflects, though, whether coverage exists in a given case

⁵ This court does not resolve here whether any particular piece of evidence relating to this argument is admissible at trial; only that Brooklyn Union may make this argument at trial and introduce admissible evidence to support it.

⁶ Similarly, Century quotes from the *Con Ed* trial court’s later statement to the jury that “if the operator of the plant was aware of a substantial probability of damage as a result of the manner in which the plant was operated you may find that the damage was intentionally caused and was therefore not accidental.” (NYSCEF No. 953 at 3, quoting NYSCEF No. 960 at Tr. 990:15-21.) But Century omits the immediately preceding sentence of that instruction, in which the trial court told the jury that “you can find intent, if you conclude that the operator of the plant knew that damages would flow *directly and immediately* from the acts of its employee.” (NYSCEF No. 960 at Tr. 990:10-14 [emphasis added].) The argument that Century seeks here to bar is that the damage for which Brooklyn Union has been held liable was accidental because it did *not* flow “directly and immediately” from releasing contaminated wastewater into the Gowanus Canal. That argument is fully consistent with the *Con Ed* jury charge on which Century relies.

depends on the kind of environmental damage that the insured expected or intended to cause through its operations (if any), the kind of environmental damage the insured is now being required to remediate, and the distance (or proximity) between the two. In some cases, a jury may well find that the insured did not intend the particular type of damage for which it is being held liable—but not necessarily.⁷ (*See Con Ed*, 98 NY2d at 217, 220-221.)

This court also finds unconvincing Century's suggestion that denying its motion altogether "would undermine the 'fundamental principle that no one shall be permitted to take advantage of his own wrong'" by permitting "a policyholder that expects or intends to cause property damage to shift the cost of his wrongdoing to the insurer." (NYSCEF No. 930 at 4-5, quoting *Messersmith v American Fid. Co.*, 232 NY 161, 165 [1921].) This suggestion overlooks that New York law consistently distinguishes in this context between injuries that the insured expected or intended to cause by its acts, and injuries that resulted unexpectedly from intentional acts. Only in the former circumstance does a policy requirement of accidental/unintended injury bar the insured's shifting the cost of the injury to its insurer. (*See Con Ed*, 98 NY2d at 220-221; *Zazynski*, 229 AD2d at 220-221; *Saks v Nicosia Contracting Corp.*, 215 AD2d 832, 834 [3d Dept 1995] [affirming motion court's conclusion, in suit against insured for negligently causing damage to property by failing to build plaintiff's house entirely within plaintiff's plot of land, that the "placement of the house partially on the neighboring parcel was the unintended result of defendant's intentional act, which is sufficient to establish that the result was accidental for insurance coverage purposes"]; *Town of Huntington v Hartford Ins. Group*, 69 AD2d 906, 907 [2d Dept 1979] [reversing motion court and holding that a reasonable jury could find property damage caused by flooding from adjacent stormwater ponds to have been the unintended result of the insured's deliberate decision to "pump[] such storm waters into said ponds" for a different purpose, namely "transferring the excess waters into an adjacent sump by means of an interconnecting weir"].⁸)

Century's motion to preclude is granted only in limited part, and otherwise denied.

⁷ In this context, Century is free to argue to the jury (and to introduce supporting evidence) that Brooklyn Union expected or intended the particular type of environmental harm for which it has been held liable, notwithstanding its lack of understanding of "the mechanics of environmental contamination at the molecular level during the operations era." (NYSCEF No. 953 at 11.)

⁸ *See also e.g. Miller v Continental Ins. Co.* (40 NY2d 675, 677 [1976] [concluding that an insured's heroin overdose was an accident for coverage purposes because the insured had intended only to use heroin, not to overdose]); *Clayburn v Nationwide Mut. Fire Ins. Co.* (58 AD3d 990, 991-992 [3d Dept 2009] [affirming motion court's determination that the "intentional acts exclusion does not bar coverage here" because the insured "did not expect, intend or foresee that plaintiff would end up crashing through the plate glass window or be injured in any way when [the insured] placed him in a bear hug"]; *Jubin v St. Paul Fire & Mar. Ins. Co.* (236 AD2d 712, 713 [3d Dept 1997] [reversing motion court and holding that "[w]here, as here, the complaint in the underlying action can be construed as alleging intentional offensive contact that results in unintended serious harm which is not inherent in the nature of the physical contact, coverage will be sustained"])).

II. Brooklyn Union's Motion to Preclude Century from Offering Evidence of Past Criminal Prosecutions (Mot Seq 027)

On Brooklyn Union's motion, it seeks to preclude Century from offering evidence of a number of prosecutions and enforcement proceedings brought against Brooklyn Union during the period it was operating MGP sites. Brooklyn Union contends that because many proceedings at issue are known to have been dismissed, and none are shown to have resulted in a conviction, introduction at trial of evidence about these proceedings would be far more prejudicial than probative. (*See* NYSCEF No. 629 at 5-6.) Brooklyn Union therefore argues that this evidence should be excluded. This court agrees.

Under New York law, evidence of prior bad acts may be admitted only when (i) it is directly relevant to a specific material issue in the case, and (ii) has substantial probative value relative to its potential for undue prejudice to the party against whom it is introduced.⁹ (*See People v Rodriguez*, 193 AD3d 554, 555 [1st Dept 2021], citing *People v Cass*, 18 NY3d 553, 559-560 [2012]; *see also People v Molineux*, 168 NY 264 [1901].)

Here, the evidence at issue consists of several news articles about an 1899 prosecution; two charts of cases brought against Brooklyn Union in the early 1920s, contained in transcripts of 1924 congressional hearings on pollution in waterways; and an indictment and other case materials relating to two federal prosecutions brought against Brooklyn Union in 1921. (*See* NYSCEF No. 629 at 3-5 [Brooklyn Union opening mem. of law].) Century contends that introduction of this evidence is directly relevant in two different respects.

1. Century contends that these criminal prosecutions and enforcement proceedings are directly relevant to (and rebut) the opinion of Brooklyn Union's expert, Dr. Shifrin that public understanding and regulation of MGP-based pollution (such as wastewater discharges into the Gowanus canal) was limited during the period in which Brooklyn Union operated MGPs. (*See* NYSCEF No. 644 at 7-8.) This contention is unpersuasive.

Dr. Shifrin's opinion—as reflected in passages from his reports quoted by Century itself—was not that regulators were *categorically* unconcerned with pollution from wastewater discharges, but rather that discharges “were curtailed if they caused a nuisance” within the technical meaning of the term, and otherwise permitted. (*See id.* at 7 & n 25, quoting from NYSCEF Nos. 646, 647 [Dr. Shifrin reports].) Evidence that the government sought to enforce laws against discharges against Brooklyn Union is not necessarily inconsistent with Dr. Shifrin's opinion—for example, if the basis for the prosecution was that the discharges were causing a nuisance.

The relevance of these prosecutions to Century's argument depends on their factual details. Those details, however, are largely absent from the record. The charts of court cases in the congressional-hearing transcripts contain no information about those cases (*see* NYSCEF No.

⁹ The parties agree that New York precedent on the admissibility of “bad acts” evidence provides the proper framework for considering this motion. (*See* NYSCEF No. 644 at 6 [Century mem. of law]; NYSCEF No. 653 at 1 & n 2 [Brooklyn Union reply mem. of law].)

634 at 114; NYSCEF No. 643 at 38); and the available information about two 1921 federal prosecutions (an indictment, case records, and the opposition to a demurrer to the indictment) is limited to little more than statements that Brooklyn Union violated the terms of the applicable federal statute (*see* NYSCEF No. 635 [indictment and case record]; NYSCEF No. 642 [case record]; NYSCEF No. 636 [opposition to demurrers]). Moreover, the available information about the 1899 prosecution is consistent with Dr. Shifrin’s opinion that regulatory enforcement was tied to allegations of a public nuisance. (*See e.g.* NYSCEF No. 631 [article discussing allegations that discharges were assertedly “polluting the water and causing an odor that offended the citizens of that district”].)

Additionally, Century defends the relevance of this evidence by suggesting that it can contextualize a 1951 guilty plea by Brooklyn Union to a violation of an antipollution statute as “the culmination of years of Brooklyn Union evading conviction.”¹⁰ (NYSCEF No. 644 at 9.) This defense itself suggests that Century sees a significant element of the evidence’s probative value as tending “to demonstrate the defendant’s propensity to commit the crime charged.” (*Cass*, 18 NY2d at 559.) That purpose is precisely what New York’s prior-bad-acts jurisprudence forbids. (*See People v Santarelli*, 49 NY2d 241, 247 [1980] [discussing the *Molineux*-based bar on propensity evidence].)

Even if this evidence *were* directly relevant on a non-propensity issue, Century would still have to show for *Molineux* purposes that it has substantial probative value, thereby outweighing undue prejudice to Brooklyn Union. It has not made that showing. It is undisputed that the 1899 prosecution was dismissed, and indeed that the court hearing that prosecution stated that because an attorney for New York City “had investigated and found the complaint to be unfounded.” (NYSCEF No. 632.) The case records for the two 1921 federal prosecutions indicate that one was dismissed on defendant’s motion and one was dismissed by the government *nolle prosequi*. (*See* NYSCEF Nos. 635 at 4, 642.) The charts of cases brought against Brooklyn Union (among others) reflect that several of those cases had been dismissed after trial (*see e.g.* NYSCEF No. 634 at 114), and the record contains no disposition information for those that then remained pending. And the potential for unfair prejudice to Brooklyn Union from introducing evidence of prosecutions that were dismissed or did not lead to conviction is obvious.¹¹ This court declines Century’s invitation to put the burden on *Brooklyn Union* at trial “to inform the jury that it wasn’t convicted of these offenses” and to “tell its story about these prosecutions.” (NYSCEF No. 644 at 11.)

2. Century also contends that these prosecutions are directly relevant to rebut Dr. Shifrin’s putative opinion that Brooklyn Union “did not know it was discharging tar and oil into

¹⁰ Brooklyn Union admitted in that case that oil had leaked into the Gowanus Canal from one of its MGPs and paid a \$750 fine. Brooklyn Union does not seek to preclude evidence relating to that prosecution or Brooklyn Union’s guilty plea.

¹¹ *Cf. People v Plaisted* (2 AD3d 906, 908 [3d Dept 2003] [holding that trial court properly limited defense’s impeachment of a prosecution witness through cross-examination about asserted prior bad acts, because “defense counsel failed to demonstrate that the absence of convictions for those alleged crimes was for any reason other than an acquittal or dismissal on the merits”] [internal quotation marks omitted]).


the Gowanus Canal during the operations period.” (NYSCEF No. 644 at 9-10.) Having reviewed Dr. Shifrin’s expert reports, including the portions cited here by Century, this court is not persuaded by Century’s characterization of Dr. Shifrin’s opinion. Nor is it clear to this court how the existence of *dismissed* prosecutions—including prosecutions expressly determined to have been factually unfounded—would be probative evidence that Brooklyn Union was put on notice that it was discharging tar into the Gowanus Canal. Moreover, the potential remains for significant undue prejudice to Brooklyn Union from admitting this evidence in its current form.¹²

Accordingly, for the foregoing reasons, it is hereby

ORDERED that Century’s motion to preclude (mot seq 042) is granted in part and denied in part as discussed above in Point I; and it is further

ORDERED that Munich Re’s motion to preclude (mot seq 043) is granted in part and denied in part as discussed above in Point I; and it is further

ORDERED that Brooklyn Union’s motion to preclude (mot seq 027) is granted.

<u>2/17/2022</u> DATE	 HON. GERALD LEBOVITZ J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	

¹² This court takes no position at this time about whether the evidence at issue on this motion could be altered or redacted in a way that would preserve any probative value it might have while minimizing prejudice to Brooklyn Union. Any such determination is appropriately made instead on a more concrete factual record at trial.