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April 4, 2008

*Via Electronic Mail*

The Honorable Alvin K. Hellerstein  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, Room 1050  
New York, New York 10007-1312

**Re: WTC Captive Insurance Co., Inc. v. Liberty Mutual, et al.  
07 CV 1209 (AKH)**

Dear Judge Hellerstein:

As counsel for several plaintiff-intervenors in the above-referenced matter, we are compelled to respond to correspondence improvidently submitted by the City's Law Department late yesterday concerning the City's liability cap. In Mr. Kahn's April 3, 2008 correspondence, the City posits that its liability is capped at \$350,000,000.00 by reading Section 408(a)(3) of the ATSSSA in *pari matria* with section 4.04 of the WTC Captive policy. Such an construction, however, clearly defies the plain meaning of the federal statute and is nothing more than an attempt by the City to manipulate its liability by voluntarily forgoing available insurance coverage.

Mr. Kahn's argument assumes away the first yardstick by which the City's liability is to be measured under Section 408(a)(3). The ATSSSA does not limit the City's liability to \$350,000,000. To the contrary, the ATSSSA limits the City's liability to "the **greater** of the city's insurance coverage or \$350,000,000." ATSSSA Section 408(a)(3)(emphasis added). On its face, that statute does not limit the City's liability to Mr. Kahn's \$350,000,000 figure. Rather, P.L.108-7, which expressly authorized the funding of \$1 billion for captive insurance or another insurance mechanism, must be read in *pari matria* with the ATSSSA, as both this Court and the Second Circuit have previously held. See McNally, 414 F.3d 352, 359 (2d Cir. 2006), *citing Hickey*, 270 F. Supp. 2d at 360, 362. Accordingly, the City's liability may be as high as the limits of its aggregate insurance.

Mr. Kahn also erroneously assumes that the terms of the WTC Captive policy control the federal ATSSSA statute, when in fact, precisely the opposite is the case. The WTC Policy was drafted by the City for its own benefit – that is part of the inducement for forming all captive insurance arrangements. In so doing, the City attempted to manipulate the amount of insurance coverage granted to it by Congress in P.L. 108-7, so as to limit its claim exposure at the expense of its contractors, whom the City is now alleged to have contractually agreed to indemnify and defend, in papers recently filed by new putative intervenors. However, the policy argument is without sound foundation.

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Section 5(b)(ii) of the Captive Policy, entitled “LIMITS OF LIABILITY, Policy Sub-Limits” provides, in pertinent part, that the City’s insurance policy liability limits are:

subject to the liability cap set forth in Section 408(a)(3) of the Airline Transportation and System Stabilization Act: \$350,000,000 or such other amount as described in Section 4.04 of the Policy;

Section 4.04 then builds on this Policy incorporation of the statutory cap by providing, in pertinent part:

...the Company’s liability is limited...to such amounts as will assure that the City [subject to the further limitations imposed by Sections 4.02 and 4.03]...of New York’s maximum liability pursuant to Section 408(a)(3) of ATSSA[sic]...does not exceed \$350,000,000 (“the Liability Cap”). In such event that the Liability Cap is held by a court of final jurisdiction to be unconstitutional, this Policy Sub-Limit B shall be ineffective and void. In the event there is (i) uncertainty as to the application of [the computation of the \$350,000,000 cap or otherwise] or (ii) such cap is subject to a pending constitutionality challenge, but covered claims are due and payable, the Company shall make such payments on condition that its rights...are reserved and protected.

Thus, there is a conflict within the Policy as to the City’s coverage: the Policy expressly states that the City’s coverage is limited to the City’s ATSSSA liability limit or “cap,” but then erroneously indicates that the cap is \$350,000,000, not \$1 billion of “insurance” provided through FEMA. Since the Policy expressly incorporates Section 408(a)(3) of ATSSSA, the Courts’ determinations that this ATSSSA cap is the aggregate of available coverage (*i.e.*: at least \$1 billion), then the contrary figure should be read out as void. Simply put, since the Policy attempts to marry the City’s coverage to the cap provided by the ATSSSA, and since the ATSSSA does not cap the City’s liability at \$350,000,000, then the City’s coverage is not capped at \$350,000,000. Instead, the City’s coverage under the Policy is capped by the aggregate of the City’s insurance coverage, an amorphous figure consistent with the City’s duties and obligations under other sections of the Policy.

For example, Section 7 of the WTC Policy is implicated when or if the fund balance falls below \$75 million. In pertinent part, that section provides that:

At the end of any calendar quarter in which Policy Sub-Limit A (either per Occurrence or in the aggregate) has not been exhausted, if the Experience Account Balance declines below a threshold level of \$75 million (the “Threshold Level”), then the First Named Insured [the City of New York] shall pay additional premium to the Company in an amount sufficient to bring the Experience Account Balance back to \$85 million (the “Contingent Premium”), *provided, however*, that the maximum aggregate amount of such

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Continent Premium shall not exceed one billion dollars less all Ultimate Net Loss allocable to Other Than Uniformed City Worker Claims; provided further, however, that the maximum aggregate amount of such Contingent Premium due to the Company at any time shall not exceed all amounts paid with respect to Ultimate Net Loss allocable to Uniformed City Worker Claims less all prior payments of Contingent Premium to the Company.

*See* WTC Captive Insurance Company, Inc. Liability Insurance Policy, Section 7.01, emphasis in original. This section, as well as others that might be explored in more detailed briefing, belie any argument that the City's coverage under the WTC Captive's policy is limited to \$350,000,000.

Mr. Kahn's argument that the existence of other coverage reduces the City's tort limit is equally unavailing. The Captive Policy expressly makes the Liberty Mutual and London policies at issue in the above-referenced litigation to be primary to the coverage provided by the WTC Captive, as this Court has so held at the City's behest. The WTC Policy also expressly makes other available contractor coverage excess to the WTC Captive coverage. Accordingly, as a matter of law, the WTC Captive coverage amounts cannot conceivably be affected by coverage that is below or above it.

In short, the City's liability limit is determined by the aggregate of its insurance coverage, whether such coverage is privately funded such as the contractor policies that make the City an additional insured, by the \$1 Billion in federal funding that initially established the WTC Captive, by the interest and recovery in the above-captioned litigation that will likely swell the amount of the coverage in the WTC Captive Fund or by self-funded requirements, such as Section 7 of the WTC Policy, that will similarly expand the amount of insurance to \$1,350,000.00. Such a construction is beyond dispute.

Thank you for the Court's kind consideration. The interveners look forward to briefing these issues in the Contractors' upcoming intervention motion and brief to strike the City's cap.

Respectfully submitted,

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W. Steven Berman

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