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

IN RE: STEAM PIPE EXPLOSION AT 41ST STREET AND LEXINGTON AVENUE	Index No. 768000/08E
	Part 52 (Justice Feinman)
	MAY 21 2008
This Document Relates To:	
All Cases	

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NYS
UNIFIED COURT SYSTEM
MAY 21 2008
REVIEWED
EF RESOURCE CENTER

PROPOSED CASE MANAGEMENT ORDER NO. 3
CONFIDENTIALITY STIPULATION AND ORDER

A. **Scope**. All documents, deposition testimony, deposition exhibits, and any other written, recorded, or graphic matter ("Discovery Material") produced by, or received from, any party in connection with the matters coordinated herein (collectively, the "Coordinated Proceeding" or the "Litigation"), whether or not in response to a formal discovery request, shall be subject to this Stipulation and Order (the "Order") concerning confidential information as set forth below. Such Discovery Material may include, but is not limited to, information, documents, correspondence, and records stored in hard copy or any electronic form, databases, video tapes and audiotapes, photographs, medical X-rays, notes, testimony, and any other written or recorded material in whatever form.

B. **Form and Timing of Designation**. Discovery Material that is to be designated confidential pursuant to this Order ("Confidential Discovery Material") will be produced and shall be so designated by being stamped or labeled with the word "CONFIDENTIAL" or, if stamping or labeling is impractical, by specific designation in

the producing cover letter or other written correspondence. To the extent possible, the CONFIDENTIAL designation shall be made in a manner which will not intrude on the text of the document and which will permit complete removal of the CONFIDENTIAL designation. Discovery Material shall be designated CONFIDENTIAL prior to, or contemporaneously with, the production or disclosure of the documents. Inadvertent or unintentional production of Discovery Material without prior designation as confidential shall not be deemed a waiver, in whole or in part, of the right to subsequently designate as confidential Discovery Material, subject to the other terms of this Order.

C. **Discovery Material Which May be Designated Confidential.** Any party may designate Discovery Material as confidential but only after a review by an attorney who has, in good faith, determined that the Discovery Material contains information protected from disclosure by statute or regulation, or trade secrets, or confidential research, development, or commercial information, or information the release of which could cause harm to otherwise-protected privacy interests; or that the Discovery Material contains critical infrastructure information that, if disseminated, would pose a risk of harm to public safety. Discovery Material which is available in the public sector may not be designated as confidential except to the extent that such material came into the public sector because of a violation of this Order or any other Order of the Court.

D. **Copies.** All copies, duplicates, extracts, summaries or descriptions (hereinafter referred to collectively as "copies") of Discovery Material designated as CONFIDENTIAL under this Order, or any portion of such copies, shall be immediately affixed with the designation "CONFIDENTIAL" if the word does not already appear on

the copy. All such copies shall be afforded the full protection of this Order and be treated as Confidential Discovery Material. Additionally, all copies of Discovery Material designated "CONFIDENTIAL" upon which it is not practicable to so affix such designation, shall be afforded the full protection of this Order.

E. **Depositions.** Portions of depositions shall be deemed confidential only if designated as such when the deposition is taken or within 10 days after receipt of the final transcript from the court reporter by the designating party, irrespective of witness signature. All Discovery Material disclosed at a deposition must be treated as confidential until the ten-day period above has elapsed. Such period may be extended by agreement of the parties. Such designation shall be specific as to the portions to be protected and, if the designation is made after the deposition, shall be in a letter to be served on: (i) the court reporter; and (ii) Liaison Counsel for Plaintiffs and Defendants (except to the extent such counsel is the designating party).

F. **Protection of Confidential Discovery Material.**

1. Use of Confidential Discovery Material. Discovery Material designated CONFIDENTIAL under this Order shall not be used or disclosed by the parties or counsel for the parties or any other persons identified below for any purposes whatsoever other than preparing for and conducting the litigation in which the Discovery Material was disclosed (including any motion practice, trial, and/or appeal). This protection shall extend to any Discovery Material given to the parties or their counsel in this Coordinated Proceeding prior to the entry of this Order where such Discovery Material was given on the basis that it would be kept confidential, provided that within 21 days of the entry of this Order, any such Discovery Material is produced to plaintiffs with

a CONFIDENTIAL designation. No disclosure of such Discovery Material may be made prior to that time.

2. Disclosure of Confidential Discovery Material. The parties and counsel for the parties shall not disclose or permit the disclosure of any Discovery Material designated CONFIDENTIAL under the terms of this Order to any other person or entity except that, the following categories of persons may be allowed to review Discovery Material which has been designated CONFIDENTIAL pursuant to this Order:

(i) counsel and employees of counsel for the parties who have responsibility for the preparation and trial of the lawsuit;

(ii) parties and employees of a party to this Order but only to the extent that such a party or employee's assistance is necessary to the conduct of the litigation in which the information is disclosed;

(iii) court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making photocopies of documents;

(iv) consultants, investigators, or experts (hereinafter referred to collectively as "experts") employed by the parties or counsel for the parties to assist in the preparation and trial of the lawsuit;

(v) auditors, regulators or insurers of any party (hereinafter referred to collectively as "auditors");

(vi) the Court and Court personnel;

(vii) non-party witnesses or potential witnesses but only to the extent that such non-party witness is providing discovery or testimony necessary to the conduct of the litigation in which the information is disclosed; and

(viii) other persons only upon consent of the designating party or upon order of the court and on such conditions as are agreed to or ordered.

G. **Written Acknowledgment or Undertaking.**

1. Any party and its counsel in any action that is coordinated herein or that becomes coordinated herein in the future may become a party to this Order, and thereby become eligible to receive or review Discovery Material designated "CONFIDENTIAL" under the terms and conditions of this Order, by such counsel entering into a written acknowledgment in the form of the Acknowledgment attached hereto as Exhibit A and serving said Acknowledgment upon Con Edison's Liaison Counsel. All counsel who execute the Acknowledgment are deemed to have signed the Acknowledgment also on behalf of other attorneys, paralegals, administrative assistants or other support staff employed by said counsel or said counsel's firm (whether on a permanent or temporary basis) and who are working on an action governed by this Order. The counsel executing the Acknowledgment shall cause such other attorneys and staff to be aware that the terms and conditions set forth in this Order apply to them as well. In each such Acknowledgment, counsel shall also affirm that the party or parties represented by such counsel have been advised fully as to the contents of this Order and have agreed to be bound by the terms and conditions set forth herein.

2. No party or counsel to any party in any pending or future action in this Coordinated Proceeding shall receive or have access to any Discovery Material designated "CONFIDENTIAL," or be permitted access to the password-protected document depository to be established by the SCPC, until counsel serves such Acknowledgment on Con Edison's Liaison Counsel as set forth in subparagraph 1 above. Liaison Counsel for Con Edison shall advise a designated representative of the SCPC on

a weekly basis of any new Acknowledgments received from counsel so that the SCPC may provide access to the password-protected documentary depository to such counsel.

3. Prior to receiving or having access to any Discovery Material designated "CONFIDENTIAL," all experts, auditors, and non-party witnesses or potential witnesses listed in Paragraph F.2 (iv) through (v) and (vii) above, shall be required to enter into a notarized written undertaking in the form of the Undertaking attached hereto as Exhibit B, agreeing to be bound by this Order and not to disclose any Confidential Discovery Material. For any Confidential Discovery Material provided before the date of the Order, any persons to whom Confidential Discovery material has been disclosed must execute the Undertaking and serve it on the counsel who provided such Confidential Discovery Material within thirty (30) days of the Order. Counsel shall be required to retain the originals of all Undertakings executed pursuant to this paragraph.

H. **Disclosure Required By Law**. This Order shall not prohibit any party from disclosing any Discovery Material as it may be required to disclose by law, including disclosure pursuant to any court or governmental decree and/or subpoena; provided, however, that in the event a request is made of a party by any person or entity (including without limitation any governmental agency or authority), acting or purporting to act under color of law (whether by subpoena or otherwise), for disclosure of Discovery Material designated as "CONFIDENTIAL" pursuant to this Order, such party shall give prompt notice of each such request to counsel of record for the party who produced and/or designated the Confidential Discovery Material, and will, to the fullest extent permitted by law, make no such disclosure until the producing and/or designating party

has had a reasonable opportunity to contest the right of the requesting person or entity to such disclosure.

I. **Control of Documents.** Counsel for the parties shall make good faith efforts to prevent unauthorized disclosure of Discovery Material designated as CONFIDENTIAL pursuant to the terms of this Order. Counsel shall maintain a record of those experts, auditors, and non-party witnesses or potential witnesses who have received or been given access to the Discovery Material by maintaining the originals of all Undertakings executed by persons or entities to whom such counsel, or the party such counsel represents (or, if applicable, investigators retained by such party or its counsel), have disclosed Confidential Discovery Material.

J. **Remedies.** In the event of non-compliance with the terms of this Order, the producing or designating party may move the Court for imposition of an appropriate remedy or sanction, including but not limited to any penalties permitted by CPLR 3126 or 22 NYCRR 130-1.1. However, prior to such motion, Liaison Counsel for Defendants shall meet and confer with the SCPC (or one or more representatives thereof) regarding the alleged non-compliance in an effort to resolve the issue and avoid the need for such motion.

K. **Filing of Confidential Discovery Material.** In the event a party seeks to file any Confidential Discovery Material that is subject to protection under this Order with the Court, that party shall take appropriate action to ensure that the Confidential Discovery Material receives proper protection from public disclosure including: (i) filing a redacted document with the consent of the party who designated the document as confidential; or (ii) where appropriate (e.g., in relation to discovery and evidentiary

motions), submitting the Confidential Discovery Material solely for in camera review. A party may not file Confidential Discovery Material including any material subject to this Order unless it complies with one of the foregoing provisions or provides sufficient notice to the other party in advance so that party can seek protection under Section 216.01 of the Uniform Rules of Trial Courts. Until a ruling is issued under Section 216.01, such Confidential Discovery Material shall not be filed with the Court.

L. **Greater Protection of Specific Discovery Material.** No party may withhold information from discovery on the ground that it requires protection greater than that afforded by this Order unless the party moves for an Order providing such special protection.

M. **Challenges to Designation as Confidential.** Any CONFIDENTIAL designation is subject to challenge. All such challenges by plaintiffs shall be made through the SCPC. The following procedures shall apply to any such challenge.

1. The burden of showing that Discovery Material should remain confidential shall be in accordance with New York law and in accordance with the CPLR unless otherwise agreed to by the parties in this Order.

2. A party who contends that Discovery Material designated CONFIDENTIAL is not entitled to confidential treatment (or, if applicable, the SCPC) shall give written notice to the designating party of the specific basis for the challenge. The parties shall meet and confer in an effort to resolve the dispute without judicial intervention within fifteen (15) days from service of the written notice.

3. Notwithstanding any challenge to the designation of Discovery Material as Confidential, all material previously designated CONFIDENTIAL shall

continue to be treated as subject to the full protections of this Order until one of the following occurs:

(i) the party who claims that the Discovery Material is confidential withdraws such designation in writing;

(ii) the designating party submits a letter application to the Court pursuant to subparagraph 5 below with respect to the confidentiality designation, and there is a final determination that the Discovery Material should no longer be designated as confidential information; or

(iii) the designating party fails to timely file a letter application with the Court pursuant to subparagraph 5 below.

4. Challenges to the confidentiality of Discovery Material are not waived by the failure to raise the challenge immediately following receipt of the Discovery Material.

5. If the parties are unable to resolve a dispute regarding the designation of Discovery Material as Confidential after holding a meet-and-confer as set forth in subparagraph 2 above, the designating party shall have ten (10) days following the close of the meet-and-confer period to submit a letter application to the Court seeking confirmation of the disputed confidentiality designation. The challenging party shall then have five (5) days to submit a response letter to the Court, and the designating party shall have three (3) days to submit a reply. Unless otherwise ordered by the Court, letter applications and responses shall not exceed six (6) pages in length and replies shall not exceed three (3) pages in length, exclusive of exhibits.

6. If a large volume of documents is to be addressed in a letter, the designating party may apply to the Court for additional time and an extension of the above page limits.

7. If a number of successive challenges are made, the parties will cooperate in good-faith with respect to the timing of any meet-and-confer or letter application process so that such challenges may be addressed at one time if possible.

8. The designating party may move for reconsideration and/or may appeal any ruling.

N. **Treatment on Conclusion of Litigation.**

1. Order Remains in Effect. All provisions of this Order restricting the use of Discovery Material designated CONFIDENTIAL shall continue to be binding after the conclusion of the Litigation unless otherwise agreed or ordered.

2. Return of CONFIDENTIAL Documents. Within thirty (30) days after the conclusion of any action that has been coordinated in the Litigation, including (where applicable) the conclusion of any appeal, all Discovery Material treated as confidential under this Order, including copies as defined above, shall be returned by the parties in such action to the producing party unless: (i) the Discovery Material has been entered as evidence or filed (unless introduced or filed under seal); (ii) the parties elect to destroy such Discovery Material in lieu of return and written confirmation by a party or its attorney is provided to the designating party that such CONFIDENTIAL Discovery Material either has been destroyed or will be destroyed in a timely fashion in accordance with the party's existing document retention practices.

O. **Order Subject to Modification.** This Order shall be subject to modification on motion of any party or any other person who may show an adequate interest in the matter to intervene for purposes of addressing the scope and terms of this Order. The Order shall not, however, be modified until the parties shall have been given

notice and an opportunity to be heard on the proposed modification, and the Court has ruled to allow the proposed modification. In no event shall this Order be modified by any subsequent CMO unless expressly so stated in such CMO.

P. **No Judicial Determination.** This Order is entered based on the agreement of the parties and for the purpose of facilitating discovery, except as to ¶ M.1 and the form of Ex. B. Nothing herein shall be construed or presented as a judicial determination that any specific document or item of information designated as CONFIDENTIAL by counsel is subject to protection under New York law or otherwise until such time as a document-specific ruling shall have been made.

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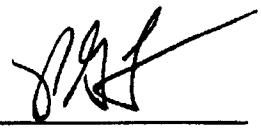
Dated: ~~April~~ May 21, 2008
New York, New York

SO ORDERED.



Paul G. Feinman, J.S.C.

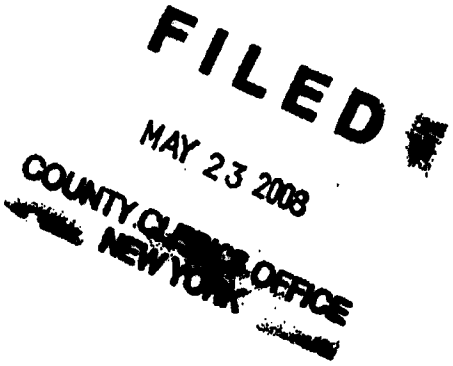


EXHIBIT A

ACKNOWLEDGMENT

I _____ of the firm _____, counsel for the following party (parties) _____, hereby acknowledge that I have read in its entirety and understand the terms and conditions of the Confidentiality Stipulation and Order ("the Order") that was issued by the Honorable Justice Paul G. Feinman on March __, 2008 in *In Re: Steam Pipe Explosion at 41st and Lexington Avenue.* I agree to comply with and to be bound by all the terms and conditions of the Order.

By my execution of this acknowledgment, I affirm that the attorneys, paralegals, administrative assistants and other support staff employed by me and/or my firm (whether employed on a permanent or temporary basis) who are working on an action governed by this Order, have been made aware of the terms and conditions set forth in this Order and I hereby sign this Acknowledgment on behalf of them as well.

I also affirm that the party or parties represented by me have been advised fully as to the contents of this Order and have agreed to be bound by its terms and conditions.

_____ _____

Date Signature

EXHIBIT B

UNDERTAKING

~~I hereby declare under penalty of perjury as follows:~~ I have read this Undertaking and understand that any information or item that has been marked CONFIDENTIAL is subject to the Confidentiality Stipulation and Order ("the Order") that was issued by the Honorable Justice Paul G. Feinman on ~~April~~ May 21, 2008 in *In Re: Steam Pipe Explosion at 41st and Lexington Avenue*, which is pending in the Supreme Court of New York County. I further understand and acknowledge that failure to comply with the terms of the Order would be a violation of an Order of the Court, that I agree to be subject to the jurisdiction of the Court for purposes of any alleged violation of the Order, and that violation of an Order of the Court could expose me to any remedies available for such violation, including any penalties available under New York law.

I agree that I will not disclose or disseminate at any time (including after termination of the above referenced proceeding) any information or item that has been designated confidential under the Order to any person or entity, except that if I am an investigator retained by a party or its counsel in an action coordinated in the above-referenced proceeding, I may show information or items designated confidential to non-party witnesses or potential witnesses so long as such person first executes and provides to me a copy of this Undertaking, which I thereafter deliver to counsel for the party. I further understand that some of the material designated confidential under the Order may, if disclosed, pose a risk of harm to public safety.

Name: _____ _____
Signature

City and State Where Signed: _____

Date:

Sworn to before me
this ____ day of _____

_____
Notary Public