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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----x

3 IN RE WORLD TRADE CENTER
3 DISASTER SITE LITIGATION,

21 MC 100 (AKH)

4 -----x

October 28, 2004
4:20 p.m.

7 Before:

8 HON. ALVIN K. HELLERSTEIN,

District Judge

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1 THE COURT: I passed out an agenda. I take it
2 everyone has a copy. Whoever is speaking, again, please
3 identify yourself so the Court reporter can pick it up.

4 I have made an agenda from your respective
5 submissions. So, I think we will include everything that has
6 been submitted, but if anyone has anything more to say or
7 another item to put down, don't be bashful about telling me.

8 I want to say that I am somewhat disappointed in what
9 I think is not the degree of cooperation that I am experiencing
10 in this collection of cases that exists in the others.

11 There has to be a much better ability on the part of
12 counsel to get together and cooperate about things that really
13 are not adversarial. Fighting over agenda points is not
14 something I want to see again. And reviewing that which I have
15 ruled on, or ignoring it, or making individual interpretations
16 of what has to be done is also not something I appreciate.

17 These are very difficult cases to manage. It's my job
18 to move them ahead, all of the tracks, to move them ahead, and
19 I will not be able to do that if every one of my orders is
20 subject to review and reexamination and a lack of diligence in
21 complying with them.

22 I may be wrong. I am not infallible. I don't claim
23 to be infallible, but we must get on. And I can understand
24 reluctance on the part of the plaintiffs to particularize, but
25 I insist on it and we are going to do it. And I don't want to

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1 deal with other kinds of remedies that a judge in this court
2 has.

3 I want this to be done on a cooperative basis. If we
4 cooperate in finding responses, we will move ahead. We will
5 move ahead, I think, more rapidly than any of us, if we think
6 about it, believes is credible. But I need your cooperation
7 and I insist on having it.

8 The first item of business is welcoming Latham and
9 Watkins to the case.

10 Mr. Shaffer, perhaps you want to introduce your
11 successor.

12 MR. SHAFFER: I would be happy to, your Honor.

13 Gary Shaffer for the City of New York. As you can
14 see, we have additional faces here to present to your Honor.

15 We have Robert Weiner and Margaret Warner, from
16 McDermott, Will and Emery, who are corporate counsel to World
17 Trade Center captive insurance companies, and with them are Jim
18 Tyrrell from Latham and Watkins.

19 I believe Mr. Weiner would like to address the Court
20 briefly, your Honor.

21 THE COURT: Please.

22 MR. WEINER: Your Honor, I had sent a letter to you on
23 October 19th advising of the existence of the LMTC Capital
24 Insurance Company. We do represent the interest of that
25 company and I thank you for having you put on the service list

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1 for the purpose of future proceedings.

2 As I indicated in my letter at the time that I wrote
3 it, there was a search for lead defense counsel. That search
4 has been concluded and Latham and Watkins has been selected as
5 lead counsel for. The captive is not yet licensed as an
6 insurance company. There still are a number of procedural
7 steps to be done.

8 I hope to have them completed within the month.
9 Notwithstanding, we are here today and I am proud to introduce
10 Mr. Tyrrell to the Court.

11 THE COURT: First, let's move that speaker.

12 MR. TYRRELL: I was hoping your Honor would ask that.
13 It was difficult not to have any eye contact whatsoever.

14 THE COURT: Thank you.

15 MR. TYRRELL: Your Honor, just briefly on behalf of
16 Latham and Watkins. To the clients, to the Court and to the
17 process, we are honored to be here. We got the good news that
18 we were selected last week. We have been working hard to get
19 up on the learning curve, but you will appreciate we are not
20 very far along at the moment, in addition to the fact that the
21 captive has not yet been finalized.

22 We have not yet had an opportunity to reach out to the
23 multiple contractors and companies that we will ultimately be
24 representing, and finalizing such details as retainer
25 arrangements and what have you, and confirmation and

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1 technicalities.

2 THE COURT: Do you anticipate being the single voice
3 for all the contractors in the City?

4 MR. TYRRELL: It is our hope to work in that
5 direction. The City will continue to act with us as
6 co-counsel, certainly with respect to the cases that were filed
7 before our appointment.

8 THE COURT: It would be very useful, because
9 Mr. Schaffer has extensive background and I am used to him, and
10 I find him to be extraordinarily reliable and persuasive when
11 he has to be.

12 MR. SHAFFER: Thank you, your Honor.

13 There is a possibility of other counsel being involved
14 in preexisting matters, and certainly Latham will be
15 representing the City on all new matters, unless there are
16 reservation of rights issues that will be dealt with as they
17 arise. The expectation is Latham will be lead counsel.

18 THE COURT: Let me take up this request for a 90-day
19 extension to answer and move.

20 I'm reluctant to -- you are going to be doing the
21 work, right, Mr. Tyrrell?

22 MR. TYRRELL: That's right, your Honor.

23 THE COURT: It's Mr. Weiner's request. You are either
24 the beneficiary or otherwise with respect to it.

25 I don't want to give a 90-day extension. I want the

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1 case moved. I recognize you are at the bottom of the learning
2 curve. I would rather do it in bites.

3 If I were to start with 45 days, with the hope that
4 perhaps you might even be able to respond, is that too short?

5 MR. TYRRELL: The answer, your Honor, it's going to
6 take us, obviously, a time to do all the things that I have
7 already alluded to. I think taking it in steps make sense, and
8 if the first step should be 45 days, I think that makes sense.

9 THE COURT: Let's do a 45-day extension to answer and
10 move.

11 Is there anyone who objects to that, if any of the
12 plaintiffs object to it?

13 Why don't you do a stipulation with Sullivan on behalf
14 of everyone else and I will endorse it.

15 Number two, what does 1b mean, communications with new
16 clients?

17 MR. TYRRELL: Your Honor, that means that we have
18 dozens and dozens of contractors that do not yet know we belong
19 to them. We are going to be --

20 THE COURT: Or vice versa.

21 MR. TYRRELL: We'll do that in this time period that
22 you have already given to us.

23 THE COURT: Okay. Thank you.

24 The second issue is jurisdictional. The status of the
25 Second Circuit appeal in Hickey.

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1 MR. WILLIAMSON: Richard Williamson for the Port
2 Authority and World Trade Center Properties, LLC.

3 As we understand it, your Honor, we should be on for
4 on or about January 10 for oral argument.

5 THE COURT: It's a little later than November.

6 MR. WILLIAMSON: You are right. We submitted dates,
7 offering dates in December, November and I think even some in
8 early December. We were not granted any of those days. What
9 we hear is January 10 is what the Second Circuit will hear it,
10 the oral argument.

11 THE COURT: Okay. You have gotten more responsive
12 information than we have.

13 MR. WILLIAMSON: It was not easy to get, your Honor.

14 THE COURT: All right. Number three.

15 Just to say another word before we get to number
16 three.

17 It's unfortunate that the date has not been advanced
18 earlier. The jurisdictional issues that I struggled with in my
19 Hickey decision need some more authority than I can give to it
20 or correction or modification, because they go to basic
21 jurisdictional issues that form a lot of the things that we
22 will be doing.

23 As you can see from my orders that are referred to in
24 correspondence to me, and in item three of the writers of this
25 agenda, I am going on the basis that the rule of Hickey is the

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1 rule for this case unless otherwise advised.

2 And, therefore, I am asking for the particularity in
3 pleadings and some other aspects of case management to
4 implement the rulings in Hickey.

5 If the Second Circuit decides that everything having
6 to do with the clearance of the work site at the World Trade
7 Center, and the dumping in Staten Island and ferrying by barge
8 is part of the Air Transportation System, Safety and System
9 Stabilization Act, it may be that the particularization is
10 premature and, vice versa, if everything is stayed, it may be
11 premature. But if there is going to be some kind of a hybrid,
12 it's very much needed.

13 And, frankly, I think for the reasons that we will get
14 into a little bit later, it's important. It's important to
15 size up these cases as rapidly as possible and to deal with
16 them as real issues, which brings us to number three, the
17 status of pleadings.

18 On October 6th, I issued an order requiring the
19 parties to proceed with their pleadings. I made reference to
20 the ambiguity of the complaints of many of the plaintiffs as to
21 various matters, and I said then, as I will be saying now, that
22 the cases will proceed more efficiently if the pleadings allege
23 these points with greater particularity.

24 And I gave 20 days to provide that particularity,
25 either by amendment to the complaint or by bill of particulars.

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1 No one has done that and I wonder why.

2 MR. NAPOLI: Your Honor, Paul Napoli.

3 We have recently filed some complaints. Some have
4 been served, some have not been served.

5 We have been working with the City, and I'm sure
6 Mr. Schaffer will concur, in trying to move the process along.
7 Part of the problem has been that they have been seeking the
8 appointment of Latham and Watkins to represent all of the
9 contractors and the City, and they have wanted to wait until
10 Latham and Watkins was in place before the issues we had
11 between us were decided.

12 It's been the defendant's position that we should just
13 amend the complaint. We believe it would be easier and more
14 efficient if we have a short-form interrogatory.

15 THE COURT: I don't. Listen, Mr. Napoli.

16 I'm a judge. I issued an order. The order said 20
17 days. It's not between you and the City; it's me.

18 You want a request for an adjournment? Come see me.
19 I want to know the position of the other side. I didn't hear
20 any request for adjournment.

21 MR. NAPOLI: I believe, your Honor, we submitted on
22 Friday a letter which you so ordered to this conference.

23 THE COURT: That's rather late. That's more than 20
24 days, wasn't it? Well, maybe not, maybe not.

25 MR. NAPOLI: Your Honor, in our cases there were

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1 several law firms.

2 THE COURT: But you are anticipating, you are
3 anticipating not doing what I asked you to do. Don't wait
4 until the last minute.

5 I didn't provide for an interrogatory, short form or
6 otherwise. You have your complaint. You don't need to ask the
7 City what your client did.

8 MR. NAPOLI: Your Honor, in the one case we served, we
9 have particularized in the complaint what you asked for in the
10 October 6th order.

11 The other cases that were served are in State court,
12 so there was nothing to particularize.

13 The others that we filed in federal court have not
14 been served, so with respect to our firm we think we are in
15 compliance with the order, your Honor.

16 You said you can amend the pleadings or a bill of
17 particulars. We told the defendants we planned on giving a
18 bill of particulars to which they responded federal court
19 doesn't allow a bill of particulars.

20 I understood, I believe I understood what you meant,
21 your Honor. An interrogatory would have been four short
22 questions and we would answer them, and we could do it rather
23 quickly in 24 hours. They wanted to wait, your Honor, until
24 the new counsel came on board and to this conference before we
25 had a procedure by which to straighten it out.

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1 I understood from the order it was one or the other.
2 The complaints, themselves, that we have been serving are 100
3 pages long. We are killing trees.

4 If we can get the specific questions that are needed
5 from them, we can give specific responses that would be
6 agreeable to both. It will be one page instead of 100 pages
7 served; that's all we were trying to accomplish by waiting for
8 Latham and Watkins to come and to have this discussion in court
9 with your Honor.

10 By no means were we trying to delay or have any delay
11 tactics with the defendants. We have been getting along with
12 them, and we have met with them several times, have a proposed
13 case management order which they had signed off on and then
14 asked us to wait before --

15 THE COURT: Mr. Napoli, what date do you want?

16 MR. NAPOLI: Your Honor, I need a week at most.

17 THE COURT: Okay. A week from today all plaintiffs
18 with respiratory injuries, I want the particulars either by
19 amendment or by a bill of particulars that I will read as a
20 supplement to the complaint.

21 I want to know when these people worked, where they
22 worked. Injury under state law is two faceted: One is when
23 the noxious fumes existed and were breathed; the second is when
24 injuries became manifest.

25 I want to know how many days people worked, where they

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1 worked, what they complained were the days that the occurrences
2 occurred, and when they discovered their injuries, and what
3 they think they are going to be. The last you may have some
4 difficulty in answering, because a lot of people may not know,
5 but you can cover that, Mr. Napoli, by finding what is known
6 and is not known.

7 So, I will give you a week from tomorrow.

8 MR. NAPOLI: Thank you, your Honor.

9 THE COURT: Anybody else?

10 Yes, sir.

11 MR. CARRAGHER: Yes, your Honor. Andrew Carboy from
12 Sullivan Papain.

13 Your Honor, for reasons unknown to me, we did not
14 receive your October 6th order until Friday when Fleming Zolack
15 faxed our office a letter asking us what we intended to do
16 about your October 6th order.

17 At that point, we put pen to paper and wrote to the
18 Court by letter dated October 26th, which we hand delivered the
19 other day, discussing our complaints and seeking --

20 THE COURT: Faxing is better than hand delivering.

21 Call my secretary and let her know you need to fax.

22 MR. CARRAGHER: Certainly.

23 THE COURT: If you fax, don't sent any hard copies.

24 MR. CARRAGHER: Certainly, your Honor.

25 In any event, we have very clearly -- we represent

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1 essentially nothing but firefighters. We very clearly
2 articulated that all of our plaintiffs were present at the
3 World Trade Center site well before the September 29th date
4 that confers jurisdiction upon this court per your Hickey
5 decision.

6 In addition, we have specified the medical diagnosis
7 that each of our clients has received. Most often that is
8 reactive airway disease or asthma.

9 And we have also alleged with particularity that our
10 clients were exposed from the moment they got on site working
11 forward from the September 12th through September 13th or even
12 the September 11th date of arrival throughout their duration at
13 the World Trade Center site.

14 Again, these gentlemen are all firefighters.

15 THE COURT: So, you essentially complied.

16 MR. CARRAGHER: Well, that's what the purpose of my
17 letter was to the Court. I wanted to see if the Court would
18 deem such pleading sufficient.

19 THE COURT: I'm not going to do that. I can't.

20 MR. CARRAGHER: All right.

21 THE COURT: But you should be able to know. If you
22 feel you have complied, then you are in compliance.

23 MR. CARRAGHER: All right. Thank you.

24 THE COURT: Subject to any motion by the defendant,
25 but I am not going to review complaints and let you know.

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1 MR. CARRAGHER: All right. Understood. Thank you.
2 THE COURT: Mr. Williamson?
3 MR. WILLIAMSON: I don't know if you wish to have --
4 THE COURT: One minute, ma'am.
5 You are you next, Mr. Williamson, then you go.
6 MR. WILLIAMSON: I don't know if it's appropriate for
7 me to respond to what Mr. Carboy just said.
8 THE COURT: Sure.
9 MR. WILLIAMSON: In actual fact, his letter, which is
10 dated October 26th, doesn't do what he just said. In actual
11 fact, it tells your Honor that your Honor's order doesn't apply
12 to the cases that Mr. Carboy is handling within his law firm
13 Sullivan Papain.
14 THE COURT: He's now telling me that they do comply.
15 I'm not getting into it, folks. I'm not going to
16 resolve disputes today. You know, because are you the lawyer,
17 if you feel you have done it, you have done it; if
18 Mr. Williamson feels you haven't, he's going to make a motion
19 to dismiss, but take note of it. You don't need a motion to
20 dismiss to remind what you need to do.
21 MR. CARRAGHER: Yes, sir.
22 THE COURT: And you can talk with Mr. Williamson, and
23 maybe he has a point for me to consider and then you will
24 change. You have time now to fix things up.
25 MR. CARRAGHER: We'll have further conversation with
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1 him.

2 THE COURT: The lady in the back.

3 MS. WERTHEIMER: Robin Wertheimer for 45 plaintiffs.

4 This is the first I am hearing of your Honor's October
5 6th order. As much as I would like to comply, I would need
6 more time in which to do so. I was not faxed this order, I
7 never received it.8 THE COURT: Were you present the last time we were
9 together?

10 MS. WERTHEIMER: Yes, I was, your Honor.

11 THE COURT: You know that Sullivan Papain became
12 liaison counsel?

13 MS. WERTHEIMER: Indeed, I do, your Honor.

14 THE COURT: Did you have discussions with Sullivan
15 Papain about getting you notice?

16 MS. WERTHEIMER: I thought once I signed --

17 THE COURT: Nothing is automatic. If you don't get
18 notice, you make sure you get notice. It's your job to follow
19 up and make sure you are on the lists.20 I need to have a very short list of people that my
21 office needs to send things to. We have no staff. We have a
22 secretary, a deputy, calendar clerk and two law clerks for
23 about 350 cases, a lot more if you count each one of these.24 I can't do it. If I don't get the cooperation in this
25 track, I will do some ordering and none of you will like it.

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1 But everyone here, it's your job to make sure that you
2 are on the right lists and that there are procedures. This is
3 not going to be a State court proceeding and you are going to
4 find out about this very, very fast.

5 You have one week to comply, a week from tomorrow.
6 There will be no extensions. Hear up. There will be no
7 extensions. Do it.

8 Are there any service problems that I should hear
9 about? I'm sorry for lecturing. I don't want to do this. I
10 can't run this case without your cooperation, but I don't want
11 to be privy to what is going on again.

12 Are there any problems about effectuating service,
13 Mr. Napoli?

14 MR. NAPOLI: Your Honor, I think that Mr. Tyrrell has
15 now joined the case. I can discuss with him potentially
16 serving the defendants through a designated agent as opposed
17 going through the Secretary of State, which takes a while.

18 We have done that in other litigation and maybe we can
19 leave that for the next conference and give us time to discuss
20 it.

21 THE COURT: To the best of your ability, Mr. Tyrrell,
22 would you tell your clients that they need to be served, and
23 they will be served one way or another, and they should make an
24 appointment to be served in a gentlemanly way? And if you
25 can't get such cooperation, please tell Mr. Napoli so he can

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1 move swiftly alternatively.

2 MR. TYRRELL: I will, your Honor.

3 THE COURT: Are there any Hague issues in this case?
4 Hague international service? I don't think so.

5 Then we have this issue, item four, on late notice of
6 claims.

7 I have been educated on this issue and I think there
8 is reason why you want to have a late notice of claim procedure
9 in the State court.

10 I refer to the Sullivan Papain letter of October 25.
11 The proposed resolution won't work because I can't stay the
12 State court proceedings, but I am anxious to work out something
13 different.

14 Because of the uncertainty in New York law, the case
15 law stating that a cause of action begins on the issuance of a
16 noxious fume that somebody breathes, and the statute of
17 limitations, Section 214(c) of the CPLR, which provides that
18 the cause of action arises for statutes of limitations purposes
19 when injury occurs or when it should be discovered.

20 We have two points of accrual. And I can understand
21 why the plaintiffs want to protect themselves, whichever way it
22 goes. If we have two different causes of action, two different
23 claims stated in court, it's going to be very difficult for me
24 to administer.

25 Now, if the lawsuits that are dealt with in Hickey

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1 were premature and a late notice of claim is being filed, I
2 think the claim subsumed in Hickey has to be dismissed, and it
3 has ramifications with regard to what I had held was a federal
4 claim for relief and what I held was a state claim for relief.
5 And, frankly, I don't know how to solve the problem.

6 So, notwithstanding my attempt at a resolution, I
7 think I was premature, and I think what needs to be done is
8 careful labeling.

9 Mr. Shaffer, you are as much an expert at this as
10 anyone. Does the law require a lawsuit to be filed within a
11 set time period after the notice of claim is filed?

12 MR. SHAFFER: It almost works in the opposite
13 direction. There is a minimum time period that one needs to
14 wait before the action can be commenced. The
15 one-year-and-90-day statute of limitations that I believe we
16 are all working under would certainly apply regardless of when
17 the notice of claim is served.

18 The late notice of claim motions were submitted, let's
19 say, on day 100 -- one year and 90 days would still apply and
20 be running during that time in terms of commencing the action.

21 THE COURT: I held earlier that the late notice of
22 claim has to be removed and filed in this court, and that
23 ruling puts into jeopardy what Mr. Carboy has pointed out are
24 the rather straightforward provisions.

25 MR. SHAFFER: I believe he has two concerns: One is
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1 the issue of jurisdiction under Hickey, and the second was
2 jurisdiction under 50(e)(7) of the general principle law.

3 THE COURT: General special law 50(e)(7) that provides
4 that all applications for the late service of the notice of
5 claim shall be made to the Supreme Court through the county
6 clerk.

7 One would think that a removed case to a federal court
8 would qualify, but given the statute, I can understand why the
9 plaintiffs feel they must file a late notice of claim.

10 MR. SHAFFER: There is some potential ambiguity, your
11 Honor.

12 THE COURT: What I think should be done is to
13 stipulate that a lawsuit should not be filed until there is
14 some kind of clarification, because once the lawsuit is filed,
15 potentially it has to be brought over here and consolidated
16 with an earlier claim.

17 MR. SHAFFER: My concern with that, we can't stipulate
18 to extend the time. We are beyond the statute of limitations.

19 THE COURT: So the lawsuit must be filed within when?

20 MR. SHAFFER: A year and 90 days. And when I say
21 can't stipulate --

22 THE COURT: What do you propose should be done?

23 MR. SHAFFER: Well, my concern, obviously, is that as
24 Mr. Carboy pointed out, subject matter jurisdiction cannot be
25 waived or stipulated to.

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1 THE COURT: Correct.

2 MR. SHAFFER: One thought was that the late notice of
3 claim motions can be made in State court. This is somewhat in
4 conflict with what your Honor was just saying earlier with
5 regard to Hickey. The jurisdiction under Hickey is that these
6 are basically pre-action proceedings and one could view them as
7 not falling under, not being relevant; yet with regard to
8 Hickey and those jurisdictions, since they proceed on not the
9 accrual of an action but the filing or commencement of an
10 action, they could be filed in State court. Once a decision is
11 rendered there, they could properly be commenced in federal
12 court.

13 THE COURT: I would like to follow that procedure,
14 even though I haven't done it before.

15 Mr. Williamson, you have been active in moving against
16 some of those. How do you feel about this?

17 MR. WILLIAMSON: We take no position on it, your
18 Honor, because these particular cases and the October 25th
19 letter --

20 THE COURT: You have somewhat of a different statute?

21 MR. WILLIAMSON: Yes, that is correct.

22 THE COURT: What does your statute say?

23 MR. WILLIAMSON: Ours, you have the 60-day waiting
24 period, you have to file a notice of claim within a certain
25 time limit under the consolidated laws, then you have to wait

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1 60 days before you can bring an action.

2 As your Honor may recall, in Freedlander, among
3 others, we moved to dismiss because they had not waited the
4 requisite time period and your Honor ultimately granted the
5 motion. And there were others like that, there were others
6 where they did follow the statute, but there were many where
7 they did not.

8 THE COURT: I know there were some where I allowed the
9 late notice and others where I didn't.

10 MR. WILLIAMSON: That is correct.

11 On those where you didn't, we urged plaintiffs in
12 those circumstances, as well as those as to which we thought we
13 had a dispositive winning motion, to take advantage of the
14 Victim Compensation Fund rather than, if we were right, wait to
15 have their case dismissed on the motion.

16 THE COURT: Is there a section like General 50(e)(7)
17 that applies to the Port Authority.

18 MR. WILLIAMSON: No, not like that, your Honor.

19 THE COURT: So there is no foreign designation at
20 issue?

21 MR. WILLIAMSON: That's correct.

22 And we are taking no position on this, trying to stay
23 out of it. Wherever it involves the Port Authority, we step in
24 and try to advise the Court and, where we can, be helpful to
25 plaintiff's counsel, where they haven't complied with the

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1 statute.

2 THE COURT: Well, I think for the Port Authority, I
3 leave it to counsel to decide which court is which.

4 I believe in all the situations we need to review what
5 goes on after the Supreme Court or I rule one way or the other
6 on the issue. If the rule is that the late notice is not
7 allowed, I will abide by the state rule. Of course, if the
8 rule is that it should be allowed, the next step is to file a
9 lawsuit and then we need to discuss what should be done with
10 that.

11 So, I will let the City and the Port Authority deal
12 with the prelawsuit stage and take note of the case after it
13 hits the lawsuit stage, and I don't know if I can do better
14 than that.

15 I am not entirely satisfied with that ruling, but I
16 don't know what else I should do.

17 Mr. Carboy, do you have any suggestions?

18 MR. FLORIANI: Your Honor, Frank Floriani for
19 Sullivan.

20 Your Honor, we believe that under the law we can have
21 the lawsuit pending and still make these motions, if you would
22 like us to further brief that.

23 THE COURT: Which motions?

24 MR. FLORIANI: These motions for these late notices of
25 claim in the State court.

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1 THE COURT: If they're in the State court, they should
2 go to the State court just?

3 MR. FLORIANI: No. I took it to mean that you thought
4 that, perhaps, the cases that we had brought were premature.

5 THE COURT: I'm not going to make any rulings at this
6 point now. I don't know if they are or not.

7 Certainly, if you are going to have a manifestation of
8 an injury, you are going to want to combine the two lawsuits.
9 You can't have two lawsuits based on the two noxious fumes. At
10 some point, they are going to be consolidated.

11 I think if, if all counsel, interested plaintiffs and
12 defense, are aware of what is going on, any discovery is going
13 to be had in this court, and there is no reason why the
14 discovery can't embrace both lawsuits. I don't think I need to
15 preside over adjudications and whether a late notice is or is
16 not appropriate.

17 All right. We're on item five.

18 I am not ruling on the case management order, because
19 I want to deal with items six and seven first.

20 What are the pending motions to dismiss? Can they be
21 identified for me?

22 MR. WILLIAMSON: I think there aren't any, your Honor.

23 THE COURT: There are not?

24 MR. WILLIAMSON: No, but for purposes of the agenda.
25 It was to apprise the Court as well as plaintiff's counsel that

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1 such motions at the appropriate time will be made.

2 Obviously, we need to have --

3 THE COURT: What are you thinking about?

4 MR. WILLIAMSON: At present, we see at least four.

5 THE COURT: This will not be binding on you. Just
6 give me a heads up.

7 MR. WILLIAMSON: Thank you, okay.

8 First, of course, motions addressed to the pleadings.
9 Unless they are improved or changed, we would say from the
10 present status of some of the complaints, we believe that some
11 of them failed to state the claims they purport to state.

12 We also have the dispositive motion on behalf of our
13 clients with respect to out-of-possession lessee.

14 We have also, on behalf of the clients, dispositive
15 motions to dismiss the cases, all of them, that is on the
16 grounds of two state immunity statutes.

17 And last, your Honor --

18 THE COURT: What are they?

19 MR. WILLIAMSON: There are two of them, your Honor, in
20 question. One is the Disaster Preparedness Statute and the
21 other is the Defense Emergency Act. They are both creatures of
22 state law.

23 THE COURT: Give me a word about each.

24 MR. WILLIAMSON: That, in circumstances such as this,
25 where there is an emergency and a disaster, if people rush in

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1 to help or do anything to help, in the case of one of our
2 clients, the lessee gets out of the way when the City declares
3 a state of emergency as it did, and the State of New York
4 declares an emergency and says we are taking over Ground Zero.
5 We're going to try to rescue anybody that may still be alive.
6 We're going to also look for remains, and do removal and clean
7 up, and look for evidence of crimes and, so, you either get out
8 of the way and/or assist. And in such a dire circumstance,
9 there are two state statutes that contemplate it and provide
10 for immunity.

11 THE COURT: Do you need discovery?

12 MR. WILLIAMSON: No, not on those, your Honor.

13 THE COURT: What do you do? You file an answer that
14 alleges all these things and move?

15 MR. WILLIAMSON: We make a motion. It's a matter of
16 public record that the mayor of the City of New York and the
17 governor declared states of emergency on September 11th, so we
18 believe we can make those motions without discovery.

19 THE COURT: But you would have to prove, I think, that
20 all the things that you did, which are claimed to be
21 actionable, were done under the embrace of those statutes and
22 those rulings.

23 MR. WILLIAMSON: We think, actually, your Honor, that
24 when you look at the exact language of both statutes, it is not
25 possible for us to have been sued without having come in under

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1 those statutes, because otherwise we did nothing and,
2 therefore, can't be sued for that. We have thought it through,
3 your Honor.

4 THE COURT: Your thinking is, I'm sure, more
5 sophisticated than mine, and you will do what you think is
6 right. But hearing you, I think you need an answer first and
7 you possibly can move simultaneously with the answer; or you
8 may need some discovery, and you may want to ask me about
9 priority in conducting discovery on that narrow issue.

10 MR. WILLIAMSON: I can tell, your Honor --

11 THE COURT: You have to make that decision.

12 MR. WILLIAMSON: Yes, your Honor, and we will bear in
13 mind your thoughts.

14 There is also the doctrine in federal immunity, and we
15 believe under that OSHA has supervisory responsibility for
16 worker respiratory safety, as it was delegated to them to by
17 the City of New York, that we are entitled to federal immunity
18 as are other defendants.

19 THE COURT: You have raised those issues. I have
20 ruled that I thought it was premature, and I think there also I
21 felt that I needed additional facts that had to be supplied.

22 I would be sympathetic to limited issue discovery, if
23 you want to make the motions or you can educate me that you
24 don't need it.

25 MR. WILLIAMSON: We appreciate it, your Honor.

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1 As we have thought about it, first of all, we raised
2 it initially as we discovered these facts in the notice of
3 removal, and then brought to your Honor's attention the actual
4 full text of inside the green line.

5 We do think, your Honor, on that, at least our present
6 thinking, and obviously we need to give Latham and Watkins a
7 chance to look into it and evaluate it as well. We do think
8 there is a possibility we might need discovery, but I should
9 tell your Honor on the first two state statutes we are already
10 well down the road. We have already made these motions under
11 the two state statutes about which I just told you.

12 Justice Stallman in Supreme New York already heard and
13 considered whether discovery was needed and said it wasn't. Go
14 ahead and make the motions. And we have done that and the City
15 has done it.

16 THE COURT: Justice Stallman is an excellent man, and
17 I know him and we have compared notes, but I have my own views
18 and I express them.

19 MR. WILLIAMSON: I just wanted to be sure that your
20 Honor at least knew that he had the motions.

21 THE COURT: And practice under the CPLR is also
22 different.

23 MR. WILLIAMSON: True.

24 THE COURT: He also has certain benefits in an easier
25 interlocutory appeal than we do, and I am concerned as well on

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1 the record that we have.

2 Are you finished with your remarks?

3 MR. WILLIAMSON: Yes, your Honor.

4 THE COURT: I will just address to plaintiffs and
5 defendants, I just want to say a word why I think it is
6 advisable to advance the discovery on this issue, if
7 Mr. Williamson and Mr. Tyrrell think it's advisable.

8 It seems to me that whether I rule in favor of the
9 defense or against the defense, this is a kind of basic issue
10 that needs to be ruled on. I do not see any benefit by
11 postponing the issue until lots of money and effort are put
12 into the case, only for the possibility that at the end of the
13 game deciding that the defense is apt to prevail.

14 I think it's important for everyone that these
15 defenses be ruled on early and that was my thinking also in the
16 airlines case. I advanced the date of the motions for
17 challenging the existence of duty in that case. It is
18 important that money not be wasted. These cases are so
19 expensive. If we can explore a defense and decide one way or
20 the other about the defense, it pays.

21 Which brings me to the next topic.

22 There are some class actions and Ms. Wertheimer just
23 talked about 45, 50 plaintiffs. There are other class actions
24 in here. And I issued an order which raised some questions
25 about the class action aspect of these cases in respect to the

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1 De Virgilio case, and I asked that cause be shown.
2 Unfortunately, I made a mistake and said it should be done
3 before November 22. I had in mind this Monday, last Friday,
4 actually. But we are where we are.

5 Who would like to discuss the advisability of the
6 class action?

7 Mr. Napoli?

8 MR. NAPOLI: Yes.

9 In your order, I didn't see a deadline. I'm sorry,
10 your Honor, for proposing the basis, but you know I am prepared
11 to talk briefly about the De Virgilio complaint and who it
12 purports as to represent. We think it's appropriate (B)(2)
13 class potential, a (B)(3) class, in that it's seeking medical
14 monitoring for those.

15 THE COURT: Look at my order of October 13, paragraph
16 three.

17 MR. NAPOLI: I'm sorry.

18 I have received almost all of your orders. I have not
19 received the 13th, your Honor.

20 I have the order that discusses De Virgilio.

21 THE COURT: All counsel, every one of my orders is
22 posted. There is a number 21 MC 100. Everything is on the
23 Web, that Web site should be checked.

24 Have someone in your office responsible for checking
25 it daily. We will endeavor to put everything on there.

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1 I also want to tell you that Robin Efron has become my
2 law clerk as of October 1, and just as some of you need a bit
3 of a learning curve, so do I each time I have to do one of
4 these, and certainly Robin has had to have one. And it's not
5 always easy.

6 So, to the extent that some of the goofs have been our
7 responsibility, I take responsibility with respect to that. We
8 will try to do a better job, and certainly we will try to do a
9 better job in posting to the Web and in making sure that we get
10 our orders out early.

11 I need one liaison counsel for the plaintiff and one
12 for the defendant, so you can make appropriate notification and
13 I depend upon you, who have better staffing, to get the word
14 out to everyone.

15 Mr. Napoli?

16 MR. NAPOLI: We believe that this is an appropriate
17 monitoring case, that there are several monitoring programs in
18 place now that were provided by the federal government, but
19 they fall short, far short of providing the monitoring that the
20 people who worked at the site are going to need now and in the
21 future.

22 And we have experts that will, at the time of
23 certification hearing, be prepared to outline to your Honor
24 what that monitoring program is.

25 We also have retained preeminent experts in the area

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1 of class certification, who believe that a (B)(2) or (B)(3)
2 class is appropriate, especially where here you may have a
3 potentially limited fund that would have to somehow be
4 allocated, not only to present victims but those in the future
5 that we all know from the studies are all going to come around.

6 We would hate to see that those people in the future
7 were left empty handed because they were the last to the
8 courthouse.

9 THE COURT: Well, you are asking for damages, as you
10 are --

11 MR. NAPOLI: Yes, we are, your Honor.

12 THE COURT: -- dependent on the particular impacts of
13 each plaintiff, you will have to go by (B)(3) and not by
14 (B)(2). And I hear you in expressing a need for relief in two
15 aspects. One is money, the other is a type of monitoring
16 program that would require equitable intervention at an early
17 date and is largely, I think, independent of any issue of fault
18 or responsibility.

19 A disaster occurred, the Government, you are arguing
20 they should step in. And since health is affected and possibly
21 compromised, there should be monitoring programs.

22 I don't think I have the capability to address that
23 issue. It's a different issue from what I have and I think I
24 am really beyond capacity in dealing with all the cases. And I
25 have been open to transfer all these cases to me so I can keep

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1 them all coordinated.

2 I don't hold open the prospect of being able to deal
3 with (B)(2) relief, except at the end of the case where it
4 would be an adjunct to everything else.

5 I really regard all these cases as actions for money
6 and to a limited pot, for the most part. And so I don't think
7 it's a (B)(2) case. I think it's outweighed by the (B)(3). If
8 it requires issue -- it requires notice to everyone.

9 Apart from notice, even though there are a large
10 number of people, there is a limited field. It would be very
11 appealing for me, because never mind the prospect of trying to
12 get all these cases into a settlement mode relatively early, to
13 have one counsel representing all the plaintiffs. It would be
14 a wonderful luxury to have. I think the prospect of that is
15 small.

16 And as long as we are going to have a committee of
17 interested lawyers, I think the better practice and the easier
18 practice to regulate, and the practice that is more reflective
19 of really the individual interests in terms of individual
20 injuries is much better served by each plaintiff having his own
21 case or her own case in this court.

22 For them to be consolidated in cases or test cases or
23 the like, I do not think that I can manage effectively class
24 actions mixed with individual actions and I don't see it. But
25 I haven't read the papers and I don't want to make any rulings

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1 unless I see the papers.

2 MR. NAPOLI: Well, your Honor, we understand that
3 there is a difference between a monitored claim and a personal
4 injury class, and we did combine them in the one class action.
5 As discovery proceeds, which, if both remain, would really be
6 subject to some of the discovery that takes place.

7 We believe that in monitoring, in a monitor case all
8 fault is at issue. While there was the initial event of
9 September 11th, as time went on, the scene changed from a
10 rescue and recovery operation to a construction and demolition
11 operation, and in that regard, there is statutory fault not
12 only to the owners of the premises but to the construction
13 companies that were involved at the scene to take care of not
14 only their workers but the subcontractors and day laborers that
15 were on the scene.

16 THE COURT: I can't say that the lawsuits are subject
17 to motions to sever at this early point. What I can say is
18 that in my reading of this complaint, I came to the strong
19 view, but not decided view, that the individual action
20 predominate. Individuals should predominate.

21 And as long as I have this view, it's going to be very
22 difficult for me to certify a class action. I do not see the
23 value in relation to my need to manage all these cases to
24 create a program of class issues to be discovered. I think
25 it's a digression from what I really need to do.

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1 And, again, I will examine the papers, but my review
2 of where we are now leads me to feel that this is not
3 appropriate for a class action.

4 And, furthermore, that if you do want to advance the
5 issues, I would rather take motions based on the pleadings
6 alone in relationship to all the other cases I had before I
7 authorize any limited class discovery.

8 MR. NAPOLI: Okay. Well, I think, your Honor, we
9 would need some limited discovery in order to prove our
10 monitoring claim.

11 THE COURT: That's a point, but I'm not going to
12 advance it. You may have a compelling need. I understand your
13 point. People are in this neighborhood and they want to know
14 about the air they breathe.

15 There are active governmental issues on this. The
16 senators of New York have proposed legislation on this issue.
17 There may be basis for court equitable actions. I will just
18 give you fair warning, I don't feel I have the capacity to do
19 it.

20 MR. NAPOLI: I understand.

21 THE COURT: If you really are interested in that, you
22 might explore it with Mr. Williamson and Mr. Tyrrell, and I can
23 talk with Chief Judge Mukasey and maybe we can sever those
24 issues and give it to another judge. I am not able to manage
25 them, and I have the belief, notwithstanding the importance of

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1 the health issues, that there are many other issues that are
2 involved here also of paramount importance.

3 People suffered irreparably by reason of the events of
4 September 11th, 2001. They have chosen to come into this court
5 rather than into the Victim Compensation Fund. They have that
6 right at common law and Congress authorized it specifically by
7 statute. And I feel I have been charged to move those cases as
8 fast as they can be moved, including the respiratory cases.
9 That's my charge. I take it very seriously and I will try to
10 work as hard as I can to do that, but I have to be open with
11 you. However compelling and important, if I got involved in
12 this separate issue, I just think it would be too much of a
13 digression in what I regard as my primary responsibility.

14 MR. NAPOLI: I understand, your Honor.

15 As part of the people that I represent, a large number
16 of those people are people who were ineligible for the Victim's
17 Compensation Fund, or turned away for one reason or another as
18 being ineligible, and included in there are a number of people
19 who are Latinos, who were day laborers, who were on the scene
20 without adequate respirators, have no insurance, were paid
21 minimum wage.

22 THE COURT: That they are Latinos is of no particular
23 interest whether they are white or black, yellow or red, Latino
24 or European, Jew, Gentile or Muslim is of no concern to me.

25 MR. NAPOLI: Excuse me. I didn't mean there to be

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1 any.

2 But those people are in need of some monitoring
3 program that there is not and there is none out there. We
4 really believe that we can have limited class discovery that
5 will not overwhelm this court with motions or practice that
6 will --

7 THE COURT: As long as fault is an issue, it will not
8 happen. It will be submerged into everything else that is
9 going on.

10 Okay. Think about what you want to do. If you want
11 to go ahead, make a motion to certify a class and whatever.
12 You need, you don't need any discovery. All the information is
13 in the public record. You can present it by an offer of proof,
14 and defendants who object to a class action can make their
15 motion, and whatever rulings I make, they will be subject to
16 reopening anyhow, because all my rulings on class issues are
17 subject to reopening and re-examination anyhow.

18 I just give you fair warning of how I regard these
19 issues at this point. I could be persuaded differently.

20 MR. NAPOLI: Hopefully I can persuade your Honor.

21 THE COURT: All right.

22 I'm up to number eight, unless I should go back to
23 five.

24 Is there any reason to go back to number five, the
25 case management orders?

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1 As you know, I have different classes, different
2 categories of cases. There are more than 100 claimants in
3 these respiratory injuries. There are about 75, I think,
4 personal injury wrongful death cases. There are property
5 damage cases. Port Authority is a plaintiff and a defendant.
6 Port Authority claims that it was the negligence of the
7 airlines and the Aviation Security Agency that caused it to
8 lose its buildings and, of course, it's being sued as well.
9 There are subrogations. There are direct property actions.

10 We are in the process of creating several separate
11 tracks because the consolidations and the coordinations have
12 been too general.

13 I want to give you a heads up of something else also.

14 The Transportation Security Administration and the
15 responsibilities that Agency has in the matter, I don't believe
16 it will affect the work at the site, but it will affect other
17 parties that are interested, in one way or another it will
18 affect everybody. All discovery by the airlines and the
19 aviation security companies have to be filtered through the
20 Transportation Security Administration. The filter is to find
21 out if anything is what is called sensitive security
22 information or SSI. If it is, it can't be disclosed except
23 under redaction or summary.

24 The process is very slow. We have been stopped in
25 discovery for about almost a year. Mr. Williamson, I think,

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1 about a year?

2 MR. WILLIAMSON: Yes. I think we have actually passed
3 the one year mark, your Honor. Yes, are you absolutely right
4 in that area.

5 THE COURT: The work with the Transportation Security
6 Administration will go to a final determination unless there is
7 resolution. An appeal from the final order of the
8 Transportation Security Administration goes not to me, but to a
9 Court of Appeals in which the party resides who does business,
10 the District of Columbia or one of those other courts of
11 appeal. So it may go to the Second Circuit, it may go to the
12 Ninth Circuit, I don't know.

13 I have offered to be a mediator, hoping to help
14 resolve some of those disputes and get discovery underway, and
15 it may be that I will be. But a snail goes faster.

16 Now, what occurs to me is that the complexity of all
17 these cases competing for a limited pot presents a unique
18 situation that I think may be unparalleled in our judicial
19 history. And the prospect is litigation beyond perhaps our
20 useful lifetimes or at least some of us, me. I see some other
21 people who have just as few hairs.

22 And I think we have clients, what do we do with this.
23 We can litigate this and proceed and it will be very
24 unsatisfactory to everybody; or we can try to figure out
25 something different and more creative.

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1 I have made these remarks to the 21 MC 97 group and I
2 have attached them to this agenda as well. Mr. Williamson now
3 has heard it and will read it.

4 But I am very serious in this. It's going to be a
5 very complicated business, and I have the optimistic hope that
6 a very good set of special masters can work with the varying
7 groups and create the possibility of settlements. It's going
8 to be particularly difficult here, because with respiratory
9 injuries, we have a tremendous variation; some people have
10 already suffered, some people are beginning to suffer, some
11 people worry that they will suffer years later and perhaps, God
12 forbid, they pass it on to their children yet to be born.

13 So it is very difficult to value the cases.

14 And without the ability to value the cases, it's hard
15 to come forward with anything meaningful. That is one of the
16 reasons, Mr. Carboy, that I wanted to have better definition
17 early in the game, so that we can start thinking about values
18 of the cases.

19 I have talked to two people about the possibility of
20 being mediators in these cases. What I want is a panel of a
21 few people, of distinguished reputation, who have experience in
22 settling and have an ability to become invested in the process
23 of settling. I want their egos on the line, which means people
24 who should have strong egos.

25 I'm not looking for the picture of the mediator who

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1 sits back and is responsive. I'm looking for a mediator who
2 can make things happen. The best person I know for this former
3 judge of this court, former professor at Columbia law school,
4 former legal adviser to the Department of State, and now a
5 fellow of the Hooper Institute in Palo Alto, a professor at
6 Stanford is Abe Sofaer. I have talked to Abe, and subject to
7 acceptance by the varying people here, he would be willing to
8 do this.

9 I have also talked to a young person, who just left
10 the White House, where he served as senior policy adviser to
11 President Bush. He was active in writing the legislation that
12 gave rise to the Victim Compensation Fund, and now is a senior
13 partner at Kirkland and Ellis. His name is Jay Lefkowitz. And
14 he also would be interested to do this.

15 I wanted someone who has a firm. I want someone with
16 staff, who could become invested in the process as well. And I
17 wanted someone who could work with Judge Sofaer, if he would be
18 accepted.

19 Kirkland and Ellis represents United Air Lines and
20 maybe one or two other parties, but I don't think they have
21 any, and they represent Skidmore, the architectural firm, have
22 done some work, and I don't know if this would disqualify them
23 or not. Jay, himself, has not done any work for that firm.

24 And you can explore it some more, so that's another
25 person. And then there is some more that's been recommended.

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1 I thought another excellent person might be, if she is
2 willing to do this, might be Pat Hynes, who is of counsel to
3 Milberg Weiss, to represent the plaintiffs, because I want
4 someone who has done work with plaintiffs, and I would be
5 willing to accept any other recommendations from any of you.
6 If you want to submit this informally or in any other way, I
7 would like you to talk about it. I would like you to explore
8 this idea.

9 It's premature, and I concede that it is, but I have
10 been at this now a year-and-a-half, and the prospect is too
11 many years to count, and we are not providing relief for people
12 when we engage in this the kind of a process. Nor is it
13 healthy for defendants, because all of us have to get beyond
14 September 11th.

15 So I want to preach this. I think it's so important
16 to deal with these cases in untraditional ways to get to the
17 resolution, to talk about them. We are going to meet, when is
18 it we have this informal conference, Robin?

19 THE DEPUTY CLERK: I believe it's November 30th. Let
20 me check.

21 It's November 30th at five p.m.

22 THE COURT: It's going to be informal. It's not going
23 to be on the record. I would like to have a small group.

24 I would like all the interested representatives.
25 Mr. Williamson is going to come, I know, and I need at least

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1 one from the respondent plaintiffs to be involved in this
2 process, one or two. Try to leave it not more than two and try
3 to exact a discipline.

4 I think the City needs to come, Mr. Tyrrell,
5 Mr. Shaffer.

6 MR. SHAFFER: Your Honor, captive does have an
7 interest in that, we would like to there as well.

8 THE COURT: You need a limit.

9 MR. SHAFFER: I understand.

10 THE COURT: I think you need to start talking with
11 Desmond Barry, who represents the airlines, and Mark Muller,
12 the lead counsel for plaintiffs.

13 And I think, I would like you to do a lot of informal
14 discussion about this amongst yourselves and with others,
15 because the more I think about it, I think it's our only way.
16 And if we go about doing this in a good way, I think we can
17 break these cases this year on Robin's tenure. That's what I
18 would like to do.

19 That's it. If there are any comments, anybody want
20 to? You don't have to.

21 We need to set another date. I really would like you
22 to bring your pleadings up in the ways I have suggested, and
23 break up these lawsuits or advance the class actions, but we
24 cannot have multiple plaintiffs represented by single counsel
25 in a single pleading. I can't administer it. We found that

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1 out before. I will carry forward.

2 It's now October. Why don't we meet in mid December?

3 If we do it Monday, December 20, it's the week of
4 Christmas. Can we do it? I may be away before then.

5 December 20, let's do it at three o'clock.

6 Are there any other items for the agenda.

7 MR. NAPOLI: Just one question, your Honor.

8 Are the conferences for 21 MC 97 also on the Web site?

9 THE COURT: Yes.

10 MR. NAPOLI: We would like to appear at those.

11 THE COURT: Yes. And just make yourself known.

12 They're essentially three tracks I'm working on, but
13 there will be more, four --

14 THE DEPUTY CLERK: Actually five, because we are
15 splitting off the property.

16 There are five tracks. There is you all, 21 MC 97 is
17 about to be split into another master calendar. We're breaking
18 off the property damage tract from 21 MC 97, that will be its
19 own.

20 Then there is the Zurich case, which are the insurers,
21 and then there is the Egis case which is separate matters
22 involving World Trade Center 7.

23 So, those are all the different tracks.

24 The insurance cases is a dispute among the insurers of
25 the World Trade Center and the lessees, the Silverstein

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1 interests and the Westfield interests. And it's essentially a
2 coverage dispute between the insureds and the lessees, and the
3 Port Authority, and a dispute among the varying reinsurers.
4 It's a case that I thought was different and, therefore, it
5 shouldn't be handled by me, but I was then reminded that since
6 the insurance is the cap of the liability. I need to take
7 those cases as well and so I have them.

8 And I am making this speech or I made this speech to
9 each one of these tracks, because one way or another, they have
10 got to be separate and they have got to be brought together,
11 each has separate features, each has common features.

12 All right. Thank you all.

13 Have a very good Thanksgiving. I will see you in
14 December.

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