

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Docket No.: 21 MC 100 (AKH)

IN RE: WORLD TRADE CENTER DISASTER SITE
LITIGATION

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION FOR DEFAULT AND PRECLUSION FOR DEFENDANTS
FOR FAILING TO TIMELY AND COMPLETELY RESPOND TO
PLAINTIFFS' FIRST SET OF DEMANDS FOR INFORMATION
AND DOCUMENT PRODUCTION**

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PRELIMINARY STATEMENT

Plaintiffs respectfully offer the within Memorandum of Law in Support of their motion for sanctions pursuant to 28 U.S.C. §1927 and Fed. R. Civ. P. 37(b)(2)(A) *et seq.*, against defendants for their continuing violations of their obligations to timely and responsively respond to plaintiffs' duly served demands and multiple orders of this Court.

QUESTIONS PRESENTED

1. Where a litigant has repeatedly and willfully ignored duly served demands and court directives to produce discovery and there is no cause for such defaults that are beyond the litigant's control, should that litigant be sanctioned by a preclusion order and an order striking its pleadings for such obstructive conduct pursuant to Fed. R. Civ. P. 37 *et seq.*?
2. Where, as a result of the litigant's failure to comply with duly served discovery demands and court directives, the court and the parties have been caused to engage in repeated conference discussions, correspondence and motion practice, should that litigant be sanctioned monetarily for multiplying and delaying the litigation under 28 U.S.C. §1927?

Plaintiffs respectfully urge that in the matter at bar, the answer to both questions presented is in the affirmative.

STATEMENT OF THE CASE

A detailed statement of the underlying facts and procedural actions leading to this motion is set forth in the Declaration of Denise A. Rubin dated August 18, 2009, and is adopted here by reference as if fully set forth at length.

ARGUMENT

POINT I.

**DEFENDANTS HAVE WILFULLY AND VEXATIONOUSLY
IGNORED DEADLINES SET IN THIS COURT’S ORDER(S)
AND PLAINTIFFS’ DULY SERVED DEMANDS FOR
DISCOVERY. THIS COURT SHOULD STRIKE THE
DEFAULTING DEFENDANTS’ ANSWER(S) AND
PRECLUDE ANY DEFENDANT’S RELIANCE ON OR
EVIDENCE RELATING TO SUCH DISCOVERY AT THE
TIME OF TRIAL.**

As this Court has recognized, Fed. R. Civ. P. 26 governs the conduct of attorneys in connection with their disclosures to one another. The Rule provides that “[p]arties may obtain discovery by ... deposition upon oral examination or written questions; written interrogatories; production of documents or things” and by other methods. *In re September 11th Liability Insurance Coverage Cases*, 243 F.R.D. 114, 124 (S.D.N.Y., 2007) *citing* Fed. R. Civ. P. 26(a)(5). The scope of discovery authorized by Rule 26(a) includes “any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.” Fed. R. Civ. P. 26(b)(1). To that end, this Court has entered numerous orders (and oral directives) in this litigation directed to the timely and effective responses to discovery by the litigants.

This Court has also recognized that it may impose appropriate sanctions on a party that, without substantial justification, fails to disclose information required by Rule 26(a) or 26(e)(2). *In re September 11th Liability Insurance*, 243 F.R.D. at 125, *citing* Fed. R. Civ. P. 37(c)(1). A failure to disclose under Rule 37 encompasses not only spoliation of evidence, but also, as here, a party’s untimely production of documents and information required to be produced. *In re September 11th Liability Insurance*, 243 F.R.D. at 125, *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002). Nor, moreover, is violation of a specific order necessary

before a court may impose Rule 37 sanctions for discovery failures. Addressing a party's failure to produce documents pursuant to Fed. R. Civ. P. 34, courts have recognized that sanctions under Rule 37(b)(2) are appropriate:

Even if a party has not failed to comply with a court order regarding Rule 34, Rule 37(d) provides that 'the court may make such orders in regard to the failure as are just, and among others, it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In addition, "[I]n lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure.'" Fed. R. Civ. P. 37(d). Such an award is authorized under Rule 37(d), "unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

Kyoei Fire & Marine Insurance Co., Ltd. v. M/V Maritime Antalya, 284 F.R.D. 126, 156 (S.D.N.Y. 2007).

In *Residential Funding*, the Second Circuit recognized that "a court may impose sanctions on a party for misconduct in discovery under its inherent power to manage its own affairs." *Residential Funding*, 306 F.3d at 107; citing *DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124, 135-36 (2d Cir.1998) and *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) ("It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.' "). Indeed, for the discovery defaults addressed in a motion such as that at bar, this Court has "broad discretion in fashioning an appropriate sanction." *Residential Funding*, 306 F.3d at 107.

No party may ignore duly served demands, the discovery requirements of the Federal Rules and the Court's orders to comply with a discovery demand and a discovery schedule with impunity. It is well settled that "all litigants ... have an obligation to comply with court orders.

When they flout that obligation they ... must suffer the consequences of their actions.”

McDonald v. Head Criminal Court Supervisor Officer, 850 F.2d 121, 123 (2d Cir. 1988).

A litigant’s noncompliance with discovery orders is considered willful when the court’s orders have been clear, when the party has understood them, and when the party’s non-compliance is not due to factors beyond the party’s control. *See Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers* 357 U.S. 197, 212-213 (1958); *Jones v. Niagara Frontier Transp. Authority*, 836 F.2d 731 (2d Cir. 1987) (holding plaintiff’s behavior to be willful when plaintiff ignored his counsel’s advice, refused to answer deposition questions, and obstructed progress on litigation that had been pending for seven years). There can be no serious argument that these defendants and their counsel had any difficulty understanding the issue at bar – *i.e.*, the fact that duly served demands for the basic discovery necessary to the issues integral in these actions required timely and complete responses. Nor has there been any good reason provided – much less a reason that is beyond the defendants’ control -- for their untimely service, service of deficient responses and – in many cases – outright failures to comply by serving *anything* responsive to plaintiffs’ demands and this Court’s orders. Indeed, this Court has repeatedly entered orders (including case management orders) directing that responsive production must be served within a reasonable time. *See, e.g.*, Order of May 20, 2009 (Exhibit “3,” section II(A)(1)): “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). *See also*: CMO 7, requiring service of production for each group of plaintiffs on a rolling thirty-day basis.

Plainly, defendants have little interest in making their production either timely or responsive. A prime example is set forth in the joint letter sent to this Court on or about June 22, 2009, where we discussed defendants' responses to plaintiff-specific demands served on the first group of trial cases:

Defendants' responses to these case-specific demands called for *plaintiff specific* responses, i.e., responses that addressed only the plaintiff who was named in the demand, in each case, one of the four plaintiffs whose cases have been chosen for Trial Group "A." Notwithstanding the clear instructions contained in the demands, the Defendants provided – ostensibly in response to these plaintiff-specific demands -- references to over *fifty million* (50 million) documents for these *four* individual cases alone. [footnote omitted].

* * *

Remarkably, in response to Plaintiffs' demands, defendant The City of New York (the "City") *alone* provided a total of 1,711,429 documents, consisting of 3,507,681 pages, as purported case-specific responses for these four plaintiffs. The other defendants, labeled as the "Other Insured Defendants", "Weeks Marine" and "SDE Defendants" produced 14,985,023 documents, 44,256 documents, and 1,499,929 documents respectively. *See* the attached charts detailing the number of documents each defendant provided for each answer, annexed to this letter as Exhibit "B." As detailed below, these responses were *anything but* responsive or case-specific.

See Joint Letter of June 22, 2009, at pp. 1-3, a copy is annexed to the Rubin Declaration as Exhibit "9." As we explained in that letter, defendants' dumping of thousands of non-responsive documents in response to fairly simple, straightforward demands, is wholly improper and unduly burdensome. Plaintiffs' Counsel should not be expected to sift through hundreds of thousands (if not millions) of documents to find the few that might arguably be responsive to the very specific demands served. *See, e.g., S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 410-411 (S.D.N.Y., 2009):

The SEC contends that Stockman can search through the ten million pages and find substantially the same documents identified

by the SEC without impinging on the thought processes of the SEC attorneys. Indeed-at significant expense and delay-Stockman could search the document databases using appropriate search terms, but the inaccuracy of such searches is by now relatively well known. [footnote omitted]. *A page-by-page manual review of ten million pages of records is strikingly expensive in both monetary and human terms and constitutes “undue hardship” by any definition.*

In response to the June 22, 2009 joint letter, this Court called Liaison Counsel and issued a verbal directive that gave counsel a period of time within which to withdraw those documents that counsel was unwilling to attest to having a “good faith” belief in their relevance to the demands posed. In doing so, this Court demonstrated its agreement – in principle – that the service by Defendants’ Counsel of mountains of non-responsive paper in answer to specific and focused demands would not be further tolerated.

As we argued on the recent motion directed toward the City’s failure to produce internal medical records for the city-employed plaintiffs, there was no real danger that this Court’s prior pronouncements and directives (much less the requirements for timely production under Rule 26 and Rule 37) about defendants’ production of the outstanding discovery was in any way unclear. Nor, moreover, should the defendants and their able counsel have had any difficulty in apprehending the plaintiffs’ duly served demands or, moreover, the relevant federal rules requiring such production.

Thus, the only question remaining is whether the defendants have complied and, as the tables annexed to the Rubin Declaration at Exhibits “7” and “8” demonstrate beyond cavil, they have not. Even to the extent that some defendants have completed their production, the production was deficient. Simple requests such as those seeking identification of records custodians resulted in lengthy boilerplate responses such as the following (taken verbatim from the response of defendant A. Russo Wrecking, annexed as Exhibit “5” to the Rubin Declaration):

Demand: Identify the past or present employee or record(s) custodian for A. Russo Wrecking, Inc.'s offices possessing, controlling or maintaining "World Trade Center Project Files" or files relating to the Subject Premises and/or on the Project from September 11, 2001 to the present.

Response: Defendant objects to this Request on the grounds that the terms "controlling," "maintaining," "World Trade Center Project Files," "Subject Premises," and "Project" are vague, ambiguous and subject to several interpretations. Defendant objects to this Request on the grounds that it is overly broad and unduly burdensome. Defendant objects to this Request to the extent that it calls for the production of information that is protected from disclosure by the attorney-client privilege, the work product doctrine or any other privilege, immunity, or limitation on discovery. Defendant also objects to this Request to the extent that it calls for information not in the possession, custody, or control of Defendant, or not available to management personnel at Defendant through customary and reasonable internal business procedures.

Subject to and without waiving Defendant's General and Specific Objections, Defendant identifies Ann Marie Russo, President of A. Russo Wrecking, Inc. Discovery in this action is continuing, and Defendant reserves the right to supplement its Response to include information that may be identified during the course of its continuing investigation or discovery efforts in this action.

Moreover, as the facts and proceedings set forth at length in the Rubin Declaration in support of this motion demonstrate, plaintiffs have met their burden of proof in making the instant application. They have established

- (1) that the party having control over the evidence had an obligation to timely produce it;
- (2) that the party that failed to timely produce the evidence had 'a culpable state of mind'; and
- (3) that the missing evidence is 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense."

In re September 11th Liability Insurance, 243 F.R.D. at 125 citing *Residential Funding*, 306 F.3d at 107 (stating legal standard where adverse inference is sought on basis that the evidence was not produced in time for use at trial). Given the Court's prior pronouncements about timely service of responses to discovery demands and the plain language of Rule 26, there can be no

reasonable argument that the defendants were not obligated to produce their responses within thirty days of the demands served or within a reasonable time thereafter. Certainly, defendants' and their counsel's culpable state of mind must be inferred from their long-standing default of plaintiffs' demands, combined with their presumed knowledge of the federal rules and this Court's orders.

A. Striking the Defendants' Answers Is An Appropriate Sanction Given the Prejudice Caused By The Conduct At Issue, Including Violation of Court Orders, Federal Rules and Plaintiffs' Demands.

The Second Circuit noted in *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068 (2d Cir. 1979), that “in this day of burgeoning, costly and protracted litigation courts should not shrink from imposing harsh sanctions where ... they are clearly warranted.” This Court has “broad authority to impose sanctions on a party for discovery misconduct under its inherent power to manage its own affairs or under Rule 37...”. *Kyoei Fire*, 284 F.R.D. at 143; *Residential Funding*, 306 F.3d at 106-107. On the record at bar, those sanctions are “clearly warranted” and this Court should not shrink from their imposition against the defendants who have regularly and repeatedly defaulted in their discovery obligations. *Cine Forty-Second Street*, 602 F.2d at 1068. Defendants' continued failure, including defaults in production and responses of *up to six months and continuing*, to comply with these very basic and minimal, indeed, threshold discovery demands demonstrates precisely the sort of “culpable mind” required for the imposition of sanctions.

Both federal and state courts have increasingly recognized that responsible compliance with discovery rules is essential to orderly civil litigation. Willful disregard by a litigant or its counsel of their discovery obligations has harmful effects extending far beyond the frustration of justice in the particular lawsuits involved. Such willful defaults also undermine the

administration of justice generally, by subverting the efficiency of the judicial process and diminishing the respect it is accorded. *See Goodsons & Co., Inc. v. National American Corp.* 78 F.R.D. 721, 722 (S.D.N.Y. 1978); *see also Kihl v. Pfeffer*, 94 N.Y.2d 118, 123 (1999) (“If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity”).

As Judge Griesa wrote in *Goodsons*, “[e]very willful default makes it more difficult for orderly discovery to take place in subsequent cases.” *Goodsons*, 78 F.R.D. at 722. The Supreme Court and other federal courts grown increasingly more willing to enforce discovery procedures with strict sanctions, partially with an eye to the general deterrent effect that sanctions have on others who might contemplate abuses. *Id.*, and *see, e. g., National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (dismissal of action for failure to respond fully to interrogatories); *Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia, Inc.*, 543 F.2d 3 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977) (striking answer, dismissing counterclaims with prejudice, and awarding a default judgment against defendants for defaults in document production and failure to appear at deposition); Note, “The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions,” 91 Harv.L.Rev. 1033 (1978).

While an order striking defendants’ answers and entering default judgments may seem harsh, it has become painfully apparent that “harsh” is precisely what is needed to get the defendants in this action to comply with this Court’s directives and, indeed, the Federal Rules on discovery. Discovery orders are meant to be followed. *Bambu Sales, Inc. v. Ozak Trading Inc.*, 58 F.3d 849, 853-854 (2d Cir. 1995). “A party who flouts such orders does so at his peril.” *Update Art, Inc. v. Modiin Pub., Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988). In *Bambu Sales*, the Court wrote “Defendants rolled the dice on the district court's tolerance for deliberate obstruction, and

they lost. We have no intention of letting them return to the table...If one suggests that our decision today is strong medicine, that is precisely what it is intended to be.” *Bambu Sales*, 58 F.3d at 853-854. The *Bambu* Court noted, moreover, that its decision in entering a default judgment was “not the first time such potent medicine has been prescribed,” citing, e.g., *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 640 (refusal for 17 months to answer “crucial” interrogatories); *Chira v. Lockheed Aircraft Corp.*, 634 F.2d 664, 666 (2d Cir. 1980) (doing “absolutely nothing at all” to comply with court orders to pursue discovery and prepare case for trial); *Cine Forty-Second Street*, 602 F.2d 1062 (refusal for three years to comply with specific court orders to answer interrogatories on damages); *Independent Investor Protective League v. Touche Ross & Co.*, 25 F.R.Serv. 2d 222 (2d Cir. 1978) (failing for many months to comply with repeated court orders to answer critical interrogatories).

In deciding whether to grant a motion for sanctions under subsections (A) through (C) of Fed. R. Civ. P. 37(b)(2) for noncompliance with discovery, the Court should consider five factors: “(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to [the party seeking sanctions]; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.” *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1022 (9th Cir. 2002); *Computer Task Group, Inc. v. Brothby*, 364 F.3d 1112, 1115 (9th Cir. 2004). This Court has repeatedly noted the importance of swift and fair resolution of this action – not only to the parties in the litigation, but to the public as well, given the genesis of these claims and the magnifying glass through which the public views these proceedings, as well as the overwhelming burden all of the ATSSSA related litigations have placed on this Court’s docket. Defendants’ continued refusal to comply with this Court’s discovery directives and their discovery obligations under the Federal Rules

must end if these matters are ever going to proceed either to trial or meaningful settlement negotiations. For all of these reasons, swift and decisive action is necessary on this motion, if for no other reason than the defendants' apparent inability or unwillingness to hear this Court's directives up until this point.

**B. At A Minimum Defendants Should Be Precluded From
Defending Against Plaintiffs' Claims By Reliance On the
Evidence Sought by Plaintiffs' Demands.**

Under Fed. R. Civ. P. 37(b)(2), the court in which an action is pending may impose a variety of sanctions upon a party for failure to comply with an order compelling discovery. The flexibility of the Rule gives the court a broad discretion with regard to sanctions, and in exercising its discretion the court should take into account the full record of the case before it. *Krieger v. Texaco, Inc.* 373 F.Supp. 108, 111 (W.D.N.Y. 1973).

“Sanctions may be warranted under Federal Rule of Civil Procedure 37(b)(2) for failure to obey a discovery order as long as the established issue bears a reasonable relationship to the subject of discovery that was frustrated by sanctionable conduct.” *Navellier v. Sletten*, 262 F.3d 923, 947 (9th Cir. 2001), *cert. denied sub nom., McLachlan v. Simon*, 536 U.S. 941 (2002); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982). Thus, on the record where counsel for plaintiffs had been given two opportunities to submit sufficient answers to interrogatories but failed to do so, the *Kreiger* Court held that it was “entirely proper to preclude proof of secondary damages by all plaintiffs except Krieger, Kuntz, Riester and Kipp.” *Krieger*, 373 F.Supp. at 111; *citing Life Music, Inc. v. Broadcast Music, Inc.*, 41 F.R.D. 16 (S.D.N.Y. 1966).

The sanction of precluding a party from defending a claim or offering evidence not properly produced in discovery at the time of trial serve a threefold purpose. Preclusionary orders ensure that a party will not be able to profit from its own failure to comply. *Dellums v.*

Powell, 566 F.2d 231 (D.C. Cir. 1977). Rule 37 strictures are also specific deterrents and, like civil contempt, they seek to secure compliance with the particular order at hand. *Robison v. Transamerica Ins. Co.*, 368 F.2d 37 (10th Cir. 1966). Finally, although the most drastic sanctions may not be imposed as “mere penalties,” (*Hammond Packing Co. v. Arkansas*, 212 U.S. 322 [1909]; *see Hovey v. Elliott*, 167 U.S. 409 [1897]) courts are free to consider the general deterrent effect their orders may have on the instant case and on other litigation, provided that the party on whom they are imposed is, in some sense, at fault – *i.e.*, that the circumstances precluding their compliance are not beyond their control. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639; *Rogers*, 357 U.S. 197; *Cine Forty-Second St.*, 602 F.2d at 1066.

In considering whether a preclusion order was unduly harsh or premature, a California District Court noted that the defendants’ willful failure to comply with the Court’s discovery orders clearly prejudiced the plaintiffs by preventing them from preparing their case. *See In re Heritage Bond Litigation*, 223 F.R.D. 527, 530 (C.D.Cal. 2004). That is exactly the situation at bar, where plaintiffs are expected to have their trial cases trial ready by late winter pursuant to this Court’s CMO 8 (*see* Exhibit “2”). The *Heritage Bond Court*, citing *Adriana Int’l Corp v. Thoeren.*, 913 F.2d 1406, 1412 (9th Cir. 1990), noted that Court’s holding that “[f]ailure to produce documents as ordered ... is considered sufficient prejudice.” *See also Computer Task Group, Inc. v. Brotby*, 364 F.3d 1112, 1116 (9th Cir. 2004) (same).

This is especially true considering the proximity of the trial cases plaintiffs’ depositions, as well as those of the Defendants’ witnesses and the rapidly approaching discovery cut-off dates set in CMO 8. *See Heritage Bond*, 223 F.R.D. at 530; *see also Payne v. Exxon Corp*, 121 F.3d 503, 508 (9th Cir. 1997) (“Many of the discovery responses eventually tendered by the plaintiffs

came only as the discovery period was drawing to a close, or after it had already closed. [Defendants] were therefore deprived of any meaningful opportunity to follow up on that information, or to incorporate it into their litigation strategy.”).

Throughout this litigation, defendants have consistently engaged in this type of bad faith litigation tactic, characterized by boilerplate responses that go on for pages without ever offering a scintilla of useable information, defendants’ refusal to meet the most basic discovery obligations in a timely or effective fashion, bringing on repeated case dispositive motions before discovery is complete, or seeking “emergency” briefing schedules on issues that are months old on the eve of the oral argument of other case dispositive motions, serving discovery only after plaintiffs had a deadline when production of their own information, such as information to the Court’s database, depended on timely compliance by the defendants (employment and payroll records, for example). This conduct is more than prejudicial, it is precisely the sort of vexatious and bad faith litigation that all of these sanctions decisions describe as the proper basis for Rule 37 sanctions to be applied.

POINT II.

THE DEFENDANTS’ CONTINUED FAILURE TO TIMELY AND EFFECTIVELY COMPLY WITH DISCOVERY OBLIGATIONS HAS VEXATIONOUSLY DELAYED AND INCREASED THE LITIGATION OF THESE MATTERS AND A PROPER MONETARY SANCTION FOR THE INCREASED TIME AND EXPENSE TO THE PLAINTIFFS AND THIS COURT IS APPROPRIATE.

This Court has broad discretionary authority in managing the litigation before it and the deterrence of intentional and unnecessary delay in the proceedings is a principal purpose of 28 U.S.C. § 1927. Fed. R. Civ. P. 37 also provides ample basis for the assessment of a monetary sanction for discovery abuses.

In this case, plaintiffs have repeatedly advised this Court of the efforts they have made in attempting to secure Defendants' compliance with their demands.

This Court has previously assessed a significant monetary sanction for discovery abuses *including deficient and untimely production of documents* by a litigant in another September 11 – related litigation. *See In re September 11th Liability Insurance Coverage Cases*, 243 F.R.D. at 131-132. Finding that Zurich American Insurance Company, the lead insurer for Westfield Corporation and Silverstein Properties had withheld and crucial documents sought in the discovery process; the Port Authority and Westfield alleged that the positions that Zurich took in its pleadings, motions, and other papers were objectively unreasonable, in violation of Rule 11, and that Zurich produced certain documents much later than they were required to produce the documents, and destroyed other documents, in violation of Fed. R. Civ. P. 37. *In re September 11th Liability Insurance*, 243 F.R.D. at 117. The documents withheld named the correct insureds on the policy, and that information was not ultimately produced until well after the completion of depositions “and following pointed inquiries by opposing counsel, following up trace references [to the withheld documents] in other of Zurich's productions.” *Id.*, 243 F.R.D. at 120. As this Court noted, in relevant part, Zurich continued to be dilatory in its production of necessary records, despite repeated demands and this Court's intervention. *Id.*, 243 F.R.D. at 122.

Explaining why this Court was imposing a very significant monetary sanction (\$500,000) on Zurich and its Counsel for its dilatory production of documents and information, this Court wrote:

Zurich, as the lead insurer on the case, and its attorneys, as lead counsel in the proceedings before me, owed the Court and the public better conduct than the conduct described herein; at a minimum, they had a duty to comply with Rule 11 of the Federal

Rules of Civil Procedure. And, having multiplied proceedings by asserting denials and defenses that could not be supported by the evidence, the conduct of Zurich and its counsel, in their efforts to do away with evidence, to not produce evidence, and to slow up production of evidence until its utility might be attenuated, compounded the wrongdoing that they perpetrated.

In re September 11th Liability Insurance, 243 F.R.D. at 131. All of the foregoing is true of the City's conduct in withholding its internal medical and employment records and delaying the resolution of these claims brought by persons the City and its counsel disingenuously refer to as "heroes." Simply stated, the City's conduct here is a shabby way to treat a hero.

Defendants have been provided ample opportunity to produce the evidence sought and this motion provides ample opportunity for the defendants to address their dilatory conduct alleged here in their responsive papers. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) ("[I]ike other sanctions, attorney's fees certainly should not be assessed ... without fair notice and an opportunity for a hearing on the record"); *see generally Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) (requiring "[a]t a minimum, ... notice and an opportunity to be heard"); *see also Beatrice Foods Co. v. New England Printing and Lithographing Co.* 899 F.2d 1171, 1177 (Fed. Cir. (Conn.), 1990).

"By its terms, § 1927 looks to unreasonable and vexatious multiplications of proceedings; and it imposes an obligation on attorneys through the entire litigation to avoid dilatory tactics." *United States v. International Broth. of Teamsters*, 948 F.2d 1338, 1345 (2d Cir. 1991). The purpose of the statute is "to deter unnecessary delays in litigation." *Id.* (quoting H.R.Conf.Rep. No. 1234, 96th Cong., 2d Sess. 8, *reprinted in* 1980 U.S.Code Cong. & Admin.News 2716, 2782). "The statute is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned only with limiting the abuse of court processes." *Roadway Express*, 447 U.S. at 762.

CONCLUSION

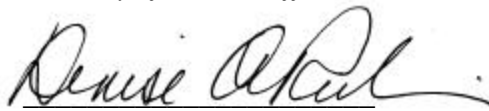
For the foregoing reasons, Plaintiffs respectfully request that this Court grant this motion, precluding any defendant from offering evidence or relying on evidence sought by Plaintiffs' First Demand for Information and Documents and additionally precluding defendants from any allegation or defense based on the information sought, i.e., safety meetings, provision of personal protective equipment and warnings about the dangers of the WTC site environment.

Accordingly, moreover, this Court should enter a default judgment against the non-compliant defendants for their continued default pursuant to Rule 37 and assessing a sanction against the defendants for their continued contumacious refusal to comply with this Court's Orders relating to timely responsive production, as well as such other relief as this Court deems just and proper.

Dated: New York, New York
August 19, 2009

Respectfully Submitted,

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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 19, 2009, I duly served a true copy of the within PLAINTIFFS' NOTICE OF MOTION, DECLARATION OF DENISE A. RUBIN DATED AUGUST 19, 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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