

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
IN RE: WORLD TRADE CENTER  
DISASTER SITE LITIGATION  
-----X

Docket No.: 21 MC 100 (AKH)

THIS DOCUMENT APPLIES TO ALL  
WORLD TRADE CENTER DISASTER SITE  
LITIGATION  
-----X

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE  
BECHTEL DEFENDANTS' MOTION TO DISMISS FOR  
FAILURE TO STATE A CLAIM**

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## INTRODUCTION

Bechtel Associates Professional Corporation, Bechtel Construction, Inc., Bechtel Corporation, Bechtel Environmental, Inc. (collectively, “Bechtel Defendants”), having filed Answers to Plaintiffs’ Master Long Form and individual “check-off” Complaints on January 22, 2008, now move to dismiss the Complaints<sup>1</sup> claiming that the basis of liability against them cannot reasonably be distilled from the pleadings. Within the past few days, the Bechtel Defendants have also served their initial responses to this Court’s ordered initial core discovery. The Bechtel Defendants’ non-responsive answers to that court-ordered core discovery are largely premised upon their present motion allegations of non-specific pleadings as an excuse for their failure to provide reasonably adequate discovery responses.<sup>2</sup>

By so doing, the Bechtel Defendants reveal their true motive for filing the present motion and also violate this Court’s express admonition at the January 11, 2007 case management conference that claims about the adequacy of pleadings and/or the filing of motions not be used as an excuse for refusing to engage in discovery.<sup>3</sup> This Court has twice rejected arguments by various Defendants that the pleadings insufficiently state causes of action pursuant to applicable New York law. Notwithstanding those prior holdings by this Court, the Bechtel Defendants have come forward with a Fed R. Civ. P. 8 motion denigrating the pleadings at this relatively late stage in these proceedings at the time that required disclosures are due, including long withheld insurance information that is increasingly proving to be crucial. As this Court has previously

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<sup>1</sup> The Bechtel Defendants’ Notice of Motion and Memorandum confirm that they are moving to dismiss pursuant to Fed.R.Civ.P. 12(b)(6).

<sup>2</sup> For example, in response to the requirement of Defendants’ Question 12 requiring that Defendants identify their applicable insurance, after identifying the Captive and its underlying insurance policies, the Bechtel Defendants advised: “To date, based on the absence of any specific allegations against Bechtel of wrongful acts or omissions, Bechtel has not put any other source of potential insurance coverage on notice of any claim against it and does not claim that any other insurance currently is available to it.”

<sup>3</sup> The full quotation from the January 11, 2007 transcript can be found on page 6 of this Memorandum.

held, the Amended Master Long Form Complaint sufficiently notifies the Defendants that Plaintiffs allege breaches of common law and statutory duties to maintain and/or enforce a safe workplace at Ground Zero during the debris removal efforts, causing Plaintiffs' respiratory and other injuries. Defendants' allegations of insufficient pleading are, once again, meritless.<sup>4</sup>

Moreover, these Defendants failed to join nearly identical arguments raised by various Defendants as part of, or in conjunction with, the immunity motions that gave rise to this Court's October 17, 2006 opinion that the Defendants, including the present movants, have improvidently brought by way of interlocutory appeal to the Second Circuit.

Defendants' allegations are also nearly identical to those raised over a year ago by Defendant Phillips and Jordan, the primary contractor for site safety at the Fresh Kills landfill, that were *also* rejected by this Court. In its Order of December 29, 2006, this Court found that the Defendants were reasonably on notice of the statutory and common law claims against them and ordered that the Defendant proceed with its responsive pleading and core discovery obligations, so that, with the assistance of the Special Masters, discovery responses could narrow and focus the pending claims.<sup>5</sup>

Nevertheless, this Court's December 29, 2006 Order established the law of the case governing the issues again raised by the present motion and are even more cogent here, given the passage of an additional year due to the stay of litigation imposed, in part, at Defendants-movants' request. Defendants' construction of the pleadings simply ignores or misconstrues the various allegations against them. The Complaint alleges, in part, that as the prime site safety

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<sup>4</sup> See, this Court's Order of January 1, 2007, so describing the instant Defendants' arguments concerning interlocutory appeals.

<sup>5</sup> Referring to the Amended Fresh Kills Long Form Master Complaint that is nearly identical to the Contractor Long Form Master Complaint at issue, the December 29, 2006 Order provides, in pertinent part, that the pleading "notifies defendants that plaintiffs allege breach of common law and statutory duties to maintain a safe workplace at Fresh Kills Landfill during the debris removal effort, causing plaintiffs' respiratory injuries," necessitating a responsive pleading.

contractor at Ground Zero, the Bechtel Defendants are liable to the Plaintiffs for the violations of various municipal, state and federal labor and workplace safety and health statutes and regulations, all of which are specifically identified, as is the conduct that, by omission or commission, constituted the respective violations.

The Complaint also alleges that co-defendants City of New York (“City”), Tully, Bovis/Lendlease, AMEC and Turner/Plaza, at times, ignored or frustrated some of the Bechtel Defendants’ site safety efforts. However, these allegations of wrongful conduct neither negate nor alter the duties that the Bechtel Defendants owed to the Plaintiffs nor the Bechtel Defendants’ liability for their breach of those duties. Rather, these allegations from the pleadings, highlighted and relied upon by the Bechtel Defendants in their motion as the thrust of their argument for the dismissal of the Complaint against them, establish the bases for claims for contribution and indemnification against the affected co-defendants. Neither the Bechtel Defendants nor any defendant in this litigation have asserted claims for contribution or indemnification, nor can such claims be asserted by common counsel with joint representation. Redress, if at all, lies not with dismissing the Plaintiffs’ valid claims pursuant to an untimely and piecemeal motion challenging the sufficiency of the pleadings, but in taking the steps necessary to assert appropriate cross-claims.

### **STATEMENT OF FACTS**

The relevant facts are set forth, at length, in the Complaint that Defendants now seek to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The Complaint, summarized below, and which is herein incorporated here by reference, is neither the initial nor the sole source of information

relevant to Plaintiffs' allegations against the Bechtel Defendants.<sup>6</sup> Rather, as part of the procedures attendant to the Defendants' former immunity motions, substantial documents were filed and are of record, including Plaintiffs' Offer of Proof, Defendants' response to Plaintiffs' Offer of Proof, a Timeline and a voluminous Joint Appendix. This Court relied on those filings, as well as on the Complaint, in its varied factual findings about the Bechtel Defendants' role at Ground Zero and the nature of the allegations against them in its decision of In re: World Trade Center Disaster Site Litigation, 456 F.Supp.2d 520 (S.D.N.Y. 2006), which are also summarized, below.

As hereinafter discussed, the Bechtel motion should be denied based upon numerous substantive and procedural bases.

#### **A. Impropriety Of The Bechtel Defendants' Motion**

The record discloses that the Bechtel Defendants filed their Answer to the Plaintiffs' Master Complaint on or about January 22, 2008. Their present Rule 12(b)(6) motion was filed on or about January 29, 2008. A subsequent Amended Answer was filed on or about February 5, 2008. Accordingly, the Bechtel Defendants failed to comply with the Rule 12(b) requirement that any Rule 12(b)(6) motion be filed *prior* to any responsive pleading.

In addition to being untimely, the Bechtel Defendants' motion is essentially the third motion formally attacking the pleadings that this Court has repeatedly held sufficient to survive challenge under Fed. R. Civ. P. 8.<sup>7</sup> Various Defendants attacked both the sufficiency of the pleadings and proofs submitted by Plaintiffs, in addition to adopting the immunity arguments of

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<sup>6</sup> While Plaintiffs are confident that the pleading is sufficient to withstand challenge under Fed. R. Civ. P. 12 (b)(6), this Court is also permitted to consider extrinsic evidence, such as the other documents filed in nearly five years of litigation. Fed. R. Civ. P. 12 (b); *see, e.g., Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. (N.Y.), 2006).

<sup>7</sup> Plaintiffs have lost count of the number of such attacks in joint correspondence and at conferences.

their co-defendants, that were resolved by this Court in its October 17, 2006 decision. These included the Westfield Defendants (Br. of February 17, 2006 at pp. 5-20), the WTC Defendants, including the Silverstein Defendants (Br. of July 21, 2006 at pp. 6-34) and Con Ed (Br. of July 21, 2006 at pp. 4-22). Although this Court did grant the respective summary judgment motions of the Westfield Defendants, the WTC Defendants and Con Ed, it did so on the basis of a failure of proof, *not on the sufficiency of the pleadings*. In re: World Trade Center Disaster Site Litigation, 456 F.Supp. 2d at 568-575. To the contrary, the Court found the pleadings more than sufficient to examine the statutory and common law allegations and apply them to the facts of record. Id.

The Bechtel Defendants' current motion is also a rehash of an identical issue determined by this Court in connection with an attempt by Phillips and Jordan, the lead contractor in charge of health and safety concerns at the Fresh Kills site, to preclude the filing of an Amended Fresh Kills Master Complaint. There as here, the Defendant claimed that the Complaint was too vague and otherwise failed to sufficiently state a cause of action in a "backdoor" Rule 12(b)(6) motion. Rejecting arguments and case law that are similar, if not identical, to that presented in the pending motion, this Court denied the Defendant's motion and ordered the parties to proceed with core discovery. This Court explained its December 29, 2006 Order at a status conference on January 11, 2007:

I want to make a couple of additional comments.

Unfortunately, the briefing schedule with regard to the motion for interlocutory appeal and the position regarding the notice of appeal that defendants took in relationship to continuing discovery has slowed the cooperation that is required in this case.

Had I known that the extended briefing schedule would be an excuse not to participate in discovery meetings, I would not have granted the enlargement.

I don't want this to happen again. If there's any plan that a motion or a planned motion or a schedule or a planned schedule or any other event will be given as a pretext not to engage in normal activities, I want to know it and to be able to consider it. So this will not happen again.

Secondly, I made some remarks at the last meeting with regard to my concerns about the adequacy of the master complaint and the check-off complaints, and I expressed concern about the ability of various defendants to make conscientious answers. That, too, was used as a reason not to engage in discovery.

I have thought about the issue, and I have come to the view that the standards of Rule 8 of the Federal Rules of Civil Procedure have been satisfied. In my order granting leave to file amendments to the master complaints with respect to Fresh Kills, I commented on the issue. I don't mean to express any satisfaction with the quality of the complaints or the check-off complaints, but I've decided that we will not do that battle under Rule 8. We will do the battle under dispositive procedures to resolve the cases.

Case Management Conference, January 11, 2007 (T. 3-4). The Court's determination applies to the present motion and should not be used as an excuse to refrain from engaging in discovery that, has thus far been completely absent from the Bechtel Defendants. Indeed, the Defendants objected to Plaintiffs' attempt to depose Bechtel as part of the immunity discovery and this Court ultimately denied our request for that deposition. The Bechtel Defendants have not produced any documents prior to the pending motion.

### **B. This Court's Prior Findings Concerning the Bechtel Defendants**

This Court's October 17, 2006 Decision and Order in In re: World Trade Center Disaster Site Litigation, 456 F.Supp.2d 520 (S.D.N.Y. 2006) concerning the Defendants' immunity motions, in which the Bechtel Defendants were participants,<sup>8</sup> makes numerous findings about the

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<sup>8</sup> As also alleged in the Complaint, this Court found that the Bechtel Defendants were "contractors," *Id.* at 540, n.10, a designation to which the Bechtel Defendants illogically object. (Defendants' Memorandum, p.5, n.3).

alleged role and alleged liability of the Bechtel Defendants relevant to the present motion. These include that:

- “Conditions at the World Trade Center site, particularly the hazards posed by the dust and contaminants that enveloped lower Manhattan for weeks following the attacks, posed significant dangers to the rescue and recovery workers.” *Id.* at 530.
- “Implementation and enforcement of viable and responsive health and safety standards was therefore essential. The workers at the site were presented with a dangerous environment, below and surrounding their work activities, threatening their health and safety.” *Id.*
- “By September 12, 2001, the City had established itself as the lead entity charged with the development and enforcement of health and safety standards at the site... At the request of the DDC, **Bechtel Environmental Safety & Health (“Bechtel”)** also **began work at the site on September 12, 2001, assisting the City with monitoring compliance with health and safety standards.**” *Id.* (emphasis added).
- “Critical to any health and safety plan was the development of appropriate standards for the use of personal protective equipment (“PPE”), including respirators.” *Id.*
- “The DDC, together with **Bechtel, also played an important role in establishing health and safety protocols**, periodically issuing Environmental Health and Safety Bulletins outlining the applicable safety standards in force at the site.” *Id.* at 531. (emphasis added).
- “The City was also focused on establishing appropriate PPE standards at the site and, by September 21, 2001, plans were in place to: Develop the job and site specific PPE requirements (DDC); Develop and distribute a list of required PPE to all site emergency response and workers, including posters for staging areas (DDC); Provide respirator fit-testing, maintenance and use information, and comprehensive technical support (N.Y.CDOH); Aggressively promote minimum PPE use in all areas where highest exposures may occur (N.Y.CDOH, NYPD, FDNY, National Guard). (Pls.’ Timeline at 2.)” *Id.*
- “From as early as September 12, 2001, the DDC, working primarily with **Bechtel, the lead contractor in charge of**

**health and safety concerns at the site**, and with the assistance of the Port Authority and the Primary Contractors, began conducting inspections in order to **enforce compliance with applicable PPE requirements.**” *Id.* at 532 (emphasis added).

- “[O]ngoing and persistent problems with enforcing compliance with applicable PPE requirements....Indeed, **problems with respirator usage would pervade the entirety of the recovery operation at the site**, with estimates prepared in January of 2002 showing compliance rates below twenty-nine percent.” *Id.* (emphasis added).
- “Within a week of the attacks, **Bechtel had noted that “[m]any workers are either not wearing or wearing inappropriate respiratory protection.**” (Pls.’ J.A. Vol. 6, Ex. 77 (WTC Site Evaluation, Sept. 19, 2001).) An October 18, 2001 report by Bechtel summarized observed safety discrepancies.” *Id.* at 533, n.7 (emphasis added).

Accordingly, the Bechtel Defendants cannot legitimately deny that they were or are unaware that that the Plaintiffs alleged that as “the lead contractor in charge of health and safety concerns at the site,” Bechtel was responsible for the failure to develop, communicate and enforce site safety, including appropriate PPE use, testing, maintenance and instruction, that was “essential” to protect worker health and safety.

### **C. The Master Complaint Adequately Notifies Defendants of The Claims Against Them**

The Contractor Master Complaint is far and above more than the “short and plain statement of the claim” required by the federal rules. The Complaint consists of 192 pages, containing some 159 footnotes supporting the claims, with extensive reference to and incorporation of documents by Bates number or to sworn testimony and other evidence. Indeed, even if Bechtel claims it is unable to glean the nature of the claims against it from the plaintiffs’ Amended Master Complaint, it’s insurer has no such problem. On August 14, 2006, Bechtel’s insurance carrier, Liberty Mutual Group, wrote to Roger J. Ewald, at Bechtel Legal & Risk Management, acknowledging Bechtel Corporation’s provision of notice and request for handling

the pleadings in this matter. *See* Exhibit “A,” Liberty Mutual letter of August 14, 2006. Pages 1-3 of the Liberty Mutual letter include a section entitled “Nature of Claim” and setting forth in some detail precisely that, *i.e.*, a distillation of the claims against the Bechtel Defendants from the plaintiffs’ Master Complaint and Check-Off Complaint.

The Contractor Master Complaint, like the other Master Complaints served as to the various defendants, is meticulously detailed, identifying each defendant and setting forth the statutory and other violations alleged against them. The Complaint identifies the Bechtel Defendants as “Contractors” (Complaint at ¶ 2), supervisors and/or construction managers responsible for environmental and occupational safety and health training, industrial hygiene services, atmospheric monitoring and testing and for the safety and health of all workers working at the World Trade Center Site. (Complaint at ¶¶ 77-82). Paragraph 8 of the Complaint further states that Plaintiffs sought to recover for injuries sustained, in part, as a result of the Bechtel Defendants’ failure to provide a safe workplace failing to warn the plaintiffs of the dangerous conditions at the World Trade Center site, in failing to provide the Plaintiffs with proper and appropriate respiratory protection and training and failing to provide or see to it that plaintiffs were provided with appropriate protection from exposure to various dangerous substances at the World Trade Center site, including but not limited to personal protective equipment, safe work equipment, and decontamination procedures and equipment.

Complaint ¶ 9 similarly advises the Bechtel Defendants that Plaintiffs seek recovery for injuries sustained as the result of Bechtel’s failure to provide proper and appropriate respiratory protection and proper and appropriate protective clothing and equipment; for failing to properly monitor air quality; for failing to properly notify the Plaintiffs of the dangerous levels of toxins and contaminants in the air at and around the World Trade Center Site; as well as the violations

of one or more of the following: the World Trade Center Environmental, Safety and Health Plan(s), the Labor Law of the State of New York, the New York State Industrial Code and the requirements of the Occupational Safety & Health Administration, other applicable federal, state and local statutes, law, rules, regulations and ordinances.

The foregoing clearly notified the Bechtel Defendants as to the nature of the Plaintiffs' claims against them.

Moreover, the level of detail demonstrated in the Contractor Master Complaint far surpasses the requirements of Fed. R. Civ. P. 8(a) by specifying the specific statutory and regulatory violations, in detail. The Complaint details the Bechtel Defendants' liability pursuant to NYS General Municipal Law §205-a and §205-e (¶¶ 1169, 1172, 1215, 1260-1263, 1264-1267); and the Bechtel Defendants' violations of NYS Labor Law §§ 200, 241, Art. 2, §27-a and Art. 28, §878 (¶¶ 1169, 1171, 1215, 1248-1250, 1253-1258, 1263); the OSH Act, 29 U.S.C. §§654 *et seq.* and 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 (Complaint ¶¶ 1215, 1222-1224, 1263), and 12 NYCRR §820.4 and §23-1.5, §23-1.7, §23-1.8, §23-1.9, §23-1.25, §23-1.26 and §23-2.1 (Complaint ¶1218) and other applicable rules, regulations and statutes, as well as common law negligence (*see* Complaint ¶¶1268-1271).

The Complaint sets forth in detail and at various points, the dangerous work site conditions faced by the Plaintiffs, including, but not limited to: toxic particles, dust, aerosols, vapor, fibers, materials, and fluids from asbestos, lead, mercury, polyvinyl chloride, dioxin, benzene, arsenic, lead, chromium, sulfur, acidic aerosols, heavy metals and fiberglass, all confirmed by environmental testing with results that were known or that should have been known to the Bechtel Defendants. *See* Complaint ¶¶ 5, 7, 1189-1192.

The Complaint alleges that the Bechtel Defendants failed to communicate these dangers to the Plaintiffs or cause them to be communicated (Complaint ¶¶ 9, 1182-1194, 1198). The Complaint alleges that the Bechtel Defendants failed to develop and/or implement sufficient and adequate dust suppression measures that were, at best, “rudimentary.” Complaint ¶¶ 1154, 1205.<sup>9</sup> The Bechtel Defendants are also alleged to have failed to ensure that the Plaintiffs attended the OSHA 10-hour site safety course; that Plaintiffs received sufficient training; that safety representatives were present at all shifts; that proper notices and illustrations were disseminated to the Plaintiffs or posted throughout the worksite of proper Personal Protective Equipment (“PPE”) use (Complaint ¶¶ 1195-1199); that appropriate PPE was distributed, fit-tested, maintained and explained to Plaintiffs (Complaint ¶¶ 8, 9, 1160, 1178, 1179, 1186, 1201, 1203, 1204, 1206, 1207, 1209-1211). Indeed, during the Bechtel Defendants’ tenure as the prime site safety contractor, the Complaint notes that PPE compliance, especially respirator use, ranged from 27% to a high of 41%, all of which were known to the Bechtel Defendants. (Complaint ¶¶ 1209-1211). The Complaint also alleges a complete failure to obtain, distribute, implement or otherwise provide other safety protections, including protective clothing, goggles, cleaning supplies and decontaminating equipment to remove dangerous substances from Plaintiffs and their clothing (Complaint ¶¶ 1216, 1220, 1222).

Paragraph 1249 of the Complaint alleges, in pertinent part, that the Bechtel Defendants violated New York Labor Law § 200 by failing to provide a reasonably safe place to work for persons lawfully performing work at Ground Zero, including the failure to ensure:

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<sup>9</sup> The Complaint even quotes and cites to a Bechtel memorandum on the need for, and lack of, such dust suppression. *See, e.g.* footnote 149 “Contractor implementation of required dust suppression measures on the WTC site is generally inadequate and inconsistent. Dust suppression needs to be a top priority in areas of debris handling and removal.” *See*, WTC Emergency Project Bechtel Environmental Safe and Health Report dated 10/29/01. CITY CM3-00068751.

- a. that the Plaintiffs were provided adequate personal protective equipment, including, but not limited to: protective clothing, masks, respirators, and goggles;
- b. that the Plaintiffs were provided other necessary work equipment, safety devices, and/or apparatus, as well as cleaning supplies and decontamination equipment;
- c. adequate workplace safety rules – including rules requiring the use of personal protective equipment – were issued, enforced, and complied with;
- d. adequate monitoring air quality at the World Trade Center Site before, during and after the commencement of the Plaintiffs’ work at the site was performed;
- e. that the Plaintiffs were notified of the dangerous substances in the air, dust, and on the surfaces at the World Trade Center Site;
- f. that atmospheric contamination was minimized or avoided;
- g. that effective engineering controls were implemented at the World Trade Center Site;
- h. that the conditions at the World Trade Center Site and/or the Plaintiffs’ particular work areas therein were subject to appropriate safety surveillance and/or inspection;
- i. that the Plaintiffs’ exposure to dangerous substances, which the Contractor defendants knew or should have known would detrimentally affect the safety and/or health of Plaintiffs, was adequately monitored.

The Complaint similarly alleges that the Bechtel Defendants violated their non-delegable duty under New York Labor Law §241(6), to ensure that all areas in which construction, excavation or demolition work was being performed were constructed, shored, equipped, guarded, arranged, operated and conducted so as to provided reasonable and adequate protection and safety to the persons employed there. *See* Complaint ¶¶ 1253-1257. The Complaint also alleges, in part, causes of action pursuant to General Municipal Law Section 205-a applicable to firefighters (Complaint ¶¶ 1260-1263) and General Municipal Law Section 205-e applicable to police officers (Complaint ¶¶ 1264-1267), along with specific citations to the statutes, codes, standards and regulations that the Bechtel Defendants violated.

Yet, with all the factual specificity summarized herein and more fully set forth in the Master Complaint, the Bechtel Defendants allege, incredibly, that the allegations against them “fail to allege any wrongdoing by Bechtel and in fact demonstrate conclusively that Bechtel cannot be liable for any of Plaintiffs’ alleged injuries.” *See* Defendants’ Memorandum, at p. 1. It is submitted that the Master Complaint, on its face and even in isolation of the other filings of record, amply sets forth causes of action in language and detail sufficient to satisfy Fed. R. Civ. P. 8 and 12(b)(6).

### **THE STANDARD OF REVIEW**

A motion pursuant to Fed. R. Civ. P. 12(b)(6) requires the court to determine if the plaintiff has stated a legally sufficient claim. The 12(b)(6) motion may be granted only if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Branum v. Clark, 927 F.2d 698, 705 (2d Cir. 1991). The court’s function is “not to assay the weight of the evidence which might be offered in support” of the complaint, but “merely to assess the legal feasibility” of the complaint. Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980). In evaluating whether plaintiff may ultimately prevail, the court must take the facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See* Jackson Nat’l Life Ins. Co. v. Merrill Lynch & Co., 32 F.3d 697, 699-700 (2d Cir. 1994).

Synergistically, Rule 8 requires a complaint to contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Rule also requires that “each averment of a pleading shall be simple, concise, and direct.” Fed. R. Civ. P. 8(e)(1). A pleading satisfies the requirements of Rule 8 so long as it gives the “defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” Conley v. Gibson,

355 U.S. at 47. Fair notice is “that which will enable the adverse party to answer and prepare for trial, allow the application of *res judicata*, and identify the nature of the case so that it may be assigned the proper form of trial.” Wynder v. McMahon, 360 F.3d 73, 79 (2d Cir. 2004). The Court may dismiss a complaint that fails to meet the requirements of Rule 8, but only if it is “so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised,” Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988), or if prejudice would result if the defendant were compelled to answer. See Phillips v. Girdich, 408 F.3d 124, 130 (2d Cir. 2005) (“As long as his mistakes do not prejudice his opponent, a plaintiff is entitled to trial on even a tenuous legal theory, supported by the thinnest of evidence.”).

## **ARGUMENT**

### **POINT I.**

#### **LIABILITY OF THE BECHTEL DEFENDANTS FOR INJURIES AT THE WORLD TRADE CENTER SITE**

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##### **A. General Municipal Law 205-a and 205-e**

The Bechtel Defendants are liable under General Municipal Law § 205-a and GML § 205-e for the injuries that befell the police officers and firefighters who worked at Ground Zero. “Sections 205(a) and (e) of the General Municipal Law impose liability for a plaintiff firefighter's or police officer's injury or death which is caused, either directly or indirectly, by the defendant's “neglect, omission, willful or culpable negligence” in failing to comply with applicable “statutes, ordinances, rules and requirements[.]” In re: World Trade Center Disaster Site Litigation, 456 F.Supp.2d at 574-575 (citations omitted). Section 205-a provides:

In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury, death or a disease which results in death, occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of

any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any fire department injured, or whose life may be lost while in the discharge or performance at any time or place of any duty imposed by the fire commissioner, fire chief or other superior officer of the fire department... .

GML § 205-e provides a substantially identical cause of action for police officers.

Liability is imposed under these provisions for any injury caused by the violation of any “well developed body of law and regulation” that “imposes clear duties.” Desmond v. NYC, 88 N.Y.2d 455, 464 (1996). This includes OSHA regulations (Feiner v. Calvin Klein, 157 A.D.2d 501 (1st Dep’t 1990); Barzaghi v. Maislin Transport, 115 A.D.2d 679 (2d Dep’t 1985), and even generalized provisions regarding maintenance (Gonzalez v. Iocovello, 93 N.Y.2d 539 [1999]), the New York State Building Code (Rosebella v. MTA, 23 A.D.3d 365 [2d Dep’t 2005]), the Industrial Code (Jones v. Fried, 21 A.D.3d 1057 [2d Dep’t 2005]), the Building Code and Housing Maintenance Code (Foiles v. DLJ Constr., 17 A.D.3d 297 [1st Dep’t 2005]), the former Fire Prevention & Building Code (Driscoll v. Tower Assoc., 16 A.D.3d 311 [1st Dep’t 2005]); Brennan v. NYCHA, 302 A.D.2d 483 [2d Dep’t 2003]), and ANSI provisions (Sawyer v. Dreis & Crump, 67 N.Y.2d 328 [1986]; *see generally* Kollmer v. Slater Electric, 122 A.D.2d 117 [2d Dep’t 1986]).

Indeed, the City has previously been found liable under GML § 205-a for failing to provide its employees the adequate safety equipment as required by OSHA. In McGovern v. City of New York, 294 A.D.2d 148 (1st Dep’t 2002), a firefighter was injured when the fire department failed to provide him with adequate protective clothing, in violation of OSHA standards. The trial court entered summary judgment in the City’s favor on the plaintiff’s claim under GML §205-a. *Id.* at 184. The Appellate Division reversed, holding that the “OSHA

regulations that require protective clothing for a firefighter's head, body, and extremities can serve as a predicate to a claim under GML §205-a because they are part of a well developed body of law and regulation and they impose a clear legal duty." *Id.* at 149 (citations omitted). The court remanded the case for trial on whether the City violated that duty in the case before the court. *Ibid.* The claims of the police officer and firefighter plaintiffs in this case are indistinguishable, alleging that the City failed to comply with basic OSHA standards for the provision of safety equipment to its police officers and other employees at the World Trade Center site.

Here, as required by GML § 205-a, the Plaintiffs have alleged injuries arising from numerous violations of "statutes, ordinances, rules, orders and requirements," leading to their injuries on the properties leased by the defendants, including violations of the Industrial Code, OSHA, and the various rules and orders issued by the City requiring compliance with these and other basic safety rules at the site. *See City Master Complaint; General Contractor Master Complaints.*

Accordingly, the claims should be permitted to proceed. *See also In re: World Trade Center Disaster Site Litigation*, 456 F.Supp.2d at 574-575. Plaintiffs also allege that the Bechtel Defendants, as the initial prime safety contractor, had both the right and duty to control work site conditions, both directly and indirectly, but failed to do so, setting forth causes of action as a matter of law. *In re: World Trade Center Disaster Site Litigation*, 456 F.Supp.2d at 574-575

## **B. Labor Law §241(6)**

As general contractors within the meaning of the Labor Law, both the City and the Contractor Defendants, especially Bechtel given its role as the initial prime site safety contractor, were responsible for site safety at Ground Zero, and are liable to the employees of the subcontractors who are injured as a result of the violation of that duty.

Section 241(6) of the Labor Law provides:

All contractors and owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirement: 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.

The statute is designed to protect workers performing construction, excavation and demolition work. Nagel v. D&R Realty, 99 N.Y.2d 98 (2003).<sup>10</sup> Accordingly, Labor Law §241(6) covers industrial accidents that occur in the context of construction, demolition and excavation operations at a construction site. Joblon v. Solow, 91 N.Y.2d 457 (1998); Page v.

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<sup>10</sup> 12 NYCRR §23-1.4(b)(13) defines “construction work” as:

All work of the type performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to specific buildings or other structures, and includes, by way of illustration, but not by way of limitation, the work of hoisting, land clearing, earth moving, grading, excavating, trenching, pipe and conduit laying, road and bridge construction, concreting, cleaning of the exterior surfaces including windows of any building or other structure under construction, equipment installation and the structural installation of wood, metal, glass, plastic, masonry and other building materials in any form for any purpose.

State, 56 N.Y.2d 604 (1982). As the case stands, the Bechtel Defendants cannot legitimately contest that they qualify as “contractors” within the meaning of this provision, nor can they as a matter of law for purposes of this Rule 12(b)(6) motion. Nor have they disputed that Ground Zero was one of the “areas in which ... demolition work [was] being performed.” Accordingly, the Defendants had a duty “to provide reasonable and adequate protection and safety to the persons employed” at the World Trade Center site. Labor Law §241(6).

It makes no difference whether the Bechtel Defendants undertook to regulate site safety directly, or through a third party such as the other world Trade Center site contractors in this case. Section 241(6) “imposes a *non-delegable* duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in or lawfully frequenting all areas in which construction, excavation or demolition work is being performed.” Rizzuto v. L.A. Wenger, 91 N.Y.2d 343, 351 (1998) (emphasis added); In re: World Trade Center Disaster Site Litigation, 456 F.Supp.2d at 573 (citation omitted); *see also, e.g., Celestine v. City of New York*, 86 A.D.2d 592, 593 (2d Dep’t 1982) (Section imposes “a nondelegable duty upon owners and general contractors to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, regardless of the absence of control, supervision or direction of the work. Liability arises out of the duties referred to in section 241 and may not be escaped by delegation.”) (citation omitted). As the Court of Appeals has explained, Section 241 “fashions absolute liability upon an owner or contractor for a breach of the duties imposed by subdivisions 1 through 6 of section 241 *irrespective of their control or supervision of the construction site.*” Allen v. Cloutier Const. Corp., 44 N.Y.2d 290, 300 (1978) (emphasis added). “Doubtless this duty is onerous; yet, it is one the Legislature quite reasonably deemed necessary by reason of the exceptional dangers

inherent in connection with ‘constructing or demolishing buildings or doing any excavating in connection therewith.’” *Ibid.*

This Court has recognized that Section 241 “essentially provides for strict liability” against an owner, contractor or their agents, regardless of whether they actually “exercised control or supervision.” In re: World Trade Center Disaster Site Litigation, 456 F.Supp. 2d at 573. Accordingly, it is enough that a jury could conclude “that someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time to prevent or remediate (a) hazard.” Celestine v. City of New York, 86 A.D.2d at 351. “Since an owner or general contractor’s vicarious liability under § 241(6) is not dependent on its personal capability to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure must also be irrelevant to the imposition of Labor Law § 241(6) liability.” *Id.* at 352.

Thus, to prevail, a plaintiff need only show that the defendant qualifies as an “owner,” “contractor,” or “agent” and that the plaintiff’s injury was caused by a violation of a concrete commandment of the Industrial Code. *See, Rizzuto*, 91 N.Y.2d at 351-52; Ross v. Curtis-Palmer, 81 N.Y.2d 494 (1993); Long v. Forest-Fehlhaber, 55 N.Y.2d 154 (1982), *rearg. denied* 56 N.Y.2d 805 (1982); Allen v. Cloutier Contr., 44 N.Y.2d 290 (1978), *rearg denied* 45 N.Y.2d at 300.

Here, Plaintiffs plainly and clearly have asserted a cognizable cause of action based, among other things, on failure to provide proper respiratory protection. Rule 12 of the Industrial Code provides: “The Board finds that every industry, trade, occupation and process involving the use or presence of materials that produce air contaminants may be hazardous to the lives, health and safety of the persons employed therein. The Board, therefore, finds that special regulations

are necessary for the protection of such persons.” 12 NYCRR §12-1.1. Accordingly, the Board promulgated Rule 23-1.8, which provides in relevant part:

Where this Part (rule) requires a respirator to be provided, the employer shall furnish and the employee shall use an approved respirator. Such respirator shall be approved for the type of operation for which it is to be used, and for the particular air contaminant present. The employer shall maintain such respirator in good repair, and shall furnish the means for its continued proper working condition. The employer shall provide daily inspection and cleaning and weekly disinfecting of such respirators. Respirators shall be disinfecting before being transferred from one person to another. When not in use, respirators shall be stored in closed containers.

12 NYCRR §23-1.8(b)(1). Other provisions of the Code define the conditions under which respirators are required, conditions that the Bechtel Defendants do not contest were present on the site, at least for purposes of the present motion. *See, e.g.*, 12 NYCRR §12-1.2 – 12 NYCRR §12-1.5.<sup>11</sup>

In any event, this Court has already found that the conditions required for the application of Labor Law § 241(6) liability were sufficiently plead, if not proved, In re: World Trade Center Disaster Site Litigation, 456 F.Supp.2d at 530-531. Moreover, this Court has also found that the Plaintiffs have plead, if not proven, that the Bechtel Defendants were “contractors” and/or

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<sup>11</sup> Other provisions of the Code are applicable as well. Section 12-1.4(a), for instance, requires that operations which produce air contaminants be “so conducted that the generation, release or dissemination of such air contaminants is kept at the lowest practicable level...using proper control or protective procedures and equipment,” and that the equipment be “maintained in good condition in accordance with the requirements of the Labor Law and the Industrial Code.” Subdivision (b)(1) requires employers to see to compliance with these rules, and (b)(2) requires that they instruct employees “as to the hazards of their work, the use of the control or protective equipment, and their responsibility for complying with the provisions of this Part (Rule), while (b)(4) forbids employers to allow contaminants “to accumulate or remain in any place or area subject to the provisions of this Part (Rule).” Furthermore, 12 NYCRR §23-1.26(c)(3) provides: “Where cleaning is performed with a torch, the person performing such cleaning shall be provided with an approved respirator. Where cleaning is performed by mechanical means, such as in scraping or grinding, the person performing such work shall be provided with an approved respirator.” Moreover, §23-1.26(d) provides that, absent suitable exhaust ventilation, “all persons performing flame-cleaning or flame-cutting operations on metals that have been coated with any compound containing lead or any other substance which may create toxic fumes when heated, and all persons located within a radius of 15’ of such operations, shall be provided with approved respirators.” Here, the work at Ground Zero involved torches and scraping or grinding of coated metals. Finally, 12 NYCRR §12-3.1 sets forth levels of exposure to toxic chemicals, levels that were clearly exceeded at Ground Zero.

“agents” of the City and its DDC. *Id.*, at 530-532. Plaintiff have clearly stated causes of action for violations of Labor Law § 241(6).

### **C. Labor Law Section 200 and Common Law Negligence**

The Bechtel Defendants are also liable under Labor Law § 200 and the common law of negligence. Labor Law § 200 is a codification of the common law of negligence as applied to workplace safety. In re: World Trade Center Disaster Site Litigation, 456 F.Supp. 2d at 571 (citations omitted); Ross v. Curtis-Palmer, 81 N.Y.2d 494; Lombardi v. Stout, 80 N.Y.2d 290 (1992); Allen v. Cloutier Constr., 44 N.Y.2d 290; Iulani v. Great Neck, 38 N.Y.2d 885-6 (1976); Russin v. Jackson Hts. Shopping Center, 27 N.Y.2d 103 (1970); Persichilli v. TBTA, 16 N.Y.2d 136 (1965). Defendants may escape liability under Section 200 and the common law by showing that they did not exercise *any* supervisory control over the injured plaintiff’s work, In re: World Trade Center Disaster Site Litigation, 456 F.Supp.2d at 571 (citations omitted) (“Recovery may not be had unless it is shown that the party to be charged exercised *some* supervisory control over the operation,”) (emphasis added) *and* that they neither created nor had actual or constructive knowledge of the allegedly dangerous condition.” *Id.*, citing, Murphy v. Columbia Univ., 4 A.D.3d 200-1 (1st Dep’t 2004) (“ holding that proof of control was not required where the “injury arose from the condition of the work place created by *or known to the contractor*[.]”) (emphasis added); Hatfield v. Bridgedale, LLC, 814 N.Y.S.2d 659, 661 (2d Dep’t 2006).<sup>12</sup>

Thus, the “statute applies, *inter alia*, to owners and contractors who either created a dangerous

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<sup>12</sup> With respect to the law enforcement and firefighting plaintiffs, it is enough to establish that the plaintiffs “suffer[ed] any injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is proximately caused by the neglect, willful omission, or intentional, willful or culpable conduct of any person or entity, other than that police officer’s or firefighter’s employer or co-employee.” Gen. Obl. Law § 11-106.

condition or had actual or constructive notice of it.” Wein v. Amato Properties, 30 A.D.3d 506 (2d Dep’t 2006); *see also* Pickering v. Lehrer-McGovern, 25 A.D.3d 677 (2d Dep’t 2006).

In this case, the Plaintiffs have alleged that the Bechtel Defendants had actual and constructive knowledge of the dangers at Ground Zero. *See* City Master Complaint; General Contractor Master Complaint. Indeed, the Defendants could not contend – and have not contended – that dangerous worksite conditions existed and that they were hired and paid to establish and enforce safety protocols to protect worker from those dangers. This Court has already found that the Bechtel Defendants played an important role in establishing health and safety protocols, In re: World Trade Center Disaster Site Litigation, 456 F.Supp.2d at 531, that the Bechtel Defendants assisted in monitoring the WTC site for health and safety violations, *Id.* at 530, that the Bechtel Defendants were the “lead contractor in charge of health and safety concerns at the site,” *Id.* at 532, that the Bechtel Defendants inspected the site “in order to enforce compliance with applicable PPE requirements,” *Id.*, and that problems with PPE use “pervaded the entirety of the recovery operation at the site.” *Id.* This is sufficient to establish liability under the common law and Labor Law § 200.

In Griffin v. NYCTA, 16 A.D.3d 202 (1st Dep’t 2005), for example, the court held the Transit Authority liable for injuries sustained by the employee of its contractor even though the Authority did not supervise the work, because the Authority was aware of the dangerous condition that led to the plaintiff’s injuries. The court explained that “[w]hile there is no evidence that the Transit Authority, the owner of the work site where plaintiff’s decedent was allegedly injured, controlled or directed the manner of the decedent’s work, such control or direction is not necessary to establish liability under Labor Law §200 where the injury arises

from the condition of the work place created by or known to the owner, rather than the method used in performing the work (cits.)” *Id.* at 203.

Likewise, in Murphy v. Columbia Univ., 4 A.D.3d 200, 201 (1st Dep’t 2004), the court held that the defendant was liable to an injured worker, even though the defendant neither employed nor contracted for the plaintiff’s work. “The evidence was legally sufficient to support the finding that [defendant] violated Labor Law § 200. It was not necessary to prove [defendant’s] supervision and control over plaintiff, because the injury arose from the condition of the work place created by or known to the [defendant], rather than the method of plaintiff’s work.” *See also* Mennerich v. Esposito, 4 A.D.3d 399 (2d Dep’t 2004); Seamon v. Chance, 197 A.D.2d 612-3 (2d Dep’t 1993).

At the very least, there are triable issues of fact regarding the extent to which these Bechtel Defendants exercised supervisory control over the Plaintiffs’ work, the degree to which they contributed to, or had actual or constructive notice of, the defects in the work site, as well as the adequacy and extent of the Defendants’ actions to ameliorate worksite dangers. None of these questions have been the subject of discovery thus far and it would be inappropriate to resolve the case on these grounds without permitting Plaintiffs a chance to develop the record further on these questions. Indeed, that is the oft-stated purpose of this Court’s ordered core discovery.

Even apart from its obligations under the Labor Law and the common law in its capacity as the initial prime WTC site safety contractor, the Bechtel Defendants owed a duty of care to the Plaintiffs in this case, a duty that was violated. Yet, “one who assumes to act, even though not obligated to do so, may thereby become subject to the duty to act carefully. Alfaro v. Wal-Mart Stores, Inc. 210 F.3d 111, 115 (2d Cir. 2000) (citation omitted); Jansen v. Fidelity & Cas. Co. of

N.Y., 79 N.Y.2d 867, 868 (1992); *see* Holling v. Dawn M., Inc., 24 A.D.3d 1010, 1011 (2005) *lv. Denied* 7 N.Y.3d 704 (2006); Castiglione v. Village of Ellenville, 291 A.D.2d 769, 770 (2002) *lv. Denied* 98 N.Y.2d 604 (2002). Indeed, whether a special duty has been breached is generally a question for the jury to decide. *See, e.g.,* De Long v. County of Erie, 60 N.Y.2d 296, 306 (1983).

Here, the Bechtel Defendants assumed the duty to take overall responsibility for ensuring the safety of the workers involved in the project. There is no dispute that the workers – who had no independent access to information about the dangers of the site or how to protect themselves from it – relied, at least in part, on the Bechtel Defendants to ensure a safe working environment.

Here, the Bechtel Defendants were negligent in ensuring the safety of the workers at the WTC site. The Bechtel Defendants were well aware of the dangers of exposure to the materials at the WTC site and drafted safety and health requirements, including requirements for the use of respirators, in recognition of that hazard. The Bechtel Defendants also knew or should have known that those requirements were not being implemented at Ground Zero. It is no answer that the Bechtel Defendants relied on the City or other WTC site contractors to take the lead in implementing safety requirements at the site. As the initial prime site safety contractor, the Bechtel Defendants had the responsibility for ensuring that the City's other contractors and the subcontractors complied with the health and safety plan.

At the very least, the Bechtel Defendants had the duty to take *some* action in light of the blatant safety violations occurring at the site, even if no more than asking the New York Department of Labor or other governmental agencies to force the WTC site contractors do their job and comply with all applicable laws or force the City to find replacements, directly warn workers of the site dangers and the need for proper PPE at all times, etc. Instead, the Bechtel

Defendants did little or effectively nothing, to the detriment of the health and safety of workers at the site.

#### **D. The Complaint Meets Applicable Pleading Standards**

A constant refrain in the Bechtel Defendants' Memoranda is that Plaintiffs' causes of action are conclusory and lack sufficient factual specificity. The Bechtel Defendants have also made much of this Court's derogatory comments about the complaints being "prolix and vague." Still, the Bechtel Defendants cannot credibly say that there has been no statement of the grounds upon which the Plaintiffs claim they are entitled to relief.

Plaintiffs have unquestionably set forth the basis of their claims: that the defendants, having a duty to institute and enforce worker safety and health procedures under city, state and federal codes, failed to do so; and that plaintiffs, as a result suffered exposure to toxins and particulate matter that covered everything in, around and brought the World Trade Center Site. Indeed, this Court has already stated that much in the factual discussion of this Court's October 17, 2006 decision denying defendants' motions for dismissal. To the extent that certain of Plaintiffs' claims, involving work performed at the World Trade Center Site are predicated upon the Defendants' individual and collective failure to provide, in part, appropriate respiratory and dermal protection, the Bechtel Defendants' argument that since the claims are the "same" as those pled against other contractor defendants they are invalid, is meritless.

Under Fed. R. Civ. P. 8(a), as long as an issue is pled, the party does not have to state the exact theory of relief in order to obtain a remedy. Al Makaaseb General Trading Co. v. U.S. Steel Intern., Inc., 412 F.Supp.2d 485, 500 (W.D. Pa., 2006); Bechtel v. Robinson, 886 F.2d 644, 649 (3d Cir. 1989). "Under the liberal pleading requirements of the Federal Rules of Civil Procedure a complaint need contain only the most basic grounds upon which the court's

jurisdiction is based and a short statement of the claim and the relief sought.” In re Boland, 79 F.R.D. 665, 668 (D.C.D.C., 1978); Fed. R. Civ. P. 8(a); *see also* Dairy Engineering Corp. v. DeRaef Corp., 2 F.R.D. 378, 379 (W.D. Mo. 1942) (“Rules of Civil Procedure ... contemplate the greatest liberality in the pleadings. Amendments are liberally allowed in the interest of justice.

Moreover, by Rule No. 8, a pleading which sets forth a claim, whether an original claim, counter claim or cross-claim is sufficient if it contains 'a short and plain statement of the claim showing that the pleader is entitled to relief.’”). Concomitantly liberal discovery rules permit parties to flesh out their respective claims, defenses, and counterclaims, in due course after issue has been joined. In re Boland, 79 F.R.D. at 668.

Citing Valle v. YMCA of Greater New York, 2006 WL 2571946, \*6 (S.D.N.Y., 2006), an employment discrimination claim, the Bechtel Defendants argue (as did Phillips and Jordan before them), that the Fresh Kills Master Complaint did not fulfill the minimum standard of “set[ting] forth minimal facts as to who did what to whom, when where and why.” They fail to acknowledge, however, that the plaintiff in Valle, a *pro se* litigant, had filed repeated complaints that did not meet those minimal standards in the most literal sense. Indeed, the Valle Court continued in the next few sentences after the cited language to point out that:

he offers no facts to support this assertion. He does not provide the names of these “younger members,” the dates of their employment, their positions, or any other identifying information which would support his ADEA claim. In addition, Valle pleads no facts whatsoever in relation to his claims of discrimination based on race, gender, and national origin under Title VII.

Valle 2006 WL 2571946, \*6.<sup>13</sup> This Court already rejected the Bechtel Defendants' argument and authority when it was previously proffered by Phillips and Jordan when it permitted Plaintiffs to file an Amended Master Fresh Kills Complaint. Instead, this Court instructed that any issues related to the sufficiency of the pleadings would not be determined pursuant to Rule 8. Case Management Conference of January 11, 2007 (T. 3-4).

**E. The Bechtel Defendants' Vicarious Liability Does Not Preclude Recovery by Plaintiffs But Establishes Bases for Claims of Contribution and Indemnification**

The Bechtel Defendants argue that because paragraph 1202 of the Master Complaint alleges that the City and contractors ignored some of the Bechtel Defendants' safety advice and violation reports, that the Bechtel Defendants did "no deficient activities" causing Plaintiffs' alleged harm, which merely stemmed from other Defendants "ignor[ing] Bechtel's efforts." Therefore, the Bechtel Defendants conclude that all of the Plaintiffs' claims should be dismissed. (Bechtel Defendants' Br., at pp. 4-5.)

First, as set forth at length, *supra*, the Bechtel Defendants' liability under the § 200 and §241 of New York Labor Law and § 205-a and § 205-e of the New York General Municipal Law may be vicarious or otherwise imposed when a contractor has even minimum supervisory control or knowledge of dangerous site conditions giving rise to injury. In re: World Trade Center Disaster Site Litigation, 456 F.Supp.2d at 571-576. It is simply no defense to the Plaintiffs' instant claims that, for the sake of argument only, the Bechtel Defendants are or were free of active negligence. Liability to workers such as the instant Plaintiffs may be "vicarious and

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<sup>13</sup> The Bechtel Defendants' other cited authority, Port Dock & Stone Corp. v. Old Castle, 507 F.3d 117 (2d Cir. 2007) is equally unavailing. Port Dock is an antitrust case that is subject to particular pleading requirements peculiar to the applicable antitrust statutes that have no import to the present matter.

purely statutory.” Colozzo v. National Center Foundation, Inc. 30 A.D.3d 251, 252 (1st Dep’t 2006).

Second, if, for the sake of argument only, the Bechtel Defendants were not guilty of any active “negligence” as they argue in their Memorandum, then their remedy is the assertion of cross-claims for contribution and/or indemnification in the present litigation against the City and prime contractors who actively frustrated or “ignored Bechtel’s efforts.” Colozzo, 30 A.D.3d at 252.

Indemnification and contribution are, of course, distinct remedies. In contribution, joint liability is shared between tort-feasors. “ Since they are *in pari delicto*, their common liability to plaintiff is apportioned and each tort-feasor pays his ratable part of the loss.” However, in indemnification, which commonly arises in cases of vicarious liability, “a party held legally liable to plaintiff shifts the entire loss to another.”

Perno v. For-Med Medical Group, P.C., 176 Misc.2d 655, 658 (Sup. Ct., N.Y. Cty., 1998)  
(citation omitted).

However, neither the Bechtel Defendants nor *any* other Defendants have asserted such claims, so that either each Defendant believes that it is actively and/or directly negligent or liable or such claims have been waived as part of some global litigation strategy. Regardless, the Bechtel Defendants remain liable to the Plaintiffs.

## CONCLUSION

The Master Complaint is neither required to be, and was never intended to be the sole source of information about the Plaintiffs' claims, and the Bechtel Defendants' continuing insistence that it should be is simply collective foot dragging on their part. The answer to Defendants' "concerns" about the sufficiency of the master pleadings is not to dismiss the Plaintiffs' cases, but rather, as previously Ordered by this Court, to proceed with the litigation and the exchange of core discovery. Bechtel cannot hide from this Court's prior findings based upon the evidence of record and the duties imposed as a matter of statutory and common law.

Dated: New York, New York  
March 11, 2008

Respectfully submitted,

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**ATTORNEY'S DECLARATION/AFFIRMATION OF  
SERVICE**

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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 NAPOLI BERN RIPKA, LLP and as such represent the plaintiffs in the within action. On March 11, 2008, I duly served a true copy of the within **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE BECHTEL DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM plus Exhibit "A" Letter from Liberty Mutual to Bechtel dated August 14, 2006** on the persons listed below by e-mail and will file same via the Court's ECF filing system.

Joseph E. Hopkins, Esq.  
James Tyrrell, Esq.  
Patton Boggs, LLP  
1 Riverfront Plaza, 6th Floor  
Newark, New Jersey 07102

Beth D. Jacob, Esq.  
Schiff Hardin, LLP  
900 Third Avenue, 23rd Floor  
New York, New York 10022

  
Denise A. Rubin

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
IN RE: WORLD TRADE CENTER  
DISASTER SITE LITIGATION  
-----X

Docket No.: 21 MC 100 (AKH)

THIS DOCUMENT APPLIES TO ALL  
WORLD TRADE CENTER DISASTER SITE  
LITIGATION  
-----X

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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE BECHTEL DEFENDANTS' MOTION  
TO DISMISS FOR FAILURE TO STATE A CLAIM

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**WORBY GRONER EDELMAN & NAPOLI BERN, LLP**

*Co-Liaison Attorneys for* : Plaintiff

115 Broadway, 12<sup>th</sup> Floor  
New York, New York 10006  
(212) 267-3700

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The undersigned attorney hereby certifies, pursuant to Fed. R. Civ. P. 11 and/or 22 NYCRR §130-1.1-a,  
that I have read the within papers and that to the best of my knowledge and belief they are not frivolous as  
that term is defined in 22 NYCRR § 130-1.1(c).

  
\_\_\_\_\_  
Attorney name:

-----  
PLEASE TAKE NOTICE:

NOTICE OF ENTRY

that the within is a (certified) true copy of an \_\_\_\_\_ duly entered in the  
office of the \_\_\_\_\_ clerk of the within named court on \_\_\_\_\_ 200\_\_.

NOTICE OF SETTLEMENT

that an order \_\_\_\_\_ of which the within is a true copy, will  
be presented for settlement to the HON. \_\_\_\_\_ one of the judges of the  
within named Court, at \_\_\_\_\_ on \_\_\_\_\_ 200\_\_ at \_\_\_\_\_ O'clock  
\_\_\_\_.M.

Dated, \_\_\_\_\_

Yours, etc.

**WORBY GRONER EDELMAN & NAPOLI BERN, LLP**