

UNITED STATES DISTRICT COURTS
SOUTHERN DISTRICT OF NEW YORK
AND
EASTERN DISTRICT OF NEW YORK

IN RE JOINT SOUTHERN AND EASTERN DISTRICTS ASBESTOS LITIGATION

NYAL-PH-8888 (CPS)
91-PH-8889 (JBW)

This Document Relates To:

All Powerhouse Cases

CON EDISON OBJECTIONS TO OCF DOCUMENTS
WHICH IT INTENDS TO OFFER ON DECEMBER 16, 1991

CON EDISON OBJECTIONS TO OCF DOCUMENTS
WHICH IT INTENDS TO OFFER ON DECEMBER 16, 1991

1. OCF Exhibit 5 - Specification #MP-5620 R-2 entitled General Insulation Specification for Piping and Equipment.

While we have no objection to the introduction of a complete copy of this specification into evidence, the copy which OCF has provided to us is incomplete. The first three pages are missing and Appendix "A" to the specification is missing as well. Any documents which are introduced should, of course, be complete.

2. OCF Exhibits 9, 73, 94, 95 and 97

These are newspaper articles concerning asbestos. OCF Exhibit 9 consists of articles from the New York Times dated December 29, 1968 concerning a symposium held by a panel of experts in environmental science in Dallas, Texas, October 7, 1964 reporting on an annual meeting of the American Public Health Association during which doctors from Mount Sinai Hospital reported that exposure to asbestos may cause mesothelioma and March 2, 1966 reporting a presentation by Dr. Irving Selikoff concerning the hazards of asbestos dust. OCF Exhibit 73 is an article from the Newark Evening News of March 2, 1966 reporting on a press conference called by Dr. Selikoff to report on his long-term study of asbestos workers. Exhibit 94 is an article from the New York Times of April 20, 1970 reporting on New York City's EPA's warning to builders concerning asbestos rules. Exhibit 95 is an article from the Daily News dated April 22, 1970 to the same effect as Exhibit 94.

Exhibit 97 is an article from the New York Post dated May 25, 1970 concerning an announcement by the Port Authority that it was substituting Rock Wool for asbestos at the World Trade Center.

OCF apparently contends that these articles are some evidence of knowledge of asbestos hazards which was available to the third-party defendants. While, generally, newspapers are self-authenticating under FRE 902(6), their content must still meet the other requirements of the Federal Rules in order to be admissible into evidence. (New England Mutual Life Insurance Company v. Anderson, 888 F.2d 646 [10th Cir. 1989]). These proposed exhibits are not admissible because they are pure hearsay to which none of the hearsay exceptions in the Federal Rules of Evidence apply.

In fact, the articles for the most part are double hearsay as they are based upon information provided to the reporter by scientists, or other third-parties. Articles which contain information provided by a third-party are not admissible on the grounds of hearsay. (New England Mutual Life Insurance Company v. Anderson, supra).

If OCF is allowed to introduce these newspaper articles into evidence, then any newspaper article is admissible at any time in any case no matter that the information in the article is pure hearsay. The folly of such a rule becomes clear when one considers that if the expert of any party to this case rendered his or her opinion to a newspaper reporter, the article and, hence, the expert opinion would be admissible without the opportunity for any other party to cross-examine the expert. These OCF exhibits are not admissible on hearsay grounds.

3. OCF Exhibit 17 - Specification for Thermal Insulation, Low Pressure Steam Drop System.

This document is incomplete.

4. OCF Exhibit 24 - Specification for thermal insulation 12-13-67, revised May 31, 1974. The document is incomplete. There is apparently an appendix of some 13 pages which is missing.

5. OCF Exhibit 25 - Survey of Thermal Insulation, New York Power Authority - Indian Point #3, June 22 to June 26, 1987.

Indian Point Unit #3 was sold by Con Edison to the New York Power Authority in the mid-1970's. Therefore, any records of material samplings in 1987 are not relevant to the claim against Con Edison. Notwithstanding, the document is irrelevant because no workers claim asbestos disease occurring from exposures in 1987 because of the long latency periods involved. Further, there is no proof that the materials sampled were present on Unit #3 at the time Con Edison owned it. The document is not admissible against Con Edison.

6. OCF Exhibits 26 and 29.

These documents also concern the testing of Unit 3 at Indian Point in 1987 (Exhibit 26) and 1989 (Exhibit 29). These documents are objectionable for the reasons stated with respect to OCF Exhibit 25.

7. OCF Exhibit 31 - Specification #MP-5620 R-3 for General Insulation - Piping and Equipment.

We question the relevance of a document dated March 5, 1976. The plaintiffs in these cases were diagnosed with asbestos disease at the latest in the mid to late 1980's. In view of the long latency period required for the manifestation of an asbestos disease, a document prepared in 1976 is not relevant because the diseases which the plaintiffs contend would have been contracted before that time.

8. OCF Exhibit 38 - Eastern Refractory's Company Memos and Invoices.

The first document in this grouping appears to be a proposal for work to be performed at Indian Point Unit #3. We note that the proposal indicates that it is two pages while only page 1 is included in the grouping.

9. OCF Exhibit 39 - Miscellaneous purchase orders dated from 1978 to 1985.

We object to these purchase orders as irrelevant. Exposures in 1978 through 1985 to asbestos could not have caused any of the injuries or deaths in these litigations because of the long latency period required for asbestos disease.

10. OCF Exhibit 47 - Addendum #2a to Specification for Thermal Insulation #9321-01-249-1.

This specification dated March 10, 1978 is not relevant because any exposures occurring at or after that time could not have produced any diseases claimed by the plaintiffs in these litigations. Further, the document is not complete.

11. OCF Exhibit 57 - Workers Compensation Board Record concerning Thomas Sheridan dated October 29, 1951.

Mr. Sheridan was apparently an employee of Con Edison who had been diagnosed with "chest pathology." There is no indication in the record that Mr. Sheridan suffered from an asbestos-related disease. Therefore, the record is not relevant to any issues in this litigation. The diagnosis "chest pathology" could relate to any number of diseases. The mere fact that it is indicated that the claimant was exposed to coal dust and asbestos dust is not probative because there is no suggestion in the documents that the chest pathology is related to either of such exposures.

Further, the document is hearsay which is inadmissible. Records of the Workers Compensation Board are not public records subject to the exception in Rule 803(8) of the Federal Rules of Evidence. Rather, such records relating to individual claimants who have suffered occupational injury are private records which are privileged from disclosure absent authorization from the worker. (Public Officers Law, Section 96[1][a]).

In addition, even if the records are public records, they are not authenticated in accordance with FRE 902(4) which requires certification of copies of public records.

Should there be any question as to the inadimissibility of these records, we ask that the Court defer its determination until we have an opportunity to fully brief the issue. Such a procedure is only fair since the one day that we have been allowed by OCF to specify our objections is not sufficient to fully brief each of our objections.

12. OCF Exhibits 63, 64 and 65.

These are various versions of Industrial Code Rule 23 (12 NYCRR 23) dated April 30, 1945 (Exhibit 63), December 31, 1951 (Exhibit 64) and November 11, 1959 (Exhibit 65). While it may be appropriate for the Court to charge the jury on these regulations at the conclusion of the proof, they are not matters to be presented to the jury in the form of evidence. They are, essentially, matters of law, not matters of evidence. If the Court determines that the regulations are appropriate for the jury's consideration and thus includes them in its charge, it, respectfully, must charge the jury that if it finds a violation of regulation, it may consider such violation as some evidence of negligence. (Costa v. Large Scale Development Corp., 10 N.Y.2d 20).

13. OCF Exhibit 66 - Industrial Code Rule 12 (12 NYCRR 12) effective October 1, 1956.

The same objection applies to Exhibit 66. Rules of the Board of Standards and Appeals are not matters of evidence, but matters of law to be charged to the jury if they are applicable.

In addition, Rule 12 is not applicable to site-owners such as Con Edison. Rule 12 as adopted in 1956 excepts from its application operations within the application of Industrial Code Rule 23 relating to the protection of persons employed in the erection, repair and demolition of buildings or structures. (12 NYCRR 12.1). The injuries claimed in these cases allegedly arise out of construction work which is excepted specifically from the application of Rule 12.

Further, the 1956 version of Rule 12 places the responsibility for air contaminants upon the employer, not the site-owner. (12 NYCRR 12.2). Accordingly, Rule 12 is not applicable against Con Edison.

On December 12th OCF filed a brief concerning the Industrial Code Rules. Because of time limitations, we are not able to respond to that brief at this time. Should the Court have any question about the application of Rule 12 to Con Edison, we ask that Court defer its determination until we have an opportunity to respond to OCF's brief.

14. OCF Exhibits 67 and 115.

These are American Standard Safety Codes for Head, Eye and Respiratory Protection dated November 25, 1959 (Exhibit 67), and November 11, 1938 (Exhibit 115).

The American Standards Association which approved these standards apparently was an organization made up of various members of

industry which adopted standards which represented "a consensus of those substantially concerned with its scope and provisions." (Page 2, Exhibit 67). Exhibits 67 and 115 apparently two such standards published by that association.

These documents are pure hearsay. Their contents are not admissible without a proper foundation. At best, they may fall within the provisions of FRE 803(18) concerning Learned Treatises. That rule requires that a proper foundation as to the authoritativeness of the document be laid by an expert witness in order for the document to qualify under the Learned Treatise exception to the hearsay rule. (Schneider v. Revici, 817 F.2d 987, 991 [2d Cir. 1987]; cf. Dartez v. Fiberboard Corp., 765 F.2d 456 [5th Cir. 1985]).

The question of the admissibility of safety codes has been addressed in Section 803[17][01] of Weinstein's Evidence (Volume 4, Rules 801-806, p. 803-319). The author has stated that "most courts that have considered the problem have rejected evidence of safety codes on analogy to the customary rule excluding treatises as not coming within a hearsay exception. Treatises are, however, the subject of a hearsay exception pursuant to Rule 803(18), provided they are offered in conjunction with expert testimony, are established as reliable and are not received as exhibits. Applying such an approach to safety codes would minimize the dangers of misunderstanding and misapplication since an expert would be available to evaluate and explain." (cf. Quinn v. United States, 312 F.Supp. 999, 1005 [Ed. Arkansas 1970], aff'd 439 F.2d 335 [8th Cir. 1971]).

Therefore, such codes are not admissible without a proper foundation. Even with that foundation, the applicable provisions may be read to the jury but may not be received as exhibits (FRE 803[18]). Accordingly, these codes are not admissible as exhibits under any circumstances.

Finally, it is to be noted that the provisions of each code apply only to employers. (Exhibit 67, Section 4.2; Exhibit 115, Section 1.10[b]). Therefore, the standards do not apply to site-owners unless they were the employers of the injured worker.

15. OCF Exhibit 68 and 69 - American Standards Association Yearbook for 1945 - 1946 (Exhibit 68) and 1938 (Exhibit 69).

This document containing a listing of officers and members of the American Standards Association is pure hearsay which may not be introduced into evidence without a proper evidentiary foundation authenicating the document and demonstrating that it is admissible under some exception to the hearsay rule. Further, the information appears to be irrelevant.

16. OCF Exhibits 70, 103 and 104.

These are excerpts from books by N. Irving Sax. Exhibit 70 is an excerpt from a book entitled Dangerous Properties of Industrial Materials published in 1957. Exhibit 103 is an excerpt from a book entitled

Handbook of Dangerous Materials dated 1951. Exhibit 104 is an excerpt from a book entitled Dangerous Properties of Industrial Materials dated 1968. The same objections to Exhibits 67 and 115 apply to these proposed exhibits.

Assuming that these books can properly be catagorized as "Learned Treatises," expert testimony is required to certify their authenticity. Assuming proper authentication, the contents are not admissible in evidence, but may be read to the jury.

17. OCF Exhibit 71 - Workers Compensation records concerning a Keasbey employee Harry Olsen.

These records are inadmissible against Con Edison for the reasons stated in our objection to Exhibit 57. The documents are hearsay and may not be introduced into evidence.

Further, insofar as Con Edison is concerned, there is no evidence that Con Edison was aware of Mr. Olsen's claim or the circumstances involving that claim. Without any foundation in that regard, the records are not admissible against Con Edison for this additional reason.

As with Exhibit 57, should the Court have any question as to the inadmissibility of these records against Con Edison we ask that we be allowed sufficient time to fully brief the issue.

18. OCF Exhibit 74 - Letter from Stone & Webster to all superintendents/safety inspectors dated May 24, 1966.

This letter is hearsay which is not subject to any exceptions under the Federal Rules of Evidence. Further, there is no indication that this letter was ever sent to or received by any representative of Con Edison. If the letter is admitted into evidence, we ask that there be a limiting instruction that it is not admissible against Con Edison.

19. OCF Exhibit 92 and 96.

These are excerpts from a publication entitled "Engineering News - Record" dated April 2nd and May 7th, 1970. The April 7th article concerns a finding by medical researchers that sprayed asbestos used in the fireproofing of steel frames of buildings causes cancer to workers. The May 7th article refers to the New York City Department of Air Resources halting of a spraying of asbestos on steel-frame buildings in New York City. As with the newspaper articles, these magazine articles are inadmissible on hearsay grounds. Further, these articles are not admissible against Con Edison because there is no credible evidence that any such operations were performed at Con Edison sites.

20. OCF Exhibits 400 through 406.

These are various scientific studies and articles concerning the dangers of asbestos exposure. They are not admissible against Con

Edison for several reasons. The first reason is that the statements in these scientific articles and reports are hearsay, the admissibility of which is controlled by Rule 803(18) of the Federal Rules of Evidence. As we have stated in our objections to other documents, that rule requires that a proper foundation be laid by an expert witness as to the authoritativeness of the treatises. (Schneider v. Revici, 817 F.2d 987, 991 [2d Cir. 1987]). Further, the articles are not admissible as exhibits even if a proper foundation is laid, although they may be read to the jury. (FRE 803[18]).

Additionally, the information in these articles is not admissible against Con Edison. The manufacturer of a product is held to the standard of an expert in the field. (Cover v. Cohen, 61 N.Y.2d 261, 473 N.Y.S.2d 378 [1984]). Thus, the manufacturer must keep abreast of scientific knowledge, discoveries and advances in the field. (Micallef v. Miehle Company, 39 N.Y.2d 376, 384 N.Y.S.2d 115 [1976]).

However, entities in the chain of distribution are not held to the knowledge and expertise of the manufacturer. Thus, in Bichler v. Willing, 58 A.D.2d 331, 397 N.Y.S.2d 57 [1st Dept. 1977], the Appellate Division held that a retailer has no independent duty to conduct independent tests of a product to determine possible risks. In Cosgrove v. Estate of Delves, 35 A.D.2d 730, 315 N.Y.S.2d 369 [2d Dept. 1970] the Appellate Division held that a retailer is under a duty to inspect only for such defects as would be disclosed by a physical examination. In Alferi v. Cabot Corp., 17 A.D.2d 455, 235 N.Y.S.2d 753 [1st Dept. 1962] the Appellate Division held that a vendor may not be held liable to perform tests on the

product under controlled conditions as there is no obligation upon the vendor to make such a test. In Chandler v. Northwest Engineering Company, 11 Misc.2d 433, 444 N.Y.S.2d 398 (Sup. Ct. Bronx County 1981), the Court determined that a seller in the chain of distribution has no duty to ascertain unknown facts. Comment a to Section 12 the Restatement (Second) of Torts (1965) states that entities in the chain of distribution have no affirmative duty to ascertain unknown facts.

Certainly, if vendors have no duty to test, inspect or ascertain unknown facts, a purchaser or ultimate user of the product, such as Con Edison, has no such duty either. If the end user was required to keep up with scientific literature concerning a product, it would be held to the same expert standard as the manufacturer. This clearly is not the law. Since Con Edison had no duty to ascertain the information in these articles, it may not be charged with knowledge of their contents. Accordingly, the content of Exhibits 400-406 is not admissible against Con Edison even if they are properly authenticated under FRE 803(18).

21. OCF Exhibits 101 and 105 - Indian Point Powerhouse.

Included in these documents are documents dated December 26, 1977 and later. We object to these documents on the grounds that they are irrelevant. None of the diseases claimed in these cases would have occurred as a result of exposures in 1977 or later because of the latency period.

One of the documents in this group is the Specification for Thermal Insulation dated December 13, 1967, revised May 31, 1974 which has

also been designated as OCF Exhibit 24. We have objected to that specification because it is incomplete.

In addition, any documents concerning Unit 3 at Indian Point dated 1975 or after are not admissible against Con Edison because Con Edison sold that unit to the New York Power Authority in late 1974.

22. OCF Exhibit 162 - 14 Street Powerhouse.

Included in this exhibit are documents dated September 1980 and later. We object to these documents on the grounds that such time periods are irrelevant because none of the diseases claimed in these cases could have occurred as a result of exposures in 1980 or later.

23. OCF Exhibit 186 - Astoria Powerhouse.

This exhibit includes documents which are dated 1975 and later. We object to these documents on the grounds that they are irrelevant. None of the diseases claimed in these cases could have occurred as a result of exposures in 1975 or later because of the latency period.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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IN RE JOINT EASTERN AND SOUTHERN DISTRICT ASBESTOS LITIGATION

NYAL-PH-8888 (CPS)

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This Document Relates to:

ALL POWERHOUSE CASES
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THIRD-PARTY DEFENDANT
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.'s
COUNTER DESIGNATIONS REGARDING
JOHN MURRAY'S DEPOSITION TAKEN ON JANUARY 1, 1990

From Page	Line	To Page	Line
40	4	42	20
45	18	45	25
79	20	79	25
80	14	81	7
81	14	81	22
83	6	83	18
84	13	84	25
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95	9	96	5
97	24	98	6
101	21	101	23
102	24	103	5
105	8	105	11
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122	4	122	5
122	10	122	13
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161	7	161	8
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162	8	162	10

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204	22	205	5
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212	2	212	13
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233	14	233	23
234	2	234	23

CLARK GAGLIARDI & MILLER, P.C.

By: _____

ROBERT J. FRISENDA SS#4475
99 Court Street
White Plains, New York 10601

Dated: White Plains, New York
December 13, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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IN RE JOINT EASTERN AND SOUTHERN DISTRICT ASBESTOS LITIGATION — NYAL-PH-8888 (CPS)

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This Document Relates to:

ALL POWERHOUSE CASES
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THIRD-PARTY DEFENDANT
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.'s
COUNTER DESIGNATIONS REGARDING
CARL L. NEWMAN'S DEPOSITION TAKEN ON NOVEMBER 13, 1991

Page	Line	To Page	Line
11	1	11	3
11	9	11	19
12	9	12	12
21	13	22	9
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Dated: White Plains, New York
December 13, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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IN RE JOINT EASTERN AND SOUTHERN DISTRICT ASBESTOS LITIGATION

NYAL-PH-8888 (CPS)

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This Document Relates to:

ALL POWERHOUSE CASES
----------x

THIRD-PARTY DEFENDANT
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.'s
COUNTER DESIGNATIONS REGARDING
WILLIAM E. CALDWELL, Jr.'s DEPOSITION TAKEN ON NOVEMBER 22, 1991

Page	Line	To Page	Line
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27	25	28	23
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85	23	86	1
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141	12	142	16

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December 13, 1991

Hon. Charles P. Sifton
United States District Judge
Eastern District of New York
United States Courthouse
Room 244
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Federal Court Asbestos Litigation
NYAL-PH-8888 (CPS)

Dear Judge Sifton:

This firm represents the Consolidated Edison Company of New York, Inc. (hereinafter Con Edison). We write to object to OCF's list of documents that it intends to introduce into evidence against Con Edison on Monday, December 16, 1991.

We vigorously object to the procedure followed by OCF in providing us with "notice" of the voluminous documents it intends to introduce against Con Edison. Sufficient notice has not been given to enable us to review all the documents and thoroughly address our objections.

At 6:30 p.m. on Monday December 9, 1991, OCF delivered to our firm an exhibit list and a box containing some of the documents contained on the list. In the covering letter OCF advised that many of the documents were not provided because they came from Con Edison files, and that we could obtain those documents from their repository, Superior Reproduction. It was not until late in the afternoon of Thursday, December 12, 1991 that OCF advised that it intended to offer documents against Con Edison on Monday December 16, 1991. Also, it was only then that OCF provided us with a copy of its trial exhibit index which indicates against whom each exhibit on the list will be offered on December 16, 1991. For the Court's reference we enclose herewith a copy of OCF's trial exhibit list. The Court has directed that objections must be filed by today.

It is grossly unfair of OCF to place such stringent and unnecessary time limitations upon us in a matter of such importance.

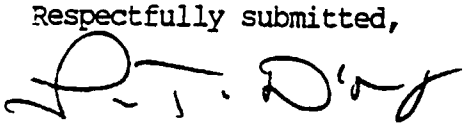
Although some of the documents which have not been provided come from Con Edison files, OCF culled those documents from hundreds of thousands of Con Edison documents which OCF sifted through for many weeks. It is virtually impossible in such a short period of time for Con Edison to go through the myriad of records produced to OCF to find the documents that OCF intends to use. It is also unfair for OCF to require us to go to its document repository to obtain these documents when we have been given such short notice. All of the documents should have been provided on December 9, 1991 and at that time we should have been told that OCF intended to introduce those documents on December 16, 1991. Such a procedure would have obviated the necessity for objections simply because we have not seen all the documents.

The attachments to this letter state our objections to documents and deposition objections and designations insofar as we are able to state them at this time. We have not been able to review the documents designated as OCF Exhibit 101 relating to Indian Point, OCF Exhibit 105 relating to Indian Point, OCF Exhibit 114 relating to Arthur Kill, OCF Exhibit 148 relating to Ravenswood, OCF Exhibit 162 relating to the Fourteenth Street Powerhouse, OCF Exhibit 165 relating to the Hudson Avenue Powerhouse, OCF Exhibit 180 relating to the 59th Street Powerhouse, OCF Exhibit 184 relating to the 39th Street Powerhouse, OCF Exhibit 186 relating to Astoria, OCF Exhibit 193 relating to Astoria and OCF Exhibit 214 relating to Kent Avenue.

We expect to have these documents to review over the weekend and we will provide the Court with a further list of objections to this group on Monday morning, if necessary. Also, should a further review of OCF's exhibit list indicate that additional objections are required, we reserve the right to make such objections at an appropriate time.

As a final point, we wish to advise the Court that we have reviewed a significant volume of documents in the preparation of our objections and have only commented on those documents to which a real and substantive objection applies. In our objections we have indicated in a few instances that if there is any question in the Court's mind as to the inadmissibility of the document, we be allowed to supplement our submission on the issue. This should not present a scheduling problem because the exhibits and deposition testimony to which we have not objected will take a significant time to place before the jury.

Respectfully submitted,



Lawrence T. D'Aloise, Jr.

LTD:mjm
Enclosure