

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE: WORLD TRADE CENTER
DISASTER SITE LITIGATION
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Docket No.: 21 MC 100 (AKH)

THIS DOCUMENT APPLIES TO ALL
WORLD TRADE CENTER DISASTER SITE
LITIGATION
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DECLARATION

DENISE A. RUBIN an attorney duly licensed to practice before the courts of the State of New York and a member of the bar of this Honorable Court, hereby declares under penalty of perjury:

1. I am associated with the law firm Worby Groner Edelman & Napoli Bern, LLP, Plaintiffs' Co-Liaison Counsel in the above-captioned matters.
2. This Declaration is made upon my personal knowledge and a review of the files maintained by the law firm for the prosecution of the plaintiffs' claims herein, including the prior correspondences to defendants and/or this Court on the matters addressed, this Court's verbal directives and written orders regarding the same.
3. At this writing, defendants remain in default of this Court's Case Management Order ("CMO") 7 and CMO 8, this Court's Order of May 20, 2009 and plaintiffs' duly-served demands for information and documents. CMO 7 is annexed to this Declaration as Exhibit "1"; CMO 8 is annexed to this Declaration at Exhibit "2"; this Court's Order of May 20, 2009 is annexed to this Declaration at Exhibit "3."
4. An exemplar copy of the Plaintiffs' First Set of Demands for Information and Document Production – in this case the Demands served on defendant A. Russo Wrecking, Inc., (but essentially identical to the demands served on each defendant) is annexed at Exhibit "4."

5. A copy of A. Russo Wrecking Inc.'s response to the demands (again, essentially identical to those responses served on behalf of each defendant by Patton Boggs, LLP), is annexed to this Declaration as Exhibit "5."

6. Annexed to this Declaration at Exhibit "6," this Court will find an e-mail communication between Christopher LoPalo of this office and Daina Bortek, an associate attorney at Patton Boggs, LLP – Ms. Bortek's responsive portion is dated July 17, 2009. That e-mail sets forth Patton Boggs' anticipated dates of completion of the defendants' productions.

7. As is clear from Ms. Bortek's part of the communication, defendants -- by their own admission -- were not in compliance with their production in response to plaintiffs' discovery demands. Of the forty three¹ defendants whose responses to the Plaintiffs' First Set of Document Demands and Requests for Information Pursuant to Fed. R. Civ. P. 34 were said to be complete or anticipated to be completed by July 31, 2009, only *three* met the thirty day deadline, *two* were one day late and *thirty eight were significantly past the deadline* – some by as much as one hundred fifty-three days. Moreover, all of the responses were boilerplate and essentially insufficient.

8. Of the defendants who were not only in default as of defendants' July 17, 2009 communication, the Table annexed to this Declaration at Exhibit "8" lists the twenty-one defendants who – again, by Ms. Bortek's representation in the July 17, 2009 e-mail (Exhibit "6") – "hope to close out the remaining productions *by late August, September time period.*" No precise date is given for those responses to be "complete." Those twenty-one defendants remain in default of plaintiffs' First Set of Document Demands and Requests for Information Pursuant to Fed. R. Civ. P. 34 at this time – *some by as much as 179-180 days.*

¹ Ms. Bortek's e-mail states fifty-nine (59) defendants' production would be completed by July 31, 2009; the discrepancy between her count of 59 and ours of 43 are the 16 Structural and Design Engineers, whose discovery has been handled separately due to this Court's order arising from their summary judgment motion.

9. Of course, in light of the defendants' well-established history in this litigation of dumping literally millions of pages of documents on plaintiffs' counsel in response to specific and finite demands, of responding in boilerplate fashion to multiple and different demands by reference to identical document ranges representing thousands (or even millions) of pages of non-responsive papers, even those defendants who claim to have completed production are, in fact, still in default having served deficient responses.

10. None of the defendants who failed to timely serve their responses has offered a reasonable excuse for that default to demonstrate that the default was due to circumstances beyond their control preventing their timely and complete response to plaintiffs' demands.

11. This Court's Order of May 20, 2009 (Exhibit "3" to this Declaration) states in relevant part: "document production *must be responsive and timely*, that is, each respondent's production must be made soon after its response, that is soon after the 30th day following the demand for production or as otherwise agreed by the parties." (Emphasis added).

12. We ask this Court to exercise its "broad authority" to impose sanctions on the defendants who defaulted on their discovery deadlines, *particularly those who currently remain in default* (see list at Exhibit "8") under its inherent power to manage its own affairs and under Fed. R. Civ. P. 37; *Kyoei Fire & Marine Insurance Co., Ltd. v. M/V Maritime Antalya*, 248 F.R.D. 126, 143 (S.D.N.Y. 2007); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106-07 (2d Cir. 2002).

13. Accordingly, given the plain and continuing defaults apparent on this record and pursuant to Fed. R. Civ. P. 26, this Court's various orders, and plaintiffs' duly-served demands, plaintiffs ask this Court to enter an order pursuant to Fed. R. Civ. P. 37 stating:

A. Pursuant to Fed. R. Civ. P. 37(b)(2)(A) *et seq.*, that

- i. Defendants who remain in default of this Court's May 20, 2009 Order, the deadlines set forth in CMO 7 and CMO 8 and/or more than 30 days in default of plaintiffs' duly-served demands for documents, shall be and hereby are precluded from offering at the time of trial any evidence related to the documents sought by plaintiffs pursuant to Fed. R. Civ. P. 37 (b)(2)(A)(ii);
- ii. Defendants who remain in default of this Court's May 20, 2009 Order, CMO 7 and CMO 8 and/or more than 30 days in default of plaintiffs' duly-served demands for documents, shall be and hereby are precluded from offering any defense or testimony based supported by the outstanding documents pursuant to Fed. R. Civ. P. 37 (b)(2)(A)(ii); and
- iii. That the Answers of Defendants who remain in default of this Court's May 20, 2009 Order, CMO 7 and CMO 8 and/or more than 30 days in default of plaintiffs' duly-served demands for documents, shall be and hereby are deemed stricken and judgment entered thereupon in favor of the plaintiffs pursuant to Fed. R. Civ. P. 37 (b)(2)(A)(iii) *and* (vi); and

B. That the defendants found in default based on the within shall be monetarily sanctioned for their continuing defaults of this Court's orders and plaintiffs' duly-served demands pursuant to Fed. R. Civ. P. 37(a)(5) and 28 U.S.C. § 1927 in an amount equivalent to the reasonable value of the attorneys' fees for the preparation of the instant motion; and

C. Such other and additional relief as this Court deems just and proper.

Dated: New York, New York
August 19, 2009


Denise A. Rubin (DR5591)

ATTORNEY'S DECLARATION/AFFIRMATION OF SERVICE


Denise A. Rubin, an Attorney duly licensed to practice before the Courts of the State of New York, hereby affirms/declares the following under penalty of perjury:

I am associated with the law firm Worby Groner Edelman & Napoli Bern, LLP and as such represent the plaintiffs in the within action. On August 18, 2009, I duly served a true copy of the within PLAINTIFFS' NOTICE OF MOTION, DECLARATION OF DENISE A. RUBIN DATED AUGUST 18, 2009 AND PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR DEFAULT AND PRECLUSION AGAINST DEFENDANTS on the persons listed below by e-mail.

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