

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: WORLD TRADE CENTER
DISASTER SITE LITIGATION

21 MC 100 (AKH)
PART 1 OF 2

THIS DOCUMENT APPLIES TO ALL
WORLD TRADE CENTER DISASTER SITE
LITIGATION

**PLAINTIFFS' RESPONSIVE DECLARATION OF THE FACTS
PURSUANT TO CASE MANAGEMENT ORDER NO. 3**

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**PLAINTIFFS' RESPONSIVE
DECLARATION OF THE FACTS
PURSUANT TO CASE
MANAGEMENT ORDER NO. 3**

The Plaintiffs submit this declaration in compliance with the directives of Case Management Order No. 3 (“CMO No. 3”), setting forth the key arguments that Plaintiffs currently anticipate may be asserted in opposition to Defendants’ anticipated motions. Part 1 of this Declaration is a summary of key events in the rescue and recovery operations at the World Trade Center Site that Plaintiffs currently anticipate will be used to oppose Defendants’ motions. Part 2 is a summary of the anticipated legal arguments and authority that plaintiffs anticipate offering in opposition. In addition, plaintiffs include a timeline of significant events. *See* Exhibit "1."

**I. THE WORLD TRADE CENTER COLLAPSE AND
FIRES POSE RESPIRATORY HAZARDS FOR RESCUE
AND RECOVERY WORKERS**

The World Trade Center consisted of seven individual buildings contained within a sixteen-acre complex in lower Manhattan, and included the buildings known as 1 World Trade Center, 2 World Trade Center, 3 World Trade Center (a/k/a the Marriot World Trade Center Hotel); 4 World Trade Center; 5 World Trade Center, 6 World Trade Center and 7 World Trade Center, as well as the surrounding plaza and underground shopping, parking and public transit facilities.

Following the terrorist attacks of September 11, 2001, the World Trade Center's buildings collapsed or were destroyed. One World Trade Center, Two World Trade Center (together known as the Twin Towers), Three World Trade Center (the Marriot WTC Hotel), Four World Trade Center, Five World Trade Center and Six World Trade Center either collapsed or were burned, leaving an enormous debris pile; Seven World Trade Center collapsed later in the day. The shopping and parking structures under the buildings and the plaza sustained major damage and collapse. The World Financial Center and the glass enclosure of the Winter Garden, the Verizon Building at West and Vesey Streets, the Deutsche Bank Building at Liberty and Greenwich Streets, 90 West Street, St Nicholas Church, and 125 Cedar Street sustained extensive damage. All of these areas, including other surrounding structures such as utilities (telephone and electric) and transportation (subways and PATH tunnels/stations) and their environs, are collectively and hereinafter referred to as the "WTC Site." Claims addressed in this declaration may also refer to work done at the Fresh Kills Landfill site and the barges, piers and transfer stations used to remove debris.

At the WTC Site, rescue, the search for and extraction of survivors, as well as firefighting and debris removal began immediately after the collapse. These operations involved thousands of New York City ("City") workers, including police ("NYPD" and Port Authority Police) and fire department ("FDNY") personnel, utility personnel, private contractors and other workers. As evidenced by the results of rescue operations, by September 15, 2001, it became clear that no survivors would be found. Eventually, the City officially deemed the work at the WTC Site "recovery" and debris removal only. Fires continued to burn under the debris pile through late December, 2001. Demolition and clearance of debris would continue for eight (8) more months.

Although “*the scope of the WTC Emergency...necessitated the involvement of various Federal, State and city agencies,*” the City and its departments, particularly the Department of Design and Construction, exercised overall leadership of the rescue and recovery effort:

The New York City Mayor’s Office of Emergency Management is responsible for overall coordination of the WTC Project. For the initial search, rescue and recovery operations, the FDNY has been identified as the Incident Command for the WTC Emergency...The NYC DDC has total control of site construction, demolition and clean-up activities.

See CITYCM3-00041692: Environmental Safety & Health Plan.

The collapse of One, Two and Seven World Trade Centers, and the destruction of the other surrounding buildings, along with the fires that followed and burned for months, resulted in the release of thousands of tons of hazardous materials into the air of lower Manhattan. Airborne contaminants included asbestos, lead, mercury, cadmium, polychlorinated biphenyls or PCBs, benzene, chromium, among others. See CITYCM3-00042227.

As the official Report of the City Council Committee on Environmental Protection acknowledged:

In the weeks following the collapse of the Twin Towers, significant quantities of smoke, dust, asbestos, dioxins, polychlorinated biphenyls (PCBs), lead, furans, volatile organic compounds, heavy metals and various other potentially hazardous substances were released into the air.

See CITY CM3-000025293: *Air Quality and Environmental Impacts Due to the World Trade Center Disaster*, December 2001.

The plume of contaminated dust that rose from the collapse was highly caustic. The pH¹ readings of dust samples measured at least as high as 12.1. See CITYCM3-00042227. The dust

¹The pH scale consists of 1-14 units. Substances that are neutral have a pH of 7.0. A pH below 7.0 is considered acidic. Substances with pH values above neutral are considered basic or alkaline. Westley v. Ecolab, Inc., 2004 WL 1068805, 5 (E.D. Pa., 2004).

or particulate matter generated by the collapses contained pulverized cement, including quartz, calcite, and portlandite, as well as disintegrated wallboard, including gypsum, mica and halite. See CITYCM3-00038540.

The air in lower Manhattan was filled with particulate matter for weeks after the collapses. See WTCP/PA-CMO3-0000119. Concentrations of dust were greatest in the days immediately following September 11, 2001. As noted, *supra*, fires burned at the WTC Site for months, and were only declared “extinguished” by the FDNY on December 19, 2001.

The City’s agencies immediately recognized the hazards that the dust and contaminants posed to rescue, recovery and other workers; notwithstanding that fact, many firefighters, police officers and other workers including construction and utilities personnel working at the WTC Site were not adequately protected. Although the FDNY advised its employees that respirators should be worn by members at the WTC Site (*see, e.g.*, CITYCM3-00057390: FDNY Department wide transmittal of safety recommendations), personnel protective equipment (“PPE”) was either inadequate or unavailable to the firefighters and other workers responding in the aftermath of the collapse.

The Mayor’s Office of Emergency Management (“OEM”) repeatedly assured the FDNY that it would work to address a severe need for respirators at the site; however, by September 22, 2001, nine days after the collapse of the Twin Towers, the FDNY noted that:

OEM must develop a plan at the 0700 meeting to address overall use & respirator issue. The “we have 8,000 on order” is losing its credibility.

See CITYCM3-00048269, Memo from: Charles R. Blaich, DC WTC Logistics Officer, To: Assistant Chief Frank Cruthers, WTC Incident Commander, "Logistics Update as of 2130 Hours, 9-22-01."

Through its Chief Safety Officer, the FDNY had the obligation to “insure compliance with site safety and health requirements” with respect to FDNY members. (CITYCM3-0002242). An FDNY order for over 5,000 respirators and 10,000 plus cartridges was prepared on September 28, 2001; however, the order was not approved *for almost two months*, until November 26, 2001. (CITYCM3-00055369). Underscoring the urgent need for respirators, the FDNY ordered adapters that would convert 15,000 “Scott” facemasks, ordinarily connected to self-contained breathing equipment, to use with filter cartridges. (CITYCM3-00055358).

Exposure continued well after the debris had been cleared; work continues at the WTC site today, including the razing of the Deutsche Bank Building. Plaintiffs involved in these cases allege exposures that begin as early as September 2001 and some as late as 2005.

II. THE CITY OF NEW YORK, AND NOT THE FEDERAL GOVERNMENT, DIRECTED AND CONTROLLED THE WTC RESCUE AND RECOVERY EFFORT

A. The City and its Agencies Assumed the Leadership of the Rescue and Recovery Efforts

Official documents from the OEM illustrate that the recovery operations at the WTC Site were directed and lead by City agencies:

All operations on the Debris/Rubble Pile will be conducted under the oversight of the Unified Command, which includes **DDC**, FDNY, OEM, NYPD *and PAPD*.

See CITYCM3-00025030: OEM Update Memorandum of November 14, 2001 (emphasis added)

addressed to all agencies. Moreover,

Both OSHA and PESH, who testified this morning, *are present on the site on a consultative basis. They do not have the power, at this point, other than the power of persuasion, to enforce safety and health regulations and rules.*

See Public Hearing on Air Quality and Other Environmental Public Health Matters Resulting from the 9/11/01 Tragedy: November 26, 2001, at p. 326.

The City Department of Design and Construction (“DDC”) was the lead agency on safety matters at the WTC Site. Robert Adams, Director of Environmental Health and Safety Services for the DDC, testified:

All other agencies involved recognized DDC’s designation as the lead agency on safety matters and understand this does not reduce their jurisdiction.

See "Air Quality and Environmental Impacts Due to the World Trade Center Disaster," December 2001 at CITY CM3-00025297.

On September 13, 2001, DDC Commissioner Kenneth Holden issued a Declaration of Emergency that allowed “*the letting of contracts for public work...under public emergency conditions*” without the need for competitive bidding. Accordingly, on September 11, 2001, the DDC requested that Bovis Lend Lease, AMEC Construction Management, Tully Construction Company and Turner Construction Company “*perform the work necessary for removal and demolition services.*” See CITY CM3-00057737: September 13, 2001 DDC's Declaration of Emergency. These private companies became known as the City’s primary contractors. The City hired the primary contractors because “*departmental forces are inadequate to perform the extensive work required by the situation.*” *Id.* As primary contractor Turner acknowledged, “*a select group of New York City Contractors, at the request and under the direction of New York City Department of Design and Construction implemented a plan to commence debris removal and recovery operation.*” AMECM3-0000000298-326: WTC Recovery Project-Turner/Plaza Sector Summary Report.

Documents produced by Defendant Bovis reveal that the DDC controlled the WTC Site, as well as all of the activities of the construction companies that responded, including rescue,

recovery and debris removal . According to these documents, the DDC set up a temporary command center in Public School IS 89 on September 12, 2001 and commenced daily meetings to organize the rescue and recovery operation: *"by the third day DDC decided to divide the site into 4 geographic quadrants, and to assign a prime CM to each quadrant."* "CM" is an abbreviation for "construction manager," a reference to the four primary contractors. *See* documents BOVCM3-000002617 through BOVCM3-000002621. The DDC divided the WTC Site into four separate work zones:

The boundaries of each zone has been determined based upon the four prime contractors...retained by the...DDC to clear and remove debris from Ground Zero. The work zone prime contractors are as follows:

Zone 1- Tully Construction

Zone 2-Bovis Lend Lease

Zone 3-AMEC

Zone 4-Turner Construction

Zone 5-Piers 25 and 6, barging and marine operations...

Zone 6-...covering the Staten Island landfill

CITY CM3-00041689: *"Environmental, Safety and Health Plan."*

The City financed the work of the primary contractors. On September 20, 2001, the City forwarded a check in the amount of Ten Million Dollars (\$10,000,000) to AMEC Construction. *See* AMECM3-000000183: September 20, 2001 Correspondence from DDC to AMEC enclosing initial payment. By January 25, 2002, payments to AMEC from the City totaled nearly sixty million dollars. (AMECM3-000000634). By March 18, 2002, Bovis Lend Lease estimated that total construction dollars "will be of the order of 225 million." AMECM3-000000631.

Although *"the scope of the WTC Emergency...necessitated the involvement of various Federal, State and city agencies,"* the City and its departments maintained and exercised overall leadership of the rescue and recovery effort, with Federal agencies serving in a supporting role:

The New York City Mayor's Office of Emergency Management is responsible for overall coordination of the WTC Project. For the initial search, rescue and recovery operations, the FDNY has been identified as the Incident Command for the WTC Emergency ...The NYC DDC has total control of site construction, demolition and clean-up activities.

CITYCM3-00041692: *"Environmental Safety & Health Plan"*; see also, Sections III and VI below.

A typical example of the supporting role played by federal agencies is their participation in the debris removal program. As the Federal Emergency Management Agency ("FEMA") commented:

Debris removal operations are under the direction of the...DDC. FEMA is responsible for administering the Federal Funds that will be granted to the State of New York and various applicants under this disaster. The City...is a sub-grantee.

The U.S. Army Corps of Engineers (will) provide technical assistance to NYC on an as required basis as NYC requests this assistance.

See CITY CMC-00033810 - Debris Monitoring Plan.

In organizational charts prepared to illustrate the different agencies involved in the recovery effort, their role in environmental health and safety, and the hierarchy they fit into, the City OEM is placed at the top. Directly below is the City Department of Health ("DOH"). Underneath these two city agencies, appear "Federal Response Coordinators," including the EPA. (CITYCM3-00057361). Among documents produced by the defendants is a control structure diagram for the WTC Recovery Team, stamped BOVCM3-000000868, that places the "*New York City Department of Design and Construction*" at the top of the pyramid. Notably, the Federal Government and its agencies are listed as "Representatives" to Contractors -- a subordinate position -- in the lower levels of the diagram. The City's comprehensive role in and leadership of the recovery effort is further underscored by a chart delineating the responsibilities

of various sections of the DDC at the WTC Site. As depicted, responsibilities assigned to the DDC and its contractors included: Project Management; Engineering Audit; Engineering; Safety/Insurance; Field Operations; Security; Logistics and Planning; Personnel Transport; and Operations Meetings and Coordination of Utilities. (CITYCM3-00035754).

B. The DDC Set Policies Governing All Aspects of Recovery

In its capacity as leader and coordinator of the recovery, the DDC promulgated policies governing all aspects of the work performed at the WTC Site. Policies and policy manuals issued by the DDC regulated everything from “*mealtime and shift change allowances*” to the type of safety equipment and measures to be implemented on the job. The table of contents from a February 2002 DDC publication, entitled “World Trade Center Disaster Recovery Policy Manual,” includes the following policies:

Mealtime and Shift Change Allowance

Safety:

- Excavation in areas around or on the main chiller plant...
- Respirator requirements for protection against Specific Hazards, SILICA...
- Fire Safety...

Meeting Schedule

AMECM3-000000449-614: *2/02 DDC Policy Manual.*

The DDC’s *World Trade Center Debris Removal Policy Binder* contains policies that regulated a variety of tasks performed by the contractors and other personnel at the WTC Site, including: preparation of field reports and submittals and the content to be included; sign-in and sign-out sheets; access to the WTC Site; reimbursement; damage appraisals; payment; payroll; crane operation; truck traffic; and subsurface operations. BOVCM3-000000911-1359: *DDC World Trade Center Debris Removal Policy Binder.*

C. The Activities of the City and its Contractors Demonstrate the City's Leadership Role

Documents produced by the City and its contractors demonstrate that the City exercised complete domination of the WTC Site and all of the activities that took place there.

1. The City Controlled Access to the WTC Site Through June 2002

On September 11, 2001, the City assumed full control of the WTC Site through the FDNY, designated as "Incident Commander." For the next ten months, the City would maintain exclusive control over the WTC Site; on June 30, 2002, the City, through the DDC, returned control of the "World Trade center complex" to the Port Authority of New York and New Jersey ("PA"). On that date, DDC Commissioner Holden wrote to the Chief Engineer of the PA:

The purpose of this letter is to inform you that the PA now has complete responsibility for the Site. On June 30, 2002, at or about 7:00 p.m., the City turned over to the PA control of the Site. As the owner of the Site, the PA is responsible to follow all applicable laws and regulations.

July 10, 2002 Correspondence to the PA from DDC.

During the ten months that comprised the recovery, City agencies directed and controlled access to the WTC Site itself, dividing it into "Red" and "Inner" Zones:

Tan passes issued by the DDC will represent access to both the Red Zone and the Inner Zone. ... The Inner Zone is the fenced area bounded by Vesey Street on the North, Church Street on the East, Liberty Street on the East and West Street. Access to the Inner Zone will be limited to construction personnel, recovery workers and authorized personnel with Tan passes issued by the DDC...NYPD, PAPD, FDNY and DDC personnel will be posted at these gates.

CITYCM3-00025030-31: OEM Update Memorandum of November 14, 2001 addressed to all agencies; *see also*, CITYCM3-00025825: September 30, 2001 OEM Memo to all agencies concerning its issuance of new credentials for access to the WTC Site).

If an agency or company determined that its personnel required access to the WTC Site, that entity applied to the DDC:

Those agencies that need to have personnel in the Inner Zone on a regular basis should submit a request in writing to the DDC command field officer for approval

See CITYCM3-00025030-31.

The OEM even had the power to exempt certain agencies from the pass requirements, and exempted the FDNY and certain, but not all, Federal agencies. *Id.* at 00025035.

The City determined not only who would have access to the site, but also how that access would take place and under what constraints. “NYPD is responsible for site security (*i.e.* access at perimeter and movement with in red zone).” *See* CITYCM3-00041825: City DOH Memo entitled “Health and Safety Controls at WTC Disaster Site” dated October 7, 2001. Visitors to the WTC site were to “be properly escorted by NYPD/FDNY/OEM” at all times “so as not to place themselves in a position where they might be injured...” . (CITYCM3-00041737).

When the recovery effort had progressed to the point where work crews required access to confined spaces in the debris fields or below ground, the DDC issued special permits to them:

WTC Emergency Project-EH&S Protocol 11-2

Permit-Required Confined Space/Confined Space Entry Site Requirements”

The contractor/agency making entry into permit-required spaces...must submit a written plan. DDC, OSHA, FDNY and Liberty Mutual will review the plan

The FDNY and DDC will be notified 24-hours in advance of all permit-required confined space entries.

DDC will develop a single permit to be used on the WTC Project site.

See CITYCM3-00023052.

In the event of an emergency that impacted the WTC site or its boundaries (such as another act of terrorism, a chemical hazard, explosion, fire, severe weather slurry wall ("bathtub") failure, etc.), the FDNY controlled the emergency evacuation of the site pursuant to its stated and published protocol ("FDNY Protocol: Emergency Evacuation Plan" AMECM3-000001129-30). Upon the notification of such an emergency, the FDNY Incident Comander would determine the scope of the appropriate evacuation. At that point, the DDC would provide "technical assistance" to the FDNY; the OEM would assume responsibility for all issues arising from the emergency beyond the WTC site boundaries, and the NYPD and PAPD would assist with evacuation of site personnel, establish control of the perimeter, and provide security at all gates and at the EPA Biosphere located at West and Vesey Streets.

2. Enforcement of Health and Safety Regulations at the WTC Site was the City's Responsibility.

On October 11, 2001, Benjamin Mojica, then Deputy Commissioner of the City DOH, wrote that "the NYCDOH is responsible for the health and safety of workers on site, and coordinating the implementation of the health and safety plan at the disaster site. ... We need to enforce this plan, as no other agency is responsible or able to do so." CITYCM3-00041296: October 11, 2001 E-mail from Mojica.

In sworn testimony presented on March 8, 2002, Robert Adams, the Director of the DDC's Bureau of Environmental Health and Safety Services explained that the City and its contractors were in charge of the recovery effort. CITYCM3-00042619-31: Testimony of Robert Adams:

The agency (DDC) remains engaged in oversight of clean up operations, coordinating with our construction manager, Bovis/AMEC Alliance and the dozens of specialty subcontractors needed for this recovery and clean up. We (DDC) remain

partnered with the FDNY as co-incident commanders for the response effort.

With our construction manager, Bovis/AMEC Alliance, who manages the day-to-day operation, *DDC remains responsible to ensure a safe and efficient recovery and clean up operation.*

On September 21, 2001 and October 19, 2001, the City DOH, through the Commissioner of Health, issued two orders. These orders established controls on building use by City personnel and mandated specific protective actions be taken when persons and vehicles left the WTC Site:

It is hereby ordered that all persons leaving the WTC site shall follow personal hygiene protocols, including but not limited to...removal or HEPA vacuuming of work clothes...

It is further ordered that all vehicles leaving the WTC site be spray washed...

See CITYCM3-00026317-18 and 00041996-97; City DOH Orders of 10/19/01 and 9/21/01.

Indeed, the DDC took charge of environmental health and safety inspections immediately after the collapse of the Twin Towers and the surrounding buildings. The agency's "*safety inspections began as early as 9/12/01 and soon became a regular part of the project.*" Id. The Port Authority was part of that safety inspection team. *See* Williamson Declaration, at Exhibit C, section (a).

The DDC issued specific requirements for PPE in its "Environmental Health and Safety Bulletins." For example, in a bulletin issued in February 2002, entitled "*Respirator Requirements for Protection against Specific Hazards,*" the DDC mandated that:

A half-face respirator with P-100, organic vapor, acid gas filters/cartridges is required within the confines of the slurry wall and for any activity or area outside the slurry wall that generates dust, fumes or vapors...

See CITYCM3-00043524; *see also*, CITYCM3-00019981: "DDC WTC Emergency Project-Bulletin Personal Protective Equipment [PPE] Requirements."

On September 20 and 22, 2001, the City DOH issued the criteria for minimum safety gear to wear in the recovery effort. CITYCM3-00043716 and 00041953: “*Minimum Gear that Should be Worn Prior to Entry Within the Police Line of WTC Work Area.*” The DOH would also issue requirements for PPE. For example, on October 22, 2001, the DOH issued the following directive:

Personal Protective Equipment Required in Debris Area

- Hardhat or helmet
- Respirator (half-face reusable) with P100/organic vapor/acid gas (OVAG) filter cartridges)

See CITYCM3-00007286.

As of March 2002, the DDC promised “to continue to oversee safety health and environmental issues to ensure that those working at the World Trade Center remain safe and healthy.” Id.

Notably, the Federal Government did not have the authority to enforce worker health and safety policies, including those established by City agencies regarding the use of PPE. As correspondence to the City DOH from the United States Environmental Protection Agency (“EPA”), dated October 5, 2001, makes clear, the City was responsible for ensuring its workers and contractors were provided with suitable PPE and enforcing PPE use:

EPA has recommended, and continues to recommend, that workers utilize personal protective equipment and the personnel wash stations to prevent the spread of asbestos and other hazardous substances... **however, we do not have authority to enforce the worker health and safety policies for non-EPA/USCG employees.** Therefore, EPA believes the Incident Commander should adopt and enforce a site-wide Health and Safety Plan.

See CITY CM3-00007586: Correspondence of October 5, 2001 from EPA Region II to Kelly McKinney, Associate Commissioner of City DOH.

In response, Associate Commissioner McKinney acknowledged that the City DOH was specifically charged with maintaining environmental safety and health of FDNY and Police

Department personnel working at the WTC Site:

The problem is enforcement. Bechtel (a City contractor) has authority over DDC contractor personnel (i.e., Turner, Tully, Bovis and Amec and their subcontractors) but has little control over FDNY, NYPD... DOH is the lead agency under OEM for this issue, and I believe we can do more to enforce H&S protocols on the ground.

See CITYCM3-00041825: City DOH Memo entitled “Health and Safety Controls at WTC Disaster Site” dated October 7, 2001.

To the extent that the City, through the DDC and the DOH, consulted with federal agencies about environmental safety and health issues at the WTC Site throughout the recovery effort, the input of the federal government was advisory. For example, on February 13, 2002, Bruce Rottner, Assistant Director of EH&S at DDC, modified the requirements for PPE use.

After conferring with OSHA representatives, the DDC:

decided to allow for the use of P-100 filters instead of the current requirement for the combination filters/cartridges. A disposable P-100 respirator complete with...sealing flange and an exhalation valve is...acceptable.

See CITCCM3-00021765; *see also*, Section III B., *infra*.

3. The City and Its Contractors Prepare and Issue WTC Site Safety Reports

The DDC and its contractors, most prominently, Bechtel Environmental Safety & Health (“Bechtel”), and the Port Authority, inspected the WTC Site to determine safety conditions and enforce compliance with PPE requirements, set forth by the City. These reports are extensively detailed, and were prepared throughout the recovery effort. *See, e.g.*, CITYCM3-00014844-57 and CITYCM3-00021319-21518. Many of the reports are accompanied by cover letters from

DDC Executive Deputy Commissioner Mike Burton, that reflect the authoritative role DDC played in environmental health and safety:

In the interest of maintaining a safe and health work site, I have asked DDC safety and health officers to report on observed safety issues during their regular tours of the site. The DDC recognizes that your agency has responsibility for the health and safety of your employees.

The only “agencies” on the distribution list for these memoranda were the Port Authority, OEM and the FDNY. (CITYCM3-00021319.)

Bechtel wrote to the City DOH to advise that its representatives, as well as the Director of Environmental Health & Safety of the DDC, were concerned about City police officers not wearing respiratory protection at the WTC Site. Bechtel requested that the City DOH “bring this issue up to the proper authorities,” not within the United States government, but “within the NYPD.” CITYCM3-00023397: October 22, 2001 correspondence from Stew Burkhammer, Bechtel Corporation to Associate Commissioner of City DOH.

4. The City and the Port Authority Controlled the Removal of WTC Debris and Safety Issues At the Site.

The DDC monitored all inbound and outbound truck traffic from the WTC Site. The City installed a Global Position System (GPS) in trucks carrying steel and other debris from the recovery. The City Department of Transportation (DOT) effected the installation. The GPS equipment enabled the City to improve the efficiency of the trucking operation. CITY CM3-00034059: 12/1/01 Memo from DDC GPS Coordinator.

The DDC assumed responsibility for the monitoring and shipment of the debris. The DDC issued “Load Debris Tickets” to the trucks leaving the WTC Site. The tickets were emblazoned with the words “DDC City of New York Load Debris Ticket” and were completed

with information about the destination of the truck and its cargo. CITYCM3-00033806: Sample DDC Load Debris Ticket.

As debris was removed, DDC officials, along with Port Authority (PA) officials, were to track, coordinate and document the following:

- A) FDNY/Rescue operations;
- B) Structural concerns;
- C) Progress of work;
- D) Weather;
- E) Trucking/Traffic operations-Manifests;
- F) Safety concerns;
- G) Equipment on site;
- H) Idle equipment; and
- I) Crane issues.

See CITY CM3-00033827 DDC/PA Field Staff Responsibilities/Procedures.

Port Authority control at the WTC site is also evidenced in a November 7, 2001 memorandum from the DDC , authored by Executive Deputy Commissioner, Mike Burton. Burton explains that *"in the interest of maintaining a safe and healthy work site, I have asked DDC/FDNY/NYPD/PAPD (Port Authority Police Department) safety and health officers to report on observed safety discrepancies during their regular tours of the site."*

Indeed, defendants concede that Port Authority Police Officers assisted in control of access to the site "sometime before September 27, 2001." *See* Williamson Timeline, at p. 5. In his Declaration, defendants' counsel Richard Williamson, Esq., writes:

Finally, beginning about a week after September 11, 2001, the PAPD, together with the NYPD, was responsible for enforcing the site security and access policies related to "Ground Zero" established by the City of New York. The PAPD, however, had no responsibility for security or access at any other location encompassed by the definition of "World Trade Center Site" contained in §I of Case Management Order No. 3, and had no responsibility related to the debris removal operation at the WTC site. In the course of performing each of these functions, the PAPD was supervised and/or controlled by the City of New York.

See Williamson Declaration, at p. 1.

The Port Authority was responsible for the safety of its own personnel, and at the behest of the City, the Port Authority's Occupational Health Inspections & Safety Division ("PAOHISD") personnel participated in the committee organized by the City to consult on environmental, safety, and health issues relating to the WTC site.² *See* Williamson Decl., at p. 4. Two PAOHISD employees "occasionally" participated, together with others, in safety inspections of the WTC site. These employees exercised direct authority over Port Authority personnel, and would also report violations by non-Port Authority workers to the City, which then undertook remedial actions. *Id.* at p. 4.

The PAOHISD personnel also took part in safety meetings conducted by the City concerning safety issues throughout the WTC Site. *See* Williamson Decl., at p. 15. These personnel participated in safety inspections of the World Trade Center Site, their role allegedly limited to observing and reporting deviations from safety policies to the City. With respect to Port Authority employees, the PAOHISD was empowered to intervene and take remedial action. *Id.*, at p. 16.

By April of 2002, the transition from DDC and City control over the WTC site to control of the site by the Port Authority was being planned and implemented. Meetings were held to discuss "World Trade Center Site Environmental, Health, and Safety Transition Issues" on April 17, 2002 and April 24, 2002, both attended by representatives of the Port Authority's Engineering Department. (CITYCM3-00016738 and CITYCM3-00016742).

² The Port Authority mistakenly argues that by working with and taking direction from the City, the Port Authority is somehow absolved of any liability for their negligence with regard to site safety and inspections.

D. The City Condemned Property Damaged by the WTC Collapse

The City Department of Buildings exercised its power to order the condemnation and destruction of buildings rendered unsafe by the collapse of the WTC. As a November 5, 2001 Emergency Declaration and accompanying correspondence make clear, the City even maintained the ability to order the destruction of Port Authority properties, including 4 and 5 World Trade Center:

Re: 5 World Trade Center

An unsafe and imminently perilous condition exists at your building reference above as the apparent result of the destruction of the World Trade Center buildings on September 11, 2001. In order to assure that the public health and safety are protected, your building needs to be repaired or demolished immediately... You must commence the work immediately. If such action is not taken, the City will perform the necessary work on your behalf. You are responsible for the costs that the City incurs for such remedial work.

(AMECM3-000000143).

Described Condition of Structure and Recommended Remedy:

Building is partially collapsed and in danger of further collapse.
Building is unsafe and not restorable

Remedy: Demolish building

(AMECM3-000000145 and 149).

E. The City Authorized the Sale of WTC Debris

The City of New York authorized the sale of scrap metal from the WTC Site. Weeks Marine, as a subcontractor to AMEC, general contractor, was directed to solicit bids for the materials. AMECCM3-000000046: May 21, 2002 Memorandum Reporting Authorization of WTC Scrap Sale by the City.

F. The City Regulated Fire Safety at the WTC Site

The FDNY issued specific directives pertaining to fire safety at the WTC Site. Topics addressed by the FDNY in this way included:

- A) Storage of flammable materials;
- B) Commencement of steel cutting activities;
- C) Crane Site safety;
- D) Gaining attention of heavy equipment operators;
- E) Procedures for movement and parking of tube trailers (containing compressed gases)

See CITYCM3-00022421-28, CITY CM3-00045049 and 57: Fire Prevention Orders.

The FDNY directives were mandatory, as a letter from Turner Construction to a subcontractor makes clear:

The attached directives have been issued by the FDNY, which must be implemented immediately. Anyone who refuses to comply with these rules will be removed from the jobsite by the Fire Department

TURCM3-000001849-53: 10/17/01 Correspondence to Canron Construction.

G. The City Created a WTC Site Emergency Plan

Further underscoring the City's absolute control of the WTC Site during the rescue and recovery effort is the fact that the ES&H Plan included a provision for the evacuation of the workplace in the event of an emergency. The FDNY was given responsibility for the evacuation and response to any emergency. In addition, the DDC circulated a list of WTC Site emergency phone numbers to all personnel working in the recovery. Although telephone numbers for Liberty Mutual Insurance Company and several of the primary contractors were provided, no government agencies other than the DDC, the FDNY, and the City and PA Police Departments were listed as contacts. (BOVCM3-000000481).

The information set forth above, taken almost entirely from official City and contractor records, exchanged by the City's own attorneys in a preliminary and limited document production, demonstrates convincingly that the City and its contractors, as well as the Port Authority-and not the Federal Government-exercised control of the rescue and recovery operations, supervising and regulating all of the relevant activities taking place at the WTC Site.

III. THE UNITED STATES AND ITS AGENCIES ADDRESSED THE ISSUE OF CONTROL

Official documents from the United States Environmental Protection Agency ("EPA") confirm that the operations at the WTC Site were under the control and jurisdiction of City agencies and City contractors, and were not "federalized."

A. The EPA's Role Was To Monitor Air Quality

Applicable federal statutes and regulations "do not obligate (the) EPA to respond to a given emergency, thereby allowing for local agencies to lead a response... ." *See* WTCP/PA-CMO3-0000280: *EPA's Response to the WTC Center Collapse; Office of the EPA Inspector General*. According to the account of the EPA Inspector General, published in 2003, the activity at:

'Ground Zero' was initially a search and rescue effort under the direction of the Fire Department of New York and, subsequently, a recovery operation under the jurisdiction of the New York City Department of Design and Construction and the Fire Department of New York.

The New York City Office of Emergency Management was responsible for coordinating the response efforts of approximately 150 government agencies and non-governmental organizations.

Id. at 0000287 and 0000288.

As EPA Administrator Christine Todd Whitman explained, “local governments are primarily the lead in responding to disasters.” The City requested “the EPA to assume lead responsibility for monitoring the outdoor conditions at and around the site of the event... .” Accordingly, the EPA established such a monitoring program. See CITYCM3-00043079: Correspondence to Senator Hillary Clinton dated February 12, 2002. The inclusion of the term “Incident Commander” is a reference to the FDNY.

B. Other Federal Agencies, such as OSHA, Provided Advice to the City

According to the EPA Inspector General, the EPA and other non-City government agencies “*were involved in providing support to local authorities regarding environmental quality and safety.*” For example:

OSHA...conducted ambient and bulk air sampling within the immediate Ground Zero Work zone and provided guidance to Ground Zero Workers regarding the use of personal protective equipment.

WTCP/PA-CMO3-0000289: EPA’s Response to the WTC Center Collapse; Office of the EPA Inspector General.

OSHA worked in the capacity of an advisor to the City and its agencies. OSHA documents described “minimum recommendations” it made to the City concerning the use of respirators and how to ensure that PPE was fitted. See CITYCM3-00010172: October 2, 2001 OSHA “Recommendations for the WTC Quantitative Respirator Fit Testing Program.” In the words of one of the City’s contractors, “OSHA is on site to help and assist. They have issued general guidelines for good work place practices.” TURCM3-000000879: September 15, 2001, Memorandum issued by Turner.

OSHA's input was strictly advisory and not binding; in fact, OSHA's recommendations exceeded the regulations adopted by the City for PPE use at the WTC Site. In a letter to the City DOH dated October 23, 2001, the Regional Commissioner of OSHA wrote that:

OSHA *recommends* that the required Respiratory Protection Zone (RPZ) be delineated as follows: 1) working in, on, or over the rubble pile... .

OSHA noted that its recommendation "is more protective in some aspects" than measures in place at that time. Demonstrating OSHA's advisory role, the correspondence is written with terms such as "we continue to support" and "we feel it is inadvisable..." in the context of environmental health and safety measures. (TURCM3-000001775).

As defendant Port Authority and the World Trade Center defendants acknowledge in the declaration of Richard A. Williamson, Esq., OSHA did not play an enforcement role with respect to environmental health and safety issues. The OSHA documents cited by defendants read as follows:

We should suspend our enforcement action and assume the role of consultation and technical assistance.

OSHA's goal from the start was protection, not enforcement...

See Williamson declaration at p. 3.

In words that underscore the supervisory role that DDC actually played at the WTC Site, the Regional Commission of OSHA wrote, "*a continued strong and active presence of DDC Safety staff at this site is necessary and will ensure that the injury and illness rate at this site remain low.*" (CITY CM3-00041049: 2/25/02 Correspondence to DDC Commissioner Holden).

IV. THE WTC EMERGENCY PROJECT PARTNERSHIP AGREEMENT DID NOT UNDERMINE THE CITY'S LEADERSHIP ROLE IN THE RECOVERY EFFORT

The WTC Emergency Project Partnership Agreement was a statement of purpose concerning the recovery entered into between the co-Incident Commanders of the WTC Site (FDNY and DDC), the primary City contractors (Amec, Tully, Turner and Bovis), four employer/employee associations, and a single department of the federal government (OSHA). The agreement does not diminish or alter the status of the City and other defendants as the entities with supervisory responsibility for the recovery effort.

The agreement expressly acknowledges the status of the DDC and the FDNY as Co-Incident Commanders. The United States Department of Labor/Occupational Safety and Health Administration is the only federal signatory to the agreement. The agreement does not modify the enforcement powers of the City and its agencies with respect to environmental safety and health issues.

The agreement is simply an expression of cooperation among the signatories to advance the goal of environmental health and safety and to share safety hazard data. *See* CITYCM3-00036178-80: *WTC Emergency Project Partnership Agreement* dated November 20, 2001. As reported in the media, the “*partnership signatories-representatives of contractors, unions and the public sector-affirmed the value of working in a cooperative, focused and voluntary effort to ensure a safe and healthful environment for everyone involved...*” *See* CITYCM3-00025767-69: “Labor Management Partnership at the WTC Emergency Project,” *Perspectives on Work*, Louis Coletti, 2001.

V. THE ENVIRONMENTAL, SAFETY AND HEALTH PLAN CONFIRMS THE CITY'S LEADERSHIP ROLE IN THE RECOVERY EFFORT

The Environmental, Safety, and Health Plan (“ES&H Plan”), a comprehensive document, with a cover page reflecting its issuance by the City DDC, “defines the minimum acceptable requirements for ensuring workers' safety and health at the World Trade Center (WTC) Emergency Project...” (CITYCM3-00041676 et seq.) The only federal agency that participated in the ES&H Plan was OSHA. Several versions of the ES&H Plan exist; all of them make perfectly clear the lead role of the DDC in environmental health and safety at the WTC Site:

This ES&H Plan is directly applicable to all work conducted by agency and prime contractor/subcontractor personnel engaged in any activity associated with the cleanup and recovery efforts on the WTC Emergency Project. **The DDC has overall responsibility for the site's ES&H program.**

See CITYCM3-00041686.

The DDC and its construction manager are identified as having direct responsibility for environmental health and safety:

The following roles and responsibilities pertain to the work directly managed by the DDC and its construction manager for the WTC Emergency Project

1.4.1.1 Construction Environmental Safety & Health Oversight-
DDC-Environmental Health and Safety Services (EHSSt)

See CITYCM3-00022229.

Accordingly, the City's contractors also bore responsibility for plan enforcement. “Each prime contractor and their subcontractors are responsible for implementation, enforcement and compliance with all aspects of this plan.” (CITYCM3-00041686). An organizational chart included in the ES&H Plan depicts the DDC at the very top of a complex hierarchy of agencies and contractors charged with oversight. (CITYCM3-00041687).

By the ES&H Plan's terms, the DDC alone had the power to stop work in the event of workplace hazards:

1.3.3-Stop Work Authority

Any DDC ES&H officer has the authority to stop work in imminent danger situations, or in any situation deemed unsafe or unhealthful to those working on the site.

See CITYCM3-00041687.

The DDC was the only government entity to serve on the WTC Emergency Project Joint Labor/Management ES&H Committee, an organization formed pursuant to the ES&H Plan to reinforce the plan's requirements and communicate them to workers. *See* CITYCM3-00041691. All prime contractors/subcontractors were to report incidents, including unsafe working conditions to the DDC. *See* CITYCM3-00041706.

Although site monitoring was performed by federal, state and city agencies, the ES&H Plan mandated that "all exposure data shall be provided to DOH who will provide a report to the DDC ES&H Director." (CITYCM3-00041712). The DDC maintained authority to modify monitoring:

With the approval of the DDC ES&H Director, site monitoring may be discontinued after representative initial monitoring is conducted and worker exposures are...controlled.

See CITYCM3-00041712.

Consistent with DDC's authority to stop work in the event of unsafe conditions :

If necessary, 'stop work' orders shall be issued if cleanup and recovery activities are not in accordance with the applicable environmental requirements, are having significant adverse impacts on the environment or will result in a significant adverse impact...if the activity continues... If such activities occur, the DDC ES&H officer will take appropriate action to halt work, provide guidance to correct the problem, and immediately notify the Prime Contractor/subcontractor ES&H manager, as

appropriate. The cleanup and recovery activity in question shall not resume until all required corrective actions have been implemented.

See CITYCM3-00041735.

VI. FEMA PROVIDES FINANCIAL RESOURCES, IN THE FORM OF GRANTS AND REIMBURSEMENT, TO SUPPORT THE RECOVERY EFFORT

On September 14, 2001, President George W. Bush declared that a national state of emergency had existed since the September 11, 2001 attacks. The President's declaration served to activate the provisions of the Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act") (42 U.S.C. Sec. 5121, *et seq.*).

In its declaration of intent for the Stafford Act, Congress made plain that it sought: 'to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters.'

Public Utility Dist. No. 1 of Snohomish County, Washington v. Federal Emergency Management Agency, 371 F.3d 701, 710-711 (9th Cir., 2004).

One of the Stafford Act's purposes is to "spread the risk of the cost of major disasters from the citizens of the disaster-stricken community to the citizens of the entire country."

State of Hawaii v. Federal Emergency Management Agency, 294 F.3d 1152, 1160 (9th Cir., 2002). FEMA is an agency of the United States Government mandated to provide federal relief for disasters. Burgos-Montes v. Municipality of Yauco, 294 F.Supp.2d 141, 142 (D. Puerto Rico, 2003). FEMA provided hundreds of millions of dollars to the City for the recovery effort.

Indeed, FEMA itself acknowledged the City's leadership role in the recovery:

as the lead entity for the response effort, the City will determine the necessity and priority of debris removal from both private and public property.

See AMECM3-000000660: October 16, 2001 FEMA Correspondence.

At the start of the recovery, the City, through its Office of Management and Budget (“OMB”), emphasized the importance of seeking and obtaining reimbursement from FEMA and document carefully the expenses incurred. *See* CITYCM3-00035875: September 18, 2001, Memo from OMB Director Adam Barsky:

To facilitate the reimbursement to the City by the Federal Emergency Management Agency for costs associated with the World Trade Center emergency, several new event codes have been established...

See CITYCM3-000035877: September 18, 2001 Memo from City Office of Payroll Administration.

FEMA provided funding for the operation throughout its duration. In many instances, too, the City would apply for reimbursement for its payment of contractors engaged in debris removal. FEMA waived limitations on the period of time in which such reimbursement could be obtained. *See* CITYCM3-00057670: September 15, 2001 Correspondence to DDC’s Commissioner Holden from FEMA.

FEMA also waived requirements for competitive bidding by contractors for which the City would seek reimbursement. *See* CITYCM3-00035866: September 25, 2001 Correspondence from Commissioner Holden.

FEMA summaries reveal that the agency provided over six hundred million dollars to the City for reimbursement of emergency work and reconstruction. *See* CITYCM3-00057674: FEMA Disaster Assistance Summary of March 15, 2002. For its part, working to ensure that the City received the maximum reimbursement from FEMA, DDC wrote to the prime contractors directing that supporting documentation for materials costs and labor payments be turned over

promptly for FEMA review. *See* CITYCM3-00035889-94: July 31, 2002 Correspondence from Commissioner Holden to prime contractors.

**VII. DEFENDANTS FAILED TO COMPLY WITH
FEDERAL, STATE AND LOCAL LABOR LAW AND
OTHER STATUTORY REGULATIONS FOR
WORKSITE AND WORKER SAFETY,
NOTWITHSTANDING THEIR CONTRACTUAL
OBLIGATIONS AND NON-DELEGABLE DUTY.**

The DDC, PA, WTCP and contractors each had a duty to comply with all of the applicable Federal, State, and local statutes and regulations relating to worker safety. In addition, the contracts under which they operated at the WTC site plainly and expressly required such compliance in all instances. The DDC issued a revised draft of the contracts with the four primary contractors involved on October 11, 2001 (CITYCM3-00030568 through CITYCM3-00030657) indicating (with emphasis added below) that:

2.2 The Contractor shall comply with *all local, State and Federal laws, rules, regulations and orders* issued pursuant to any Emergency Declaration applicable to this Agreement and to the work to be done hereunder. ... the Contractors further agree to indemnify the City of New York for any work related injuries and are provided with a general liability policy.

Indeed, Article 38 of the contract requires specifically:

38.1 The Contractor must strictly comply with all applicable provisions of the New York State Labor Law, including amendments thereto, and the provisions of Section 6-109 of the New York City Administrative Code, as amended.

See also Prior draft of the contracts delivered to the four primary contractors by the Department of Design and Construction on September 29, 2001 containing similar provisions (CITYCM3-00014442 and CITY CM3-00014483).

Another provision of the October 11, 2001 contract, Article 30, "Dust Hazard" required that:

Pursuant to Section 222-a of the Labor Law of the State of New York, Contractor agrees that:

- (a) if in the performance of the Work, a harmful dust hazard is created for which appliances or method for the elimination of harmful dust have been approved by the Board of Standards and Appeals of the State of New York, Contractor shall be responsible for the installation, maintenance and effective operation of such appliances and methods.
- (b) *if Contractor does not comply with the provisions of Section 222-a of the Labor Law, this Contract shall be void.*

See CITYCM3-00014033 (emphasis added). Similarly, in its "Emergency Contract for Demolition Services, Debris Removal and related Construction Services at the World Trade Center Complex," (CITYCM3-00014536), the DDC required the contractors to "[m]onitor compliance by the Subcontractor(s) with the following requirements applicable to the Work: (1) New York State Labor Law" (CITYCM3-00014549).

Notably, the DDC required the contractors and subcontractors (CITYCM3-00014009) to agree that they would:

- 5.25 Provide work in accordance with the following code compliance:
 - a. New York State Uniform Fire Prevention and Building Code;
 - b. National Fire Prevention Association (NFPA) requirements;
 - c. National Electrical Code (NEC);
 - d. American National Standard - ANSI, A117.1 1986 or current edition (Accessibility and Usability by the Handicapped);
 - e. Occupational Safety and Health Administration (OSHA);
 - f. New York State Department of Labor Rules and Regulations;
 - g. New York State Energy Code;
 - h. Local Codes and Ordinances;

- i. New York State Department of Health requirements; and
- j. New York State Department of Environmental Conservation

The City's documents (CITYCM3-00009918 through CITYCM3-00009919) expressly state that "All work performed must be in compliance with appropriate regulations from EPA, US DOL, OSHA, NYSDOL, ELAP [and] NYCDEP." These federal and state environmental and occupational safety and health laws contemplate emergencies and disasters; the fact that the work was precipitated by a terrorist attack provides no basis for non-compliance with such laws at the WTC site. Nonetheless, there is ample evidence to support plaintiffs' contention that non-compliance with the relevant statutes, regulations and ordinances was rampant. Indeed, workers were even discouraged from filing for coverage for violations:

We were told people were being discouraged from filing claims under PESH, because this is a rescue operation...People should have the right to file a PESH complaint.

Public Hearing on Air Quality and Other Environmental Public Health Matters Resulting from the 9/11/01 Tragedy: 11/26/01, at p. 102. In a February 4, 2002 Memorandum from Samir Shah at the DDC, and addressed to the Construction Managers, Mr. Shah attempted to clarify the Sign In/Sign Out Policy at the WTC worksite:

As per our December 17, 2001 memo, all workers are required to sign in/out pursuant to the New York State Labor Law (Section 220 and 230). Due to the complex nature of this emergency project, a grace period was implemented from September 11, 2001 until October 14, 2001, which waived the sign in/out requirement during this time... .

(CITYCM3-00016609). That *the grace period was expressly enacted for only the sign in/out requirements* under the Labor Law indicates that the other provisions of the Labor Law related to provision of safety equipment and a safe work place for all workers had not and could not have been suspended during this time.

From the time of the collapse of the buildings on September 11, 2001, and continuously thereafter, the Defendants were aware of the danger posed to the FDNY, NYPD and other workers at the World Trade Center site by exposure to toxins, contaminants, teratogens, and other harmful elements, dust, fiberglass, glass, silica, asbestos, lead, benzene, organic matter, and other hazardous chemicals, substances and elements, aerosols and fumes in the air and on surfaces. Under the Labor Law of the State of New York and other applicable city, state and federal statutes, law, rules and regulations including General Municipal Law §§ 205-a and 205-e, it was each defendants' duty to provide for the safety, protection and well-being of persons lawfully working at the World Trade Center Site.

These laws, rules and regulations require Defendants to provide a reasonably safe place to work. The Labor Law mandates that workers shall be provided a work place that "shall be so ... equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places." Labor Law § 200(1). Similarly, Labor Law 241(6) provides that:

6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Defendants' duties included, monitoring and honestly reporting the air quality at the World Trade Center Site before, during and after the commencement of said work.

Defendants had a duty to provide, furnish, and/or ensure the use of safe, suitable, and an adequate work environment, adequate protective equipment, including, but not limited to:

protective clothing, masks, respirators, cleaning supplies, and decontamination equipment, as well as safe work equipment, safety devices, and/or apparatus for all persons lawfully performing work at the World Trade Center Site which they utterly failed to do.

The DDC, PA, WTCP and contractors failed to reasonably supervise and oversee the workers to ensure compliance with all safety regulations and directives, and that safety equipment: (a) was made available to the workers; and (b) was being used consistently and properly.

WTCP is liable in tort to the FDNY, NYPD and other workers as a lessee of the WTC site.

From September 11, 2001, and continuing for days, weeks and/or months FDNY, NYPD and other workers were lawfully present at the World Trade Center Site. Each participated in the work at the WTC Site in the course and discharge of their employment duties from September 11, 2001 and continuing for days, weeks, months, and some, even for years thereafter.

Each worker on the WTC site was exposed to toxins, contaminants, teratogens, and other harmful elements, dust, fiberglass, glass, silica, asbestos, lead, benzene, organic matter, and other hazardous chemicals, substances and elements, aerosols and fumes in the air and on the surfaces at the WTC Site during their work.

The City failed to provide all workers on the site with proper respiratory equipment to prevent inhalation of toxic vapors, fumes, dust and particulates.

In violation of the Labor Law of the State of New York, and other applicable city, state, and federal statutes, laws, rules, and regulations, City, PA, WTCP the contractors and others breached their non-delegable duties by failing to properly notify Plaintiff(s) of the dangerous levels of toxins, contaminants, teratogens, and other harmful elements, dust, fiberglass, glass,

silica, asbestos, lead, benzene, organic matter, and other hazardous chemicals, substances and elements, aerosols and fumes in the air and on the surfaces at the WTC Site; failing to establish and implement a proper and effective respiratory protection program and safety protection program. Defendants also failed to provide workers with appropriate respiratory protection and safety protection. These failures led to the workers suffering exposure(s) and or contamination by known and unknown contaminants at the site, resulting in the injuries they allege here. Defendants failed to prevent and/or minimize atmospheric contamination; failed to use effective engineering controls and failed to provide appropriate surveillance and/or inspection of the conditions at the World Trade Center Site so as to ameliorate and minimize those hazards that might otherwise have been avoided.

Defendants and their actions failed to reflect and/or apply any subsequent and adequate or honest updates in information regarding the toxic exposures at the worksite, as necessary. Defendants violated the Labor Law of the State of New York, including one or more of the following: Section 200, Section 240, and/or Section 241(6).

Workers were also and/or further injured by reason of the Defendant(s) having violated the applicable statutes, ordinances, rules, orders, and requirements, including, but not limited to one or more of the following: the Occupational Safety & Health Standards as promulgated by the Occupational Safety and Health Administration, including, but not limited to: Article 1926, 29 U.S.C. Sections 654 et. seq.; the provisions of 29 C.F.R. §1910.38, §1910.132-134, §1910.146, §1910.120; §1910.156; §1910.1001, §1910.1025, §1910.1027, §1910.1000, and §1910.1200; the provisions of the U.S. Department of Welfare; New York State Labor Law, including, but not limited to: §200, §240, and §241(6); Article 2, §27-a, Article 28, §878; 12 NYCRR §820.4 and §23-1.8; The Industrial Code, including, but not limited to: §23-1.5, §23-1.7, §23-1.8, §23-1.9,

§23-1.25, §23-1.26, §23-2.1; New York State General Municipal Law §205-a and/or §205-e; and other applicable rules, regulations and statutes.

VIII. DEFENDANTS FAILED TO WARN WORKERS ON THE WTC SITE ABOUT THE DANGERS TO WHICH THEY WERE EXPOSED; ALTERNATIVELY, DEFENDANTS MISLED WORKERS ABOUT THESE SAME DANGERS.

Following the terrorist attacks of September 11, 2001, at the World Trade Center Site, the air and the area in, around, on, and at the World Trade Center Site was polluted and contaminated with toxic particles, dust, aerosols, vapor, fibers, materials, and fluids (“Dust”). These include asbestos, lead, and mercury from items such as personal computers, mainframe computers, and copy machines; mercury from fluorescent lights; plastics, polyvinyl chloride insulations of cables, nylon carpeting, and other materials containing and/or producing dioxins and other harmful materials when burned; benzene from the jet fuel and other petroleum products stored in the towers; lead ammunition from the on-site Secret Service shooting range; and arsenic, lead, mercury, and chromium stored in the U.S. Customs laboratory.

The levels and types of exposures to the workers, including rescue, recovery, construction and other workers resulting from this mixture of materials, dust, toxins, and a smoldering fire that lasted more than three months and reached temperatures as high as 1800° Fahrenheit was unprecedented.³ Dust and vapors blanketed work site, as well as, the *entire* area surrounding the World Trade Center Site. The ongoing fires burning at the World Trade Center Site produced a mixture of toxic gasses and ultra-fine particulates. Indeed, air samples taken from a rooftop one mile north of the World Trade Center Site demonstrated “unprecedented

³ Paul J. Liroy, “Characterization of the Dust/Smoke Aerosol that Settled East of the World Trade Center in Lower Manhattan After the Collapse of the WTC 11 September, 2001,” *Envtl. Health Perspectives* 110(7):703-14 (July 2002), p. 703.

ambient levels” of fine particulate matter, sulfur, acidic aerosols, heavy metals, and other dangerous compounds.⁴

In December 2001, at an "Agency Safety Meeting," among the issues discussed was the fact that a number of Port Authority Police officers had been tested and found to have markedly elevated levels of mercury in their blood. (CITYCM3-00018275). Of 42 Port Authority Police Officers tested, 4 PAPD officers were found to have elevated levels of mercury and the results of 14 other officers were still pending (24 officers had normal/acceptable blood levels). *Id.*

Shortly after September 11, 2001, tests conducted by the United States Geological Survey (“USGS”) determined that the dust at the World Trade Center Site was highly caustic and thus capable of burning moist tissue in the throat, eyes, and nasal passage. This dust was determined to have a pH value of 9.0 to 11.0, indicating that the dust was highly alkaline and comparable to ammonia. Some of the dust samples taken by the USGS on September 17-18, 2001, registered higher than 11.0 on the pH scale—this level is as caustic as liquid drain cleaners.⁵

Days after September 11, 2001, the New York Environmental Law & Justice Project sent dust samples from several lower Manhattan locations to two respected laboratories. One such sample showed a 90% fiberglass content.⁶ Fiberglass consists of glass fibers that are small enough to be inhaled and cause respiratory irritation in humans and fibrosis (a scarring or

⁴Thomas Cahill, *et al.*, “Analysis of Aerosols from the World Trade Center Collapse Site, New York October 2 to October 30, 2001.” *Aersol Sci., & Tech.* 38:165-183 (2004) p. 182; Laurie Garrett, “A ‘Chemical Factor’ in Skies,” *New York Newsday* (September 11, 2003). Dr. Cahill took more than 8,000 air samples, starting October 3, 2001, from a rooftop on Varick Street in Manhattan.

⁵ Roger Clark, *et al.*, “Environmental Studies of the World Trade Center Area After the September 11, 2001 Attack” (USGS Open File Report OFR-01-0129) (<http://pubs.usgs.gov/of/2001/ofr-01-0429/>), p.4; Philip Landrigan, M.D., *et al.*, “Heath and Environmental Consequences of the World Trade Center Diaster,” *Envtl Health Perspectives* 112(6):73139, 732 (May 2004), at p.16.

⁶ Juan Gonzalez, “Health Hazards in Air Worry Trade Center Workers,” *Daily News* (September 28, 2001); Juan Gonzalez, *Fallout.*, p. 6. The sample was taken at the corner of Church and Vesey Streets, at the northeast corner of the WTC Site.

thickening of tissues deep in the lung, impairing respiration) in animals. Glass fibers are also highly irritating to the eyes.

On September 18, 2001 the EPA announced that the air was “safe” to breathe notwithstanding the fact that the agency did not have sufficient data and analyses to make such a blanket statement. At that time, air monitoring data was lacking for several pollutants of concern, including particulate matter and PCB’s. The White House Council on Environmental Quality influenced, through the collaboration process, the information that EPA communicated to the public through the collaboration process, the information that EPA communicated to the public through its early press releases when it convinced EPA to add reassuring statements and delete cautionary ones. See August 21, 2003 "EPA’s Response to the WTC Collapse: Challenges, Successes, and Areas for Improvement."

The New York City Department of Environmental Protection (“NYDEP”) also conducted numerous tests on an ongoing basis determining that the air at and around the WTC Site was contaminated and polluted with the aforementioned toxic dust. Notwithstanding the results of these tests, the NYDEP and the City and its contractors advised workers including Plaintiff(s) that the air in and around the World Trade Center Site was safe for the Plaintiff(s) to inhale, ingest, contact, absorb, and touch.

The information about the dangers that actually existed at the WTC Site was not provided to treating physicians or to the rescue, recovery, inspection, repair, or fire, police, or other workers at the site. Experts and private citizens testified that the federal government, state government and city government had (1) not been operating in compliance with the laws of the United States, and (2) had been providing the public, firemen and police officers with erroneous

information. See February 21, 2002 EPA National Ombudsman First Investigative Hearing on WTC Hazardous Waste Contamination.

The City, PA, WTCP and contractors failed to enforce the workers' compliance with stated safety regulations and directives, further imperiling the workers' health and safety.

By advising the workers at the WTC site that the air in and around the worksite was safe for them to inhale, ingest, contact, absorb and/or touch, or, alternatively, by failing to apprise the workers accurately about test results produced by the various city, state and federal agencies, the defendants undermined any safety regulations or directives that might have been in place at the site.

In November, 2001, a report⁷ prepared for the National Council of Structural Engineers Associations - Structural Engineering Emergency Response Plan Committee noted that the structural engineers at the WTC site had concerns about environmental contamination at the WTC site, but proceeded with their work due to the urgency of the situation. See WTCP/PA - CMO3 - 0000921-22, "Evaluation Report: EPA's Response to the World Trade Center Collapse: Challenges, Successes, and Areas for Improvement" Report No. 2003-P-00012, August 21, 2003.

The report noted that although the engineers assumed the air quality was being monitored by government agencies, specific information on the results of this monitoring did not filter down to the structural engineering teams. Further structural engineers did not know if they were wearing the correct respirators. The Evaluation Report Conclusion stated bluntly:

The public wanted better information about air quality than they received from government sources. A NYCDOH study, other lessons learned reports, and testimony provided at various hearings

⁷ "World Trade Center Disaster: *Structural Engineers at Ground Zero*," August Domel, Jr., Ph.D., S.E., P.E., November 2001.

suggest that the public did not receive adequate air quality information and that individuals cleaned their residences without using proper procedures and personal protection. In addition, workers at Ground Zero may not have used respirators due, in part, to inadequate EPA and other government communication.

See WTCP/PA - CMO3 - 0000921-22.

IX. CONGRESS CREATED A CAPTIVE INSURANCE POLICY TO BENEFIT THE INJURED WORKERS INCLUDING THE CITY WORKERS BECAUSE THE CONGRESS UNDERSTOOD THAT SOME BASIS FOR LIABILITY AGAINST THE CITY AND STATE OF NEW YORK AND THEIR AGENTS OR CONTRACTORS MIGHT BE ESTABLISHED BY THE PLAINTIFFS.

An Act of Congress (Public Law 108-7, 117 STAT. 517, 518 FEMA) passed by the United States Legislature in February of 2003 was enacted for the sole purpose of compensating the workers of the WTC site for injuries obtained in the demolition and debris removal at the site.

By that legislation, Congress established a captive insurance policy and mechanism in Public Law 108-7, 117 STAT. 517, 518, for resolving claims brought by injured workers, including city employees with no restriction or date limitations on liability.

The Act was established to compensate injured workers regardless of whether worker's compensation was available to the injured and whether or not they were city employees.

As noted, supra, the Act was also established to compensate injured workers without regard to the date when these workers were physically present at the worksite. The Act itself contains no time limitation on liability. The United States Congress, through Public Law 108-7, 117 STAT. 517, 518, directed FEMA to

provide, from funds appropriated to [FEMA] for disaster relief for the terrorist attacks of September 11, 2001, in Public Law 107-117, up to \$1,000,000,000 to establish a captive insurance company or

other appropriate insurance mechanism for claims arising from debris removal, which may include claims made by city employees.

This captive insurance policy has now been fully funded and activated by the United States Government, and has also created a system including claims adjusters to compensate the injured workers under the policy. Notably, the language of SDEA §9193(2) states:

1. The state, any political subdivision, municipal or volunteer agency, ... or any individual, partnership, corporation, association, trustee, receiver or any of the agents thereof, in good faith carrying out, complying with or attempting to comply with any law, any rule, regulation or order duly promulgated or issued pursuant to this act, [FN1 omitted here] any federal law, or any arrangement, agreement or compact for mutual aid and assistance or any order issued by federal or state military authorities, relating to civil defense, including but not limited to activities pursuant thereto, in preparation for anticipated attack, ***during attack, or following attack or false warning thereof, or in connection with an authorized drill or test, shall not be liable for any injury or death to persons or damage to property as the result thereof.***

...

2. The provisions of this section shall not affect the right of any person to receive benefits to which he may be entitled under the workers' compensation law, volunteer firefighters' benefit law, volunteer ambulance workers' benefit law, any pension law or the general municipal law, nor the right of any person to receive any benefits or compensation under any act of congress or under any law of this state.

See NY Unconsol. Laws § 9193(1) and (2).

A plain reading of SDEA §9193(2) demonstrates that there is no immunity for the defendants from workers' claims for “benefits or compensation” such as workers’ compensation.

Basic rules of construction dictate that the Congress would not have created and funded a Captive Insurance policy to protect the interests of defendants who would be immune from liability for the plaintiffs' injuries under a State or Federal statute.

X. NOTWITHSTANDING DEFENDANTS' RELIANCE ON THEIR ALLEGED IMMUNITY UNDER THE SDEA, THAT STATUTE WAS NEVER INVOKED.

Defendants are not immune pursuant to the State Defense Emergency Act (N.Y. Unconsolidated Laws, § 9193(1)). To obtain such immunity, the defendant(s) must demonstrate the existence of a *nexus* between the governmental direction that the defendant was purportedly obligated to follow and the allegedly negligent conduct that is claimed to give rise to liability. *See* Plaintiffs' Declaration of Law. No such nexus existed, and none can be demonstrated, hence the SDEA does not apply to the facts of this situation.

Notably, none of the proclamations of the City or State of New York implemented the SDEA, the New York State and Local Natural and Man-Made Disaster Preparedness Act, nor suspended any other environmental, safety, labor and/or health regulations, codes and/or rules.

Plaintiffs reserve the right to further supplement and/or amend the arguments and authority set forth here at the time of briefing.

Dated: New York, New York
April 6, 2005

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: WORLD TRADE CENTER
DISASTER SITE LITIGATION

21 MC 100 (AKH)
PART 2 OF 2

THIS DOCUMENT APPLIES TO ALL
WORLD TRADE CENTER DISASTER SITE
LITIGATION

DECLARATION OF SERVICE

Denise A. Rubin, an attorney duly licensed to practice before the Courts of the State of New York, hereby declares that on April 6, 2005, I caused the within Plaintiffs' Responsive Declaration of the Facts ("Part 1 of 2"), the Plaintiffs' Responsive Declaration of the Law ("Part 2 of 2") and Timeline to be served on the persons listed on the service list below by regular mail; said documents were enclosed in a post-paid and addressed wrapper and deposited in a collection box under the exclusive control of the United States Postal Service in the State of New York and to be electronically filed with the Court.

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