

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE: WORLD TRADE CENTER DISASTER  
SITE LITIGATION

21 MC 100 (AKH)

THIS DOCUMENT APPLIES TO ALL WORLD  
TRADE CENTER DISASTER SITE LITIGATION

**STATEMENT OF UNDISPUTED MATERIAL FACTS IN  
SUPPORT OF PLAINTIFFS OPPOSITION TO  
DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT ON FEDERAL IMMUNITY**

Pursuant to Fed. R. Civ. P. 56 and L. Civ. R. 56.1 Plaintiffs submit this Statement of Undisputed Material Facts in support of their Opposition to Defendants' Motion for Summary Judgment Based on Federal Immunity.

**POINT I.**

**THE CITY OF NEW YORK AND ITS CONTRACTORS  
MAINTAINED PRIMARY CONTROL OF THE WTC SITE  
FROM SEPTEMBER 11, 2001 UNTIL JUNE 30, 2002 IN  
CONJUNCTION WITH THE PORT AUTHORITY OF NEW  
YORK AND NEW JERSEY AND THE SILVERSTEIN  
ENTITIES<sup>1</sup>**

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1. From September 11, 2001 until June 30, 2002, the City of New York ("City") and its contractors, in conjunction with the Port Authority of New York and New Jersey ("PA") and the Silverstein Entities, exercised primary control of the WTC Site. The discovery taken in this case overwhelmingly supports this conclusion.

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<sup>1</sup> "DDC, working with the Port Authority of New York and New Jersey, has been managing the demolition, excavation and debris removal at the WTC Complex." Memorandum from Commissioner of the DDC Kenneth Holden to Mayor Michael Bloomberg dated March 6, 2002. See Plaintiffs' Ex. 163CITYCM3-00072305-CITYCM300072309.

2. On September 11, 2001, the City assumed management, coordination, and control of work and debris removal operations at the WTC Site. The City's Department of Design and Construction ["DDC"] contracted with four construction managers ["CMs"], who then hired sub-contractors, to perform the debris removal and assist with recovery operations.<sup>2</sup> The DDC, working with the PA, managed and controlled the demolition, excavation and debris removal at the WTC Complex.<sup>3, 4</sup>

3. The City, through its DDC and the four CMs, in conjunction with the PA, until on or about June 30, 2002 controlled the WTC Site absolutely. After June 30, 2002, the City returned complete physical control of the site to the PA.<sup>5</sup> During the period of time described above, the City and its contractors determined and controlled access to the WTC Site, deciding who would have access, how that access would take place, and under what constraints.<sup>6, 7, 8</sup> As

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<sup>2</sup> Undated Executive Summary of a Debris Removal Insurance program by James G. Smith of FEMA. Written in response to a 3/15/2002 correspondence from Ted Monette. *See* Plaintiffs' Ex.175, FEMA-DC00004560.

<sup>3</sup> Memorandum from Kenneth Holden of the DDC to Mayor Michael Bloomberg dated 3/6/2002 discussing the DDC's WTC Debris Removal project. *See* Plaintiffs' Ex.163, CITYCM3-00072305.

<sup>4</sup> "It will be the responsibility of the DDC to determine which Contractor should undertake work in each area." *See* Plaintiffs' Ex.164, CITY CM3-00014395.

<sup>5</sup> *See* Plaintiffs' Ex.200, Declaration of Richard A. Williamson, Esq. in Connection With Section III(A)(2) and III(A)(3) of case management order No. 3 dated March 16, 2005, stating, *inter alia*, that the City of New York had control of the debris removal operations on the site immediately following the attack on 1 WTC at approximately 8:46 a.m. on September 11, 2001 and retained such control over the site until June 30, 2002 (except for 7 WTC, the control of which was returned to the Port Authority on May 10, 2002).

*See* Plaintiffs' Ex.36, Deposition Testimony of Jack Klein for Silverstein Properties, Inc., September 14, 2005, Tr. pp. 25-26; 28-30; 39-41.

<sup>6</sup> A Department of Health Memorandum dated October 7, 2001, entitled "Health and Safety Controls at WTC Disaster Site," said, "NYPD is responsible for site security (*i.e.* access at perimeter and movement within red zone)." *See* Plaintiffs' Ex.125, CITYCM3-00041825.

<sup>7</sup> Visitors to the WTC site were to be properly escorted by New York City personnel at all times "so as not to place themselves in a position where they might be injured..." *See* Plaintiffs' Ex. ,11, CITYCM3-00041737.

<sup>8</sup> "I had -- in order to get into any portion of 7 WTC, I had to -- I had to present a pass that was issued to me by the City of New York. So -- and anyone who was doing work under our direction, meaning Silverstein Development's direction, had to be passed and directed to go into the site by the City of New York. We did some investigative work early on and we had to make arrangements to get these people down to -- to obtain passes to get in specifically to the 7 WTC Site." *See* Plaintiffs' Ex. 36, Klein Depo. at p. 40.

evidence of this continued control, even personnel affiliated with Federal agencies required passes issued by the City to gain access to the site.<sup>9</sup>

4. As the United States government itself acknowledged, the City and its contractors initiated, undertook and completed the debris removal.<sup>10</sup> The City financed the work of the primary contractors.<sup>11</sup> The four prime contractors or “CMs,” as well as the subcontractors, were not volunteers. In fact, they were paid tens of millions of dollars by the City, through checks issued by the City’s Comptroller’s office, for the work they performed beginning September 11, 2001.<sup>12</sup> For example, on September 20, 2001, the City forwarded a check in the amount of Ten Million Dollars (\$10,000,000) to AMEC Construction.<sup>13</sup> By January 25, 2002, payments to

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<sup>9</sup> An undated facsimile message from the State Department to Ted Monette regarding international participation at the WTC project states that logistic support will be coordinated between the City of New York and the Department of State. Badging credentials are the requirement of the City of New York. The representatives would have no access to the disaster site, except by special invitation at the discretion of the City of New York. *See* Plaintiffs’ Ex.182, FEMA-DC00001677

<sup>10</sup> “The work for debris removal will be accomplished by the City of New York and reimbursed through the Public Assistance Program.” “The Local and State governments have not requested direct federal assistance for these activities and are effectively completing the activities described under the Mission Assignment.” *See* Plaintiffs’ Ex.62, FEMA-DC0013239.

<sup>11</sup> *See* Defendants Ex U Holden Depo.at p. 22:

Q: So if it's time and materials basis, they would send a bill to the DDC who then would review the bill on a time and material basis and pay the bill?

A: That is correct.

<sup>12</sup> *Id.* at p. 36:

Q: And they ultimately would receive checks for that work?

A: That's correct.

Q: And those checks were issued by the City Of New York?

A: That's correct.

Q: And what agency in the City Of New York would issue those checks?

A: I believe the Controller's Office of The City Of New York issues checks for the City Of New York. So I believe they were controller's office-issued checks, as is common.

<sup>13</sup> *See* Plaintiffs’ Ex.185, AMECM3-000000183: September 20, 2001 Correspondence from DDC to AMEC enclosing initial payment.

AMEC from the City totaled nearly sixty million dollars.<sup>14</sup> On March 18, 2002, Bovis Lend Lease estimated that total construction dollars, all to be paid outright by the City, “will be of the order of 225 million.”<sup>15</sup>

5. Notwithstanding the City’s role in controlling the WTC Site, the PA retained responsibility for the area as well.<sup>16, 17, 18</sup> At no point after September 11, 2001 did Silverstein Properties, any of the WTC Property defendants or the PA ever receive any written communication, including government orders, that the lease agreements for the WTC Site were no longer in effect. Therefore, the Silverstein entities’ obligations under their lease with the PA continued without interruption from September 11, 2001 through June 30, 2002 and beyond, up

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<sup>14</sup> See Plaintiffs’ Ex.143 AMECM3-000000634

<sup>15</sup> See Plaintiffs’ Ex.144 AMECM3-000000631

<sup>16</sup> See Defendants Ex U Holden Depo at. 263-264:

Q: Okay. Can you tell me whose responsibility it would have been to clean up the property if the city decided not to undertake the task?

A: I guess theoretically it was Authority property, so I guess from some perspective one would have expected the Port Authority I guess to clean up their buildings per se. But, you know, in light of the fact that they were city firefighters and city police officers and employees of other city agencies and people who worked and paid taxes to the City of New York in those buildings, I don’t think those -- those distinctions were drawn.”

<sup>17</sup> See Defendants Ex. CW, Levy Depo., at p. 91:

Q: Mr. Levy, before the break you indicated that at some time after September 11th, 2001, the property, WTC Site, was taken over by the city; is that correct?

A: I didn’t say taken over. I said the city was in control of the site.

<sup>18</sup> In an e-mail from Eddy Louie of the Port Authority to Allison Meyrowitz (also of the Port Authority) dated November 16, 2001, discussing the Port Authority’s policies regarding access for workers to the WTC site Mr. Louie wrote:

I never received the plan for the monitoring and product recover wells. I received a call today from the Port’s legal department. Sid Lipstein is the attorney handling this matter for the Port. He is reviewing the Silverstein lease to determine whether Silverstein needs to be involved in the consent to entry by Con Edison. He is also preparing an Entry Permit for Con Edison. In addition he would like someone from Con Edison to touch base with his environmental engineer, Marvin Kirschner (201) 216-662(?). The plans should be sent to Marvin at 241 Erie Street, Jersey City, New Jersey 07310, Room 230. Please let me know how you make out with Marvin. I will also forward the entry permit to you after I receive it.

See Plaintiffs’ Ex.175, CE00000173.

to the present.<sup>19</sup> The Silverstein entities' responsibilities under the lease included rebuilding the structures at the WTC Site, no matter what the cause of their destruction.<sup>20</sup> The Silverstein entities had an obligation under the lease to take all reasonable safety precautions necessary to protect persons or property on the WTC Site pending the completion of any necessary repairs and debris removal.<sup>21</sup>

6. From September 11, 2001 through June 30, 2002, the City took no action that, in effect or by design, involuntarily or voluntarily divested the PA from possession and control of the WTC Site.<sup>22</sup> Further, the PA did not relinquish any property interest it held in the WTC site during that time. It did not announce publicly, for example, that it had ceded control of the

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<sup>19</sup> See Defendants Ex. CW, Levy Depo at. 68-69:

Q. And your obligations under the lease have continued from July 24th, 2001, until now?

A. Yes. Painfully so that we keep making the rent check every month.

Q. And when you say -- okay. And Port Authority's obligations under the lease have continued from July 24th, 2001, till now?

Colloquy omitted

A. The document speaks for itself.

Q. Well, have you ever been given a letter from the Port Authority that the lease is no longer in effect?

A. No.

Q. Have you ever been given any letters from the Port Authority that indicate that any or all of your obligations under the lease are suspended for any period of time?

A. No.

<sup>20</sup> See Defendants Ex. CW, Levy Depo. at. pp. 80-81:

Q. So one of the obligations of the net lessees under each of the leases signed was that they would have to rebuild the property, regardless of the cause of the destruction; isn't that correct?

A. Yes.

<sup>21</sup> See Plaintiffs' Ex. 182, WTCP-CMO3-00001-459 Net Lease between PA and 1 WTC LLC, page 161..

<sup>22</sup> See Defendants Ex. CW, Levy Depo. at. p. 100:

Q: And from September 11th to say December 20th of 2001 did Silverstein properties or the WTC entities receive any correspondence from the City with regard to them taking over control of the WTC Site?

A: I don't believe so.

WTC Site to the City. Further, neither the acting Executive Director nor the Board of Commissioners of the PA issued any directives, orders and instructions transferring control of the WTC Site to the City. Also, the Governors of New York and New Jersey never approved a transfer of the WTC Site to the City. During the demolition and debris removal, the City even required the permission of the PA to raze certain structures at the WTC Site.<sup>23</sup>

7. Representatives of the PA, the WTC Defendants and Silverstein Properties controlled and directed the work performed at the WTC Site, including the assurance of occupational and environmental safety and health.<sup>24</sup> Silverstein Properties went so far as to attend and participate in the WTC Infrastructure Recovery Coordination Meetings at which environmental safety and health issues were addressed. For example, Walter Weems and Tony Rubino, representatives of Silverstein, attended such meetings.<sup>25, 26</sup>

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<sup>23</sup> See Defendants' Ex, U Holden Depo. pp. 309-310 (emphasis added):

Q: Can you tell me, what did the PA actually do with regard to determining whether or not you are authorized to proceed with the demolition?

A: I -- this letter was probably a dotting of the I and crossing of the T letter where Frank was basically saying that the department of buildings has, to the best of my knowledge, no legal authority over Port Authority buildings and that the Port Authority, you know, does -- makes determinations that would otherwise be performed by the Department of Buildings. And Frank is saying, as such, you're authorized to proceed with the demolition of 4, 5, and 6.

Q: Other than allowing you to demolish these buildings, what other communications or approvals did you receive from the Port Authority regarding the WTC project, if any?

A: The Port Authority really didn't play a very active role in the operations, aside from the specific individuals mentioned before, most specifically Peter Rinaldi. But you know, as -- as I'm sure you're aware, they lost quite a number of employees during the collapse of the Trade Center. And they lost their offices, which were their headquarters, which were located in the WTC. So they really gave us wide latitude to operate. They assigned one of their senior engineers, Mr. Rinaldi, to us on a full - time but other than that, the Port Authority gave us wide range to proceed, you know, as -- you know, with great latitude...

<sup>24</sup> The PA, the WTC Defendants and the Silverstein entities named as defendants herein consented to the involvement and direction of the City in the rescue, recovery and debris removal operations at the WTC Disaster Site. For example, approval from both the PA and the City was necessary before Consolidated Edison could perform work at 7 WTC in November 2001. See Plaintiffs' Ex. 176, WTCP-CMO3-0002778: Subsurface Investigation Work Plan/7 WTC.

<sup>25</sup> See Plaintiffs' Ex. 183, City CM3-00035234 - CityCM3-00035235.

8. Even when compliance levels with safety and health regulations in the debris removal operations were at their lowest, contractor oversight remained controlled by the DDC, the City going so far as to actually reduce contractor supervision.<sup>27, 28</sup> The recovery operations included the removal of debris by the PA Police Department, FDNY and NYPD. Working with the City and its contractors, the PA Police Department controlled access to the WTC Site by workers and others lawfully present. PA personnel, including engineers and occupational safety and health experts, also participated in the debris removal operations.<sup>29</sup> "The PA remained an integral part of the project, providing high-level management staff to assist in planning and construction management."<sup>30</sup>

9. The City, through the DDC, sought the guidance and advice of PA personnel with respect to debris removal and the geography and design of the WTC. These PA personnel exercised authority to direct, control and enforce health and safety practices as to workers and

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<sup>26</sup> See Plaintiffs' Ex. 36 Klein Depo. at pp. 78-79:

Q. What people did you go with?

A. Okay. If I was going to the infrastructure meetings, I -- I -- you know, it depended on the day. You know, sometimes I attended the meetings, sometimes I didn't attend the meetings, other people attended the meetings for me. It was Tony Rubino, who was the engineer at 7 WTC who attended some of the meetings on my behalf or with me. Walter Weems from Silverstein Properties attended the meetings either on my behalf or with me. And Mike Manila from Tishman Construction on some basis -- on some days.

Q. How about Mr. Dacunto?

A. I don't know if Bill ever went to one of the infrastructure meetings.

<sup>27</sup> "Presently, three prime contractors are operating at the GZ site proper. Tully, Bovis and AMEC continue with debris removal and supporting operations. Plans, according to DDC, are to shift to one prime contractor over the next two weeks. This shift to one contractor will ease the contract oversight burden required by DDC. DDC plans to cut its management oversight workforce by 75% by the end of December." See Memorandum dated November 30, 2001 from Allen Rose of the Army Corps. Of Engineers to Sean Dowling at FEMA regarding a time and materials contract at Ground Zero. See FEMA-DC00004401.

<sup>28</sup> "Recommend that construction management be handled by one designated GZ prime contractor and DDC to continue to provide project management/oversight." See Memorandum from Allen Rose, ACOE, to Sean Dowling at FEMA regarding time and materials contract at Ground Zero. See FEMA-DC00004404.

<sup>29</sup> See Defendants' Ex V, Burton Depo. at pp. 178-182.

<sup>30</sup> See Plaintiffs' Ex.177, FEMA-NY00077192.

others lawfully present at the WTC Site.<sup>31</sup> With respect to PA buildings remaining at the WTC Site, the PA fulfilled the role of the NYC Building Department.<sup>32</sup> The City DDC served as the lead agency on safety and health matters at the WTC Site.<sup>33</sup>

10. The Health and Safety plan was managed and enforced by Liberty Mutual under a DDC Contract.<sup>34</sup> The City, its contractors, and the PA collected information necessary for the enforcement of health and safety laws, rules and regulations at the WTC Site. The DDC and its contractors, most prominently, Bechtel Environmental Safety & Health (“Bechtel”), and the PA, inspected the WTC Site to determine safety conditions and enforce compliance with personal protective equipment ["PPE"] requirements set forth by the City. These reports are extensively detailed, and were prepared throughout the recovery effort.<sup>35</sup>

11. The City’s contractors also accepted responsibility for the WTC Project Environmental Health and Safety [“EH&S”] Plan enforcement.<sup>36</sup> Each prime contractor and their subcontractors were responsible for implementation, enforcement and compliance with all aspects of this WTC EH&S Plan.<sup>37</sup> The City’s primary contractors were not drones, taking directions blindly from the DDC and other municipal agencies. To the contrary, the primary

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<sup>31</sup> See Defendants’ Ex. AB Plaskon Depo. at pp. 79-86.

<sup>32</sup> “This letter is to advise the DDC that the engineering Department of the PA of NY/NJ performs the role of the NYC Building Department for all PA facilities located within NYC.” See Plaintiffs’ Ex. 178, CITYCM3-0-0035831 - CITYCM3-00035832.

<sup>33</sup> Robert Adams, Director of Environmental Health and Safety Services for the DDC, testified: “All other agencies involved recognized DDC’s designation as the lead agency on safety matters and understand this does not reduce their jurisdiction.” See Plaintiffs’ Ex. 71, “Air Quality and Environmental Impacts Due to the WTC Disaster,” December 2001 at CITYCM3-000025293.

<sup>34</sup> See FEMA-NY00067895.

<sup>35</sup> Plaintiffs’ Ex.179, CITYCM3-00014844-57 and CITYCM3-00021319-21518.

<sup>36</sup> “Each prime contractor and their subcontractors are responsible for implementation, enforcement and compliance with all aspects of this plan.” See Plaintiffs’ Ex.100, CITYCM3-00041686.

An organizational chart included in the ES&H Plan depicts the DDC at the very top of a complex hierarchy of agencies and contractors charged with oversight. See Plaintiffs’ Ex. 100, CITYCM3-00041687.

<sup>37</sup> See EH&S Plan at PA-CMO3-0000057.

contractors exercised discretion and authority at the WTC Site, and had full decision-making power.<sup>38</sup> The primary contractors had the authority to hire sub-contractors and disburse City funds “based on project needs and reasonable accounting practices.”<sup>39</sup> Official documents provided to the primary contractors by the City throughout the rescue, recovery and debris removal operation, well into 2002, confirm this ability.<sup>40</sup>

12. Sub-contractors working at the WTC Site were hired, and paid, by the primary contractors.<sup>41</sup> In accordance with their role as “managers” of the WTC Site, each of the four primary contractors received a management fee for their work.<sup>42</sup> If one of the primary contractors determined that an aspect of the subcontractors’ work was inferior, the “coercion of withholding payment,” could be used to effect improvement in the performance of the subcontractor.<sup>43</sup> This “kind of regular interaction with contractors or subcontractors was pretty standard operating procedure.”<sup>44</sup> This control, exercised by the primary contractors, could have

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<sup>38</sup> See Defendants’ Ex. U Holden Depo. at pp. 197-198:

A. Yeah, that's clearly Bovis. Bovis is contractor in that last sentence.

Q. Okay. When the document indicates that the contractor is now authorized to disburse the funds utilizing its best judgment based upon the two criteria listed, what is your understanding as to what the project needs would be?

A. Certainly, you know, putting it in the context of September 20th, so nine days after the tower collapsed, we were still working you, you know, in the heart of rescue operations. So at that point in time Bovis was not only being directed by DDC, but also FDNY, PD, and PAPD personnel to take -- to help direct equipment on the site to aid in what we thought were rescue issues at the time.

Q. Was Bovis to use this money to pay subcontractors?

A. To cover their own staffing costs and subcontractors, correct.

<sup>39</sup> *Id.*

<sup>40</sup> See Plaintiffs’ Ex. 143 AMEC CM3-000000634, DDC Correspondence to AMEC dated January 24, 2002, transmitting \$10,000,000 to primary contractor AMEC to disburse City funds as it sees fit; *see also*, Defendants’ Ex. U Holden Depo. at pp. 201-202.

<sup>41</sup> See Defendants’ Ex. U Holden Depo. at pp. 206-207.

<sup>42</sup> *Id.*, at pp. 235-236.

<sup>43</sup> *Id.*, at pp. 214-215.

<sup>44</sup> *Id.*, at p. 215.

been used to ensure a subcontractor's compliance with environmental and occupational safety and health requirements.<sup>45</sup> However, this control was never used for the benefit and safety of the WTC workers. Former Commissioner Kenneth Holden testified of his concern that primary contractors "would be exposed to numerous lawsuits based on hazardous materials at the site long after the project was done."<sup>46</sup>

13. Contracts between the City and its four primary contractors were not signed.<sup>47</sup> These draft contracts embodied the terms, conditions and requirements of the agreement between the City and the primary contractors for the work to be performed at the WTC Site.<sup>48</sup> For this reason, the draft contracts set forth the duties and responsibilities of each of the four primary contractors at the WTC Site.<sup>49</sup> On September 29, 2001 and October 11, 2001, the DDC circulated, to each of the four primary contractors, copies of then working drafts of the agreements.<sup>50</sup>

14. Importantly, Mayor Giuliani, Governor Pataki and/or President Bush suspended no federal, state or local laws with respect to protection of workers.<sup>51</sup> New York State Labor Law § 200, New York State Labor Law § 241 *et seq.*, including §241(6), General Municipal Law § 205-a, and General Municipal Law § 205-e, among other statutes and regulations, were neither

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<sup>45</sup> *Id.*, at pp. 215-216.

<sup>46</sup> *Id.*, at pp. 219-220.

<sup>47</sup> *Id.*, at pp. 222-223.

<sup>48</sup> *Id.*, at pp. 223-224; "[E]ven though they were not signed, the contractors knew that they were a binding document, except for the remaining issue...the indemnification issue." *Id.*, at p. 238; "Indemnification...was the only issue preventing everyone from signing contracts." *Id.*, at pp. 238-239.

<sup>49</sup> *Id.*, at p. 240.

<sup>50</sup> *See* Plaintiffs' Ex.117, CITYCM3-00030568 *et seq.* and CITYCM3-0001442 *et seq.*

<sup>51</sup> *See* Defendants' Ex. W Murray Depo.at p. 183:

Q. Do you have any knowledge as to whether or not any laws were suspended during your work, Turner's work at Ground Zero between September 12, 2001 and December 2001?

A. I don't know of any laws specifically suspended.

suspended nor revoked on or after September 11, 2001.<sup>52</sup> Because no federal, state or local laws were suspended or revoked with respect to protection of workers, the contracts with the CMs emphasized the primary contractors' obligations to comply with said laws:

Sec. 2.2. The Contractor shall comply with all local, State and Federal laws, rules, regulations and orders issued pursuant to any Emergency Declaration applicable to this Agreement and to the work to be done hereunder.<sup>53</sup> (emphasis added)

Accordingly, defendants were required to comply with New York State Labor Law §200, § 241, including §241(6), and NY State Municipal Law §205a-e at all times on and after September 11, 2001.<sup>54</sup>

15. The contracts make clear that the four primary contractors bore responsibility to ensure the safety of all of those lawfully present at the WTC Site; such responsibility was not limited to the primary contractors' own employees:

Sec. 15.2 During the performance of the Work and up to the date of Final Acceptance, the Contractor shall take all reasonable precautions to protect the persons and property of the City and of others from damage, loss or injury resulting from the Contractor's, and/or its Subcontractors' operations under this Contract. The Contractor's obligation to protect shall include the duty to provide, place or replace and adequately maintain at or about the Site suitable and sufficient protection...<sup>55</sup> (Emphasis added).

16. In addition, the primary contractors were to ensure that subcontractors were complying with federal, state and local safety regulations. Under Sec. 11.4.20, the primary contractors were to *"monitor compliance by the Subcontractors with the following*

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<sup>52</sup> *Id.*

<sup>53</sup> *See* CITYCM3-00030575 (Emphasis in the original).

<sup>54</sup> *See* Contracts for Debris Removal - CITY CM3-00030589.

<sup>55</sup> *See* Plaintiffs' Ex. 184, CITY CM3-00014463.

*requirements applicable to the Work: (1) New York State Labor Law... .”*<sup>56</sup> (Emphasis added).

17. All "emergency" conditions had ended by September 15, 2001. By that time, it was clear to all involved that no additional living survivors would be thereafter found in the WTC Site. As of September 29, 2001 the Mayor officially declared that that there would not be additional survivors found at the WTC Site.<sup>57</sup>

## POINT II.

### **THE FEDERAL GOVERNMENT DID NOT CONTROL THE WORK AT THE WTC SITE**

18. At no time on September 11, 2001 or anytime thereafter did the Federal Government or any of its agencies control access to or direct the work performed at the WTC Site.<sup>58</sup> Rather, as previously discussed, control remained with the City. At no time on September 11, 2001, or anytime thereafter, did Silverstein Properties, Inc., Silverstein Development Corp., or a WTC Defendant act at the direction of, or pursuant to the discretion of, the Federal Government or any agency thereof in the rescue, recovery and debris removal efforts.<sup>59</sup> It is unequivocally clear that the federal government did not control or direct the City's work at the WTC Site.<sup>60, 61</sup>

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<sup>56</sup> See Plaintiffs' Ex.185, CITY CM3-00030589.

<sup>57</sup> See Defendants' Ex. V, Burton Depo. p. 55:

Q: Did there come a time when it was clear that there were no survivors or further survivors after September 11, 2001?

A: The mayor at some point did establish a date, I think, that the rescue effort was over and the recover effort has started. I can't recall the date at this point.

Q: Well does September 29, 2001 refresh your recollection as to the date?

A: That's about the date I think it happened.

<sup>58</sup> See Plaintiffs' Ex. 36 Depo. of Jack Klein, Silverstein Properties, Inc., September 13, 2005 at pp. 99-100: "Q. Anybody from OSHA ever directed to you do anything? A. No. Q. Anybody from FEMA ever directed to you do anything? A. No. Q. Anybody from the Army Corps of Engineers ever directed to you do anything? A. No."

<sup>59</sup> See Defendants Ex. CW, Levy Depo, pp. 176-177:

19. As previously stated, the work of the debris removal was done exclusively or at the direction of the City.<sup>62</sup> Testimony shows that the four primary contractors' work was

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Q. Was Silverstein Properties Inc., WTC entities, or 7 WTC Corp. Ever given any direction by any federal officer regarding work at the site?

\*Colloquy omitted.\*

A. No.

Q. And specifically 7 WTC, was any federal -- did any federal officer give any direction as to the work at the site at any time?

\*Colloquy omitted.\*

A. No.

<sup>60</sup> See Defendants' Ex. V, Burton Depo. p. 345:

Q: Did they ever direct how the work was being done?

\*Colloquy omitted.\*

A: I don't recall them doing it.

See also, *Id.*, at p. 344:

Q: So, they (FEMA) did not direct anybody: would that be correct?

A: I don't recall them directing anybody.

<sup>61</sup> See also Defendants' Ex. U, Holden Depo. at p. 117

Q: And at the WTC Site did any Federal Officer ever direct me in any way whatsoever at the WTC Project?

A: Did any Federal officer direct me in any way. As I said, on the late morning, early afternoon of September 11<sup>th</sup>, when I went to the command and control center of the police department, it was not clear from whom requests were coming. It was a chaotic, difficult time. So absent that - - you know, absent the late morning to mid-afternoon time period of September 11<sup>th</sup> itself I do not recall a Federal officer giving me specifically a direct order regarding the WTC.

Q: And that would include FEMA?

A: That would include FEMA.

Q: It would include OSHA?

A: That would include OSHA.

Q: And any other Federal agency?

A: And any other agency.

*Id.*, at p. 100:

Q: So when you began that work at the WTC Site, it was not at any Federal officer's direction: is that correct?

A: Absolutely correct.

<sup>62</sup> See Plaintiffs' Ex.146, FEMA-DC00004579. An undated draft for a memorandum that addresses the issue of whether several different debris removal operations' costs would be reimbursable under public assistance stated:

controlled, directed and managed at all relevant times by the City.<sup>63</sup> Deposition testimony reveals that Turner's employees were not subject to the oversight of the federal government or its agencies.<sup>64</sup> It further shows that Tully's work was not directed or controlled by the federal government or its agencies.<sup>65, 66</sup> Neither the PA and Silverstein entities nor their subcontractors

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New York City (NYC) through its Department of Design and Construction (DDC) is in charge of the debris removal activity at the WTC (WTC) site. Because of logistical and economies of scale concerns, it was decided that DDC would obtain blanket insurance coverage for debris removal activity to protect NYC and its contractors and subcontractors rather than have each contractor obtain separate insurance coverage and charge NYC which is generally a reimbursable contract cost. FEMA agreed that the insurance premiums for an Overall Coordinated Insurance Policy (OCIP) purchased directly by NYC would be a reimbursable expense to NYC pursuant to Office of Management and Budget (OMB) Circular A-87, Attachment B, para 25(a).

<sup>63</sup> See Defendants' Ex. BD Abadie Depo. p. 310:

Q: You got your direction from the DDC?

A: Yes.

<sup>64</sup> A: Yes.

<sup>64</sup> See Defendants' Ex. W, Murray Depo. p. 201:

Q: Did they (any federal agency) enforce the environmental health and safety plan on your employees in that zone?

A: For Turner employees

Q: That's Correct?

A: No.

<sup>65</sup> See Defendants' Ex. AE, William Ryan Depo. at p. 184::

Q: Did he (FEMA liaison) direct your and/or any Tully entities as to the construction debris removal work or any work that Tully and/or its entities were performing in that zone?

A: No

*See Id.:*

Q: During your tenure at the WTC Site, ground zero, did there come a point when the Army Corps of Engineers directed the work of Tully and/or any of its entities at the WTC Site?

A: They never directed us. They were present at meetings.

*See Id.,* at p. 191

Q: And did the EPA and/or any of its representatives or employees direct you in the course of your removing debris?

A: No

Q: Did FEMA direct you and/or Tully's employees and/or other entities or employees in – in the debris removal process?

were directed or controlled by the federal government or its agencies in the work they performed at the WTC Site.<sup>67, 68</sup>

**a. The Occupational Safety and Health Administration (OSHA) Did Not Enforce Its Regulations At The WTC Site, Nor Supervise or Control the Work Done There.**

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20. OSHA did not enforce any of its standards on the WTC worksite, deferring instead to the City and its contractors.<sup>69</sup> The City was not in *good faith* carrying out,

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A: I did answer that question, that no they did not direct us.

<sup>66</sup> See *Id.*, at p. 183:

Q. And during your tenure at the WTC Site, ground zero, did there come a point in time when the Federal Emergency Management Agency ever directed any of your work at that site?

A. My contact with the federal emergency management was that they -- a guy came around in a golf cart and he told me that he was the liaison and he would furnish to me tools and equipment, any tools and equipment that I needed. That was my only interaction with FEMA. I know FEMA was more involved with New York City DDC.

<sup>67</sup> See Plaintiffs' Ex. 36, Klein Depo. at p. 105:

Q: Anybody from OSHA ever direct you to do anything?

A: No

Q: Anybody from FEMA ever direct you to do anything?

A: No

Q: Anybody from the Army Corps of Engineers ever direct you to do anything?

A: No

<sup>68</sup> See Defendants' Ex. AB, Plaskon Depo. at p. 307:

Q: Ms. Plaskon, did any Federal officer in any way direct the way you did work at the WTC properties?

A: Direct the way I did work?

Q: Yes.

A: No.

See also Defendants' Ex. DI, Rinaldi Depo. at p. 335:

Q: Did FEMA direct the work or did they just approve how the money was going to be spent?

A: I did not see FEMA direct work at the site.

<sup>69</sup> "Both OSHA and PESH, ... are present on the site on a consultative basis. They do not have the power, at this point, other than the power of persuasion, to enforce safety and health regulations and rules." See Plaintiffs'

complying with or attempting to comply with any law, any rule, regulation or order duly promulgated or issued pursuant to the SDEA in denying OSHA the right to enforce its standards and in not taking appropriate enforcement action given OSHA's consultation status.<sup>70,71</sup> In fact, the City acted in *bad faith* in not taking appropriate enforcement action given OSHA's consultation status.

21. Illustrating the City's *bad faith* is its denial of an OSHA request to assume an enforcement role in October 2001 through June 2002.<sup>72</sup> At all relevant times the City refused to allow OSHA any authority to regulate or enforce its recommendations at the WTC site. In fact, the City's continued refusal to follow OSHA's recommendations allowed countless workers, including the plaintiffs, to be exposed to toxins, and become injured. The City's refusal to follow OSHA's recommendations was *not in good faith* carrying out, complying with or attempting to comply with any law, any rule, regulation or order duly promulgated or issued pursuant to the SDEA.

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Ex. 39 Public Hearing on Air Quality and Other Environmental Public Health Matters Resulting from the 9/11/01 Tragedy: November 26, 2001, at p. 326.

<sup>70</sup> See Plaintiffs' Ex. 40, CITYCM3-00074953: "Unfortunately OSHA has take an "advisory" role to date. Gil Gillen is the Area director for OSHA. She has recommended that the Commissioner of Health contact the Secretary of Labor, Elaine Chao as well as the Assistant Secretary of Labor for OSHA John Henshaw in Washington and request OSHA assume as active enforcement role in this crisis."

<sup>71</sup> See Plaintiffs' Ex. 40 CITYCM3-00074953: "Unfortunately OSHA has take an "advisory" role to date. Gil Gillen is the Area director for OSHA. She has recommended that the Commissioner of Health contact the Secretary of Labor, Elaine Chao as well as the Assistant Secretary of Labor for OSHA John Henshaw in Washington and request OSHA assume as active enforcement role in this crisis."

<sup>72</sup> See Plaintiffs' Ex 41, "Kelly McKinney stated that the City would like OSHA to start taking enforcement action at the WTC and Staten Island Landfill sites. I explained that we are currently in a technical support mode at both operations. I asked if the WTC site was still a rescue/recovery operation under control of the NY Fire Department. Mr. McKinney stated that it was. He stated that New York City may formally ask the Secretary of Labor to direct OSHA to do enforcement as they believe that the contractor's "fear" OSHA's ability to issue penalties and that would cause compliance. " E-mail from Philip Peist of OSHA to Patricia Clark of OSHA dated October 7, 2001 with notes from a Health & Safety Meeting that took place on October 7, 2001. See OSHA-NY00042648.

22. OSHA was present in a consultative, rather than an enforcement role, in consequence of the City's decision to lead the WTC debris removal operation.<sup>73</sup> Throughout the debris removal, OSHA's primary role was one of assistance and consultation, not enforcement, within the WTC Recovery Project Area ("Green Line").<sup>74</sup> Documentation clearly shows that OSHA was "absolutely NOT" in enforcement mode inside the inner zone of the emergency area.<sup>75</sup> OSHA personnel were present on the worksite and attended safety meetings, but only provided advice and information; OSHA personnel could not enforce OSHA regulations and did not levy fines for non-compliance with OSHA or other safety and environmental rules.<sup>76</sup>

23. The City did not follow the, then non-binding, recommendations and advice promulgated by OSHA for the safety and protection of the WTC workers. The City and the primary contractors assumed the responsibility to enforce OSHA's rules and regulations throughout debris removal.

24. OSHA was relegated to serving a merely advisory role because the City determined that enforcement of OSHA's rules and regulations would impede and slow the removal of the debris at the WTC Site. OSHA's recommendations for PPE use, for example, exceeded the regulations the City adopted at the WTC Site.<sup>77, 78, 79</sup> The presence of OSHA

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<sup>73</sup> *Id.* CITYCM3-00074953.

<sup>74</sup> Talking Points Memorandum from OSHA dated 12/31/2001. *See* Plaintiffs' Ex.42 OSHA-NY00037021.

<sup>75</sup> WTC Emergency OSHA Response Orientation pamphlet dated 04/29/02. *See* Plaintiffs' Ex. 43 OSHA-NY00042575.

<sup>76</sup> NYCDOH documents hazards and control issues and demonstrates that OSHA's involvement was only advisory: "worker safety is not under routine control by OSHA until it is a construction site..." *See* Plaintiffs' Ex.44 CityCM3-00044444-CityCM3-00044446.

A memorandum issued by Turner said that "OSHA is on site to help and assist. They have issued general guidelines for good work place practices." *See* Plaintiffs' Ex. 45 TURCM3-000000879, dated September 15, 2001.

<sup>77</sup> In a letter to the City DOH dated October 23, 2001, the Regional Commissioner of OSHA wrote that: "OSHA *recommends* that the required Respiratory Protection Zone (RPZ) be delineated as follows: 1) working in, on, or over the rubble pile... ." Project meeting minutes also document that OSHA was working in consultation mode and that DDC and its contractors were controlling operations at the site. *See* TURCM3-000000837-TURCM3-000000842. Meeting minutes dated 9/27/01: "OSHA is still in consultation mode." TURCM3-

representatives, acting only in a consultative capacity, did not relieve the contractors of their

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000000837. OSHA reported levels of contaminants. *See* Plaintiffs' Ex.52, BOVCM3-000002942 – BOVCM3-000002945.

<sup>78</sup> *See* Plaintiffs' Ex.53, Underscoring the merely advisory role that OSHA actually played at the WTC Site, the Regional Commission of OSHA wrote, "*a continued strong and active presence of DDC Safety staff at this site is necessary and will ensure that the injury and illness rate at this site remain low.*" (CITY CM3-00041049: 2/25/02 Correspondence to DDC Commissioner Holden).

<sup>79</sup> *See* Defendants' Ex. BD, Abadie Depo., pp. 64-67:

Q. Okay. And so can you tell us what it meant to be an OSHA partnership at the AOL Time Warner project?

A. To be in an OSHA partnership is being proactive in working with OSHA to ensure the safety of the people that are working for you.

Q. And does mean that OSHA was at the scene of the AOL project?

A. Yes.

Q. Did that mean that Bovis wasn't responsible for worker safety?

\*Colloquy omitted.\*

A. There's nothing in an OSHA partnership that says that OSHA is responsible for safety as opposed to a contractor.

Q. And can you explain that, please?

A. The contractors are always responsible for safety. You're working with OSHA to be proactive to make it a safer site.

Q. So regardless of whether OSHA is actually at the scene on a given day at the AOL project if there is an incident, Bovis is potentially responsible?

A. Depending on the incident, yes

Q. If somebody wasn't wearing their respirator in a situation where OSHA required it and they were injured at the AOL site, Bovis would be responsible?

Q. Isn't that correct?

\*Colloquy omitted.\*

A. Depending on the situation.

Q. Now, at the WTC, the OSHA partnership any different?

A. The OSHA partnership was similar to AOL.

Q. As a matter of fact, at the WTC project OSHA was in an advisory mode. Did you ever hear that before?

A. At the WTC, OSHA had about 50 inspectors. At AOL they might have had one inspector every couple of months.

Q. Did you ever hear that OSHA at the WTC project was in an advisory mode?

A. Yes.

Q. And when did you hear that?

A. When they first brought OSHA onto the project.

responsibility for their employees and subcontractors' employees' health and safety, as well as the health and safety of all others lawfully present on the WTC site.

**b. The Federal Emergency Management Agency (FEMA) Neither Controlled Nor Supervised The Work Done At The WTC Site.**

25. On September 14, 2001, President George W. Bush declared that a national state of emergency had existed since the September 11, 2001 attacks. The President's declaration served to activate the provisions of the Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act") (42 U.S.C. Sec. 5121, *et seq.*).<sup>80</sup> Accordingly, FEMA's primary role was to provide reimbursement to the New York City and New York State agencies for the work performed at the WTC Site.<sup>81, 82</sup> Throughout the rescue, recovery and debris removal operations, FEMA neither controlled nor directed the work of the City or its contractors.<sup>83</sup>

26. Although FEMA provided hundreds of millions of dollars in reimbursement to the City for the recovery effort, FEMA itself acknowledged the City's leadership role in the recovery.<sup>84</sup> Through its Office of Management and Budget ("OMB"), the City emphasized the importance of seeking and obtaining reimbursement from FEMA for payment of its contractors

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<sup>80</sup> One of the Stafford Act's purposes is to "spread the risk of the cost of major disasters from the citizens of the disaster-stricken community to the citizens of the entire country." State of Hawaii v. Federal Emergency Management Agency, 294 F.3d 1152, 1160 (9<sup>th</sup> Cir., 2002).

<sup>81</sup> As FEMA commented: "Debris removal operations are under the direction of the DDC. FEMA is responsible for administering the Federal Funds that will be granted to the State of New York and various applicants under this disaster. The City ... is a sub-grantee." *See* Plaintiffs' Ex. 49 CityCM3-00033810.

<sup>82</sup> FEMA's active role in the disaster, according to former DDC Deputy Commissioner Michael Burton, was to pay the contractors. "They -- one of the direct issues that they are involved with and were involved with down at the WTC was to reimburse the city for money." *See* Defendants' Ex. V, Burton Depo. at p. 20. "Debris removal operations are under the direction of the ... DDC. FEMA is responsible for administering the Federal Funds that will be granted to the State of New York and various applicants under this disaster. The City...is a sub-grantee."

<sup>83</sup> "The Public Assistance Program is voluntary. If all eligibility requirements are met and you wish to seek federal reimbursement, you must adhere to the program guidelines." *See* Plaintiffs' Ex.50, FEMA-NY00042518: State Emergency Management Office Federal Emergency Management Agency Public Assistance Program - Applicant's Handbook.

<sup>84</sup> "[A]s the lead entity for the response effort, the City will determine the necessity and priority of debris removal from both private and public property." *See* Plaintiffs' Ex. 51 AMECM3-000000660: October 16, 2001 FEMA Correspondence.

engaged in debris removal, documenting the expenses incurred.<sup>85 86</sup> FEMA provided over six hundred million dollars (\$600,000,000) to the City for reimbursement of work and reconstruction.<sup>87</sup>

**c. The Army Corp of Engineers ["ACOE"] Neither Controlled Nor Directed The Work Performed At The WTC Site.**

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27. A typical example of the supporting role played by federal agencies is their participation in the debris removal program. For example, the U.S. Army Corps of Engineers ["ACOE"] only provided assistance upon specific request and direction by the City.<sup>88</sup> The ACOE did not activate any personnel under a mission assignment for debris removal at Ground Zero as of September 17, 2001.<sup>89</sup> Testimony demonstrates that the ACOE was not responsible for the debris removal operation at the WTC Site,<sup>90</sup> and, in fact, had no direct involvement with debris removal.<sup>91</sup> As ACOE Area Engineer Leach testified, the City and its contractors were responsible for the removal of debris.<sup>92</sup>

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<sup>85</sup> See Plaintiffs' Ex.52, CITYCM3-00035875: September 18, 2001, Memo from OMB Director Adam Basky: "To facilitate the reimbursement to the City by the Federal Emergency Management Agency for costs associated with the WTC emergency, several new event codes have been established..."

See also Plaintiffs' Ex.173, CITYCM3-000035877: September 18, 2001 Memo from City Office of Payroll Administration.

<sup>86</sup> See Defendants' Ex. U, Holden Depo. at p. 110:

Q: And other than reimbursement of costs of the project, FEMA really - - that was their role at the site, the reimbursement of costs?

A: FEMA was - - FEMA did reimburse, to the best of my knowledge, the City for its costs in - -the cleaning up of the WTC Site.

<sup>87</sup> See Plaintiffs' Ex.53, CITYCM3-00057670: September 15, 2001 Correspondence to DDC's Commissioner Holden from FEMA. FEMA also waived requirements for competitive bidding by contractors for which the City would seek reimbursement.

<sup>88</sup> "The U.S. Army Corps of Engineers (will) provide technical assistance to NYC on an as required basis as NYC requests this assistance." See Plaintiffs' Ex. 49 CITY CMC-00033810 - Debris Monitoring Plan.

<sup>89</sup> See Plaintiffs' Ex. 57 FEMA-DC00013239

<sup>90</sup> See Plaintiffs' Ex. 58 Leach Depo. at p. 62.

<sup>91</sup> *Id.* at pp. 64-65.

<sup>92</sup> *Id.* at pp. 25-26

28. The City and its contractors planned and executed debris removal.<sup>93</sup> Although defendants represented otherwise to this Court, the ACOE did not have any role with respect to the slurry wall of the WTC Site.<sup>94</sup> Bovis and its subcontractors addressed the slurry wall.<sup>95</sup> A private sub-contractor, Meusler-Rutledge, was hired to assess the damage to the slurry wall and determine the “remedial efforts” needed to shore it up.<sup>96</sup> Construction work needed to secure the sides of the slurry wall was awarded to “a contractor by the name of Nicholson.”<sup>97</sup> Finally, Commissioner Holden testified that the ACOE played no role with respect to the slurry wall.<sup>98</sup>

**d. The Environmental Protection Agency ["EPA"] Neither Controlled Nor Directed The Work Done At The WTC Site.**

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29. As was the case with OSHA and FEMA, the EPA’s involvement at the WTC Site was minimal, and only advisory.<sup>99</sup>

30. The City Department of Health ["DOH"] independently performed air testing at the WTC Site, but failed to disclose the true results of the testing to the workers and the public.<sup>100</sup> A letter from the USEPA to the DOH establishes that the EPA had no control over

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Q. Do you know if anyone from the Corps had any responsibilities for cleanup activities, remediation, debris removal at the WTC Site.

A. The Corps of Engineers, they were not responsible but they were providing support services to the recovery operation at the World Trade site?

<sup>93</sup> *Id.*

<sup>94</sup> “The slurry wall is about a 3-foot thick wall that was built in 22-foot long sections...when the WTC was built. That basically was the perimeter foundation walls for the WTC...The concern was that as the 210-story towers collapsed, they broke the horizontal support...the Hudson River was going to flow in. “ *See* Deft. Ex. U, Ken Holden Depo. at p. 171.

<sup>95</sup> “The ACOE will provide technical assistance to NYC on an as required basis as NYC requests this assistance.” *See* Plaintiffs’ Ex. 49, CityCM3-00033810

<sup>96</sup> *See* Deft. Ex. U, Ken Holden Deposition at pp. 172-173.

<sup>97</sup> *Id.* at p. 175.

<sup>98</sup> *See* Defendants’ Ex. U, Holden Depo. at p. 180.

<sup>99</sup> Applicable federal statutes and regulations “do not obligate (the) EPA to respond to a given emergency, thereby allowing for local agencies to lead a response... ” *See* Plaintiffs’ Ex. 60 WTCP/PA-CMO3-0000280: *EPA’s Response to the WTC Center Collapse; Office of the EPA Inspector General.*

<sup>100</sup> *See* Plaintiffs’ Ex. 61, Deposition of Isaac Weisfuse, M.D, September 16, 2005, at pp. 69-70

operations at the WTC Site.<sup>101</sup> Thus, to the extent that the City, through the DDC and the DOH, consulted with federal agencies about environmental safety and health issues at the WTC Site throughout the recovery effort, the input of the federal government was merely advisory.<sup>102</sup>

**e. Testimony of Federal Officials Confirms Lead, Authoritative Role of the City and Its Contractors**

31. The deposition testimony of EPA, FEMA and ACOE personnel, including high-ranking officials, confirms the lead role assumed by the City and its contractors at the WTC Site. Federal agencies, like OSHA, maintained a consultative role, while others, like the ACOE, were careful not to displace the City as the entity in charge of the debris removal operations. FEMA's role was limited to reimbursing the City for monies it expended in hiring contractors for the removal operations. (Monette tr. at p. 22 and p. 54)

***Testimony of FEMA Field Coordinator Monette***

32. Theodore Monette served as FEMA's Field Coordinator at the WTC Site. (Monette tr. at p. 11) Although he was "the lead federal official...on site," with all federal

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<sup>101</sup> "We do not have the authority to enforce the worker health and safety policies for non EPA/USCG employees." *See* Plaintiffs' Ex. 115, CityCM3-00007585-CityCM3-00007586.

<sup>102</sup> James Abadie of Bovis testified that although the EPA and the DEP were present on the worksite, it was the DDC that directed the contractors' work. *See* Defendants' Ex. BS, Abadie Depo., pp. 462-463.

Q. By the way, what federal agency, if any, directed the work of Bovis performed at the site?

A. OSHA was on side [sic]. For a while, I mean, DEP was there.

Q. Did they direct your work, OSHA?

A. Did they direct our work. They -- we worked under their guidelines that they established for us at the site.

Q. And they were there in and [sic] advisory mode; isn't that correct?

A. I don't know what they were there with -- how their relationship with the government and the DDC and what other capacity they were working at. But they had an impact on what we did or didn't do.

Q. You got your direction from the DDC?

A. Yes.

employees reporting to him, no City agencies reported to him. Similarly, none of the City's contractors reported to him. (Monette tr. at p. 16 and p.18). FEMA hired no contractors for debris removal at the site while the City hired all such contractors. (Monette tr. at 22-23) FEMA had no power to remove the City-hired contractors, and did not approve the contracts or terms of the work to be completed.<sup>103</sup> (Monette tr. at p. 36 and p. 70) FEMA did not direct the debris removal performed by the contractors. (Monette tr. at p. 69)

33. Monette admitted, "DDC...had responsibility for management of the debris operation," and responsibility for site safety. (Monette tr. at p. 37)

Q: [W]ho, if anybody, had the role to enforce respiratory usage for workers at the World Trade Center Site?

A: It would have been DDC. (Monette tr. at pp. 65-66)

FEMA had no responsibility for site safety.

Q: Did FEMA have any responsibility with respect to environmental safety and health for workers down at the World Trade Center site who were not employees of FEMA...?

A: No. (Monette tr. at pp. 50-51)

34. As for OSHA, ACOE and EPA, these agencies did not have enforcement authority, and simply provided "technical assistance" to the DDC and other City agencies. (Monette tr. at p. 55 and pp. 58-59)

### ***Testimony of Area Engineer David Leach***

35. David Leach is an Area Engineer for the ACOE. (Leach tr. at p. 20) In response to a subpoena and deposition notice served by the defendants, he testified as an ACOE

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<sup>103</sup> See Defendants' Ex.CS, Monette Depo. at p. 35

Q: With respect to New York City agencies, did FEMA have any authority to remove any New York City agencies from the World Trade Center site?

A: None.

representative knowledgeable of the role the organization fulfilled at the WTC Site. (Leach tr. at p. 12)

36. As Leach explained, “the removal of debris from lower Manhattan, this was under the direction of the City’s Office of Emergency Management.” (Leach tr. at p. 23) The “City maintained control of the debris removal operation at the World Trade Center Site.” (Leach tr. at p. 68) The ACOE provided no “land-based” services at the WTC Site. (Leach tr. at pp. 65-66). Moreover, Leach could not identify any mission assignment (written orders) given to the ACOE with respect to debris removal at the site. (Leach tr. at pp. 62-63). Similarly, Leach could not identify any function served by the ACOE concerning the survey and stabilization of the WTC slurry wall. (Leach tr. at p. 75)

37. Leach detailed a hierarchy of different governmental agencies responding to the September 11, 2001 attacks. The hierarchy he described placed the ACOE on the bottom and the City on top: ACOE would report to FEMA, which, in turn, would report to the New York State Office of Emergency Management, which, in turn would report to the City. (Leach tr. at pp. 67-68) Leach acknowledged that the ACOE did not interfere with the City’s decision-making:

Q: The Army Corps did not interfere with the City’s plans for the recovery effort and the debris removal?

A: To my knowledge, we did not interfere. The Corps of Engineers did not interfere. (Leach tr. at p. 90)

***Testimony of EPA On Scene Coordinator Steven R. Touw***

38. Steven R. Touw served as an “On Scene Coordinator” for the EPA at the WTC Site. At deposition, he freely acknowledged that, with respect to response and debris removal, “New York City was in control of the situation,” and not federal agencies. (Touw tr. at p. 28, pp. 45-46) Overall, “This was an incident that happened in New York City. New York City was

recognized to be in control of the situation...” (Touw tr. at p. 28) The City’s authority displaced that of federal agencies.

39. For example, OSHA, which acted in a consultative role, exercised no enforcement authority at the site. (Touw tr. at p. 58) FEMA, with its primarily role of providing reimbursement of monies expended by the City in connection with debris removal, did not take any enforcement action either. (Touw tr. at pp. 71-72)

As for the EPA, its On Scene Coordinator reported to the City.

A. I reported to the Office of Emergency Management.

Q. That’s a New York City agency; correct?

A. New York City, correct. (Touw tr. at p. 17)

The EPA enjoyed no enforcement authority during debris removal:

Q. What enforcement authority, if any, did the EPA have with respect to the debris removal operations at the World Trade Center site?

A: I don’t know of any authority. (Touw tr. at pp. 18-19)

40. More specifically, EPA had absolutely no enforcement authority with respect to the use of personal protective equipment.

Q. What enforcement authority did the EPA, pursuant to the NCP, this environmental safety and health plan, or any other rule or regulation, have with respect to the use of PPE over non-EPA personnel at the World Trade Center site?

A. I don’t believe we had any authority, as you defined it. (Touw Tr. at p. 164)

***Testimony of EPA Official Bruce Sprague***

41. Bruce Sprague is the Chief of the Response and Prevention Branch of the EPA. (Sprague tr. at p. 9), and served in that capacity at the WTC Site. He explained that during debris removal operations, the City was responsible for provision of personal protective

equipment and enforcement of its use. (Sprague tr. at p. 20). Sprague also described an organizational structure of government agencies present at the site, placing the City Office of Emergency Management at the very top, followed closely by the Fire Department and the DDC, to the exclusion of federal entities like OSHA and EPA, which had no enforcement power over PPE. (Sprague tr. at p. 40)

Q The second sentence reads that: “The New York City Mayor’s Office of Emergency Management is responsible for overall coordination of the WTC project.” Do you agree with that sentence?

A: Yes.

Q. “The NYC DDC has total control of site construction, demolition, and clean-up activities.” I have the same question. Do you agree or disagree with that statement?

A. Yes, I would agree with that statement. (Sprague tr. at p. 206)

**POINT III.**

**NOTWITHSTANDING LOCAL, STATE AND FEDERAL  
LABOR LAWS AND ENVIRONMENTAL RULES AND  
REGULATIONS, THE CITY, ITS CONTRACTORS AND  
THE OTHER WTC DEFENDANTS KNOWINGLY FAILED  
TO IMPLEMENT REQUIRED SAFETY PROTECTIONS  
AND ENFORCE OSHA REGULATIONS THAT WOULD  
HAVE PROTECTED WORKERS AT THE WTC SITE, AND  
EACH SUCH INSTANCE WAS AN EXAMPLE OF THEIR  
NOT “IN GOOD FAITH CARRYING OUT, COMPLYING  
WITH OR ATTEMPTING TO COMPLY WITH ANY LAW,  
ANY RULE, REGULATION OR ORDER DULY  
PROMULGATED OR ISSUED PURSUANT TO THE...  
(SDEA).”**

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42. Within hours of the collapse of the WTC towers, the City, through the Mayor’s Office of Emergency Management ["OEM"], the DDC, the DOH and the FDNY began to assess the potential health hazards created by the dust and fires at the site.<sup>104</sup>

**a. The WTC Buildings Contained Many Substances Known  
To Be Hazardous When Ingested, Inhaled or Contacted.**

43. Before September 11, 2001, the buildings at the WTC generated large amounts of hazardous waste, as defined by the Resource Conservation and Recovery Act (RCRA), producing over 10,000 pounds of hazardous waste per year. The buildings contained thousands of computers, fluorescent light fixtures, stored chemicals, underground and above ground storage tanks holding tons of diesel fuel and fuel oil, electrical transformers laden with PCB-containing oil, asbestos, and other hazardous substances.<sup>105</sup> Defendants knew that the collapse of these buildings would release these toxic substances, presenting a grave health risk to all who were exposed.

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<sup>104</sup> See Plaintiffs’ Ex. 63 CITYCM3-0004459.

<sup>105</sup> See Defendants’ Ex. V, Burton Depo., at pp. 49-51.

44. The City, through its agencies, agents and contractors, knew that protection from hazardous particulate matter, fumes and dust was necessary for workers at the WTC Site.<sup>106</sup> The official Report of the City Council Committee on Environmental Protection acknowledged: "In the weeks following the collapse of the Twin Towers, significant quantities of smoke, dust, asbestos, silica, dioxins, polychlorinated biphenyls (PCBs), lead, mercury, cadmium and other heavy metals, furans, volatile organic compounds, poly cyclical aromatic hydrocarbons, benzene<sup>107</sup> and various other potentially hazardous substances were released into the air."<sup>108</sup> However this message was confused by inaccurate *bad faith* reports of safe conditions from top management at the DDC.<sup>109</sup>

45. The Defendants knew that exposure to these harmful substances could cause a plethora of health problems for the WTC workers. For instance, they were aware that exposure to carbon monoxide could cause chronic angina and cardiac dysfunction.<sup>110</sup> They knew that exposure to chromium metal and insoluble salts could cause chronic nasal septum perforation, liver and kidney damage, as well as cancer.<sup>111</sup> Defendants further knew that exposure to Crystalline Silica (as respirable dust) could cause progressive respiratory symptoms, silicosis and

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<sup>106</sup> On September 21, 2001 and October 19, 2001, the City DOH, through the Commissioner of Health, issued two orders. These orders established controls on building use by City personnel and mandated specific protective actions be taken when persons and vehicles left the WTC Site: "It is hereby ordered that all persons leaving the WTC site shall follow personal hygiene protocols, including but not limited to...removal or HEPA vacuuming of work clothes... It is further ordered that all vehicles leaving the WTC site be spray washed... See Plaintiffs' Ex. 64, CITYCM3-00026317-18 and 00041996-97; City DOH Orders of 10/19/01 and 9/21/01. Notably, these protocols were NOT followed or enforced.

<sup>107</sup> See OSHA-NY00045060: "Air samples taken within the plume have contained high mixtures, at times, of compounds like benzene, which has been linked - for long term exposures - to anemia and leukemia."

<sup>108</sup> See Plaintiffs' Ex. 66, CITY CM3-000025293: *Air Quality and Environmental Impacts Due to the WTC Disaster*, December 2001.

<sup>109</sup> "All DDC Personnel should feel confident that they are not being exposed to unhealthy levels of chemicals and that air quality is generally good." See Plaintiffs' Ex. 67, BOVCM3-000001521.

<sup>110</sup> See Plaintiffs' Ex. 68 TURCM3-000000219

<sup>111</sup> See *Id.*

cancer.<sup>112</sup> They knew the exposure to Freon (R-22) could cause cardiac arrhythmia, cardiac arrest and asphyxiation.<sup>113</sup> They knew that exposure to Lead (metallic and inorganic) is linked to decreases in muscle strength, abdominal pain, severe constipation, nausea, vomiting, paralysis of the wrist joint, kidney damage and nervous system disorders.<sup>114</sup> Defendants also knew that exposure to mercury compounds could cause pneumonitis, tremor and gastrointestinal distress.<sup>115</sup> They knew that exposure to PCBs could cause chemical acne, black heads, dark patches on skin, liver damage, digestive disturbances, impairment of the immune system and cancer.<sup>116</sup> In short, the dust and particulate matter in and around the WTC Site was not safe for the Plaintiffs to touch, contact in any way, absorb and ingest as illustrated above.

46. The information about the dangers that actually existed at the WTC Site was not provided to treating physicians or to the rescue, recovery, inspection, repair, or fire, police, or other workers at the site.<sup>117</sup> This failure to inform was an example of the defendants' *not "...in good faith* ("emphasis added") carrying out, complying with or attempting to comply with any law, any rule, regulation or order duly promulgated or issued pursuant to this act... ." A November 2001 report<sup>118</sup> prepared for the National Council of Structural Engineers Associations - Structural Engineering Emergency Response Plan Committee noted that the structural

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<sup>112</sup> *See Id.*

<sup>113</sup> *See Id.*

<sup>114</sup> *See Id.*

<sup>115</sup> *See Id.*

<sup>116</sup> *See Id.*

<sup>117</sup> *See* Plaintiffs' Ex. 69, February 21, 2002 EPA National Ombudsman First Investigative Hearing on WTC Hazardous Waste Contamination. Experts and private citizens testified that the federal government, state government and city government had (1) not been operating in compliance with the laws of the United States, and (2) had been providing the public, firemen and police officers with erroneous information..

<sup>118</sup> *See* Plaintiffs' Ex. 70, "WTC Disaster: *Structural Engineers at Ground Zero*," August Domel, Jr., Ph.D., S.E., P.E., November 2001.

engineers at the WTC site had concerns about environmental contamination at the WTC site.<sup>119</sup> However, the City never addressed these concerns.

47. From the time of the collapse of the buildings on September 11, 2001, and continuously thereafter, Defendants were aware of the danger posed to the FDNY, NYPD and other workers at the WTC Site by exposure to toxins, particulate matter and contaminants in the air and on surfaces. The levels and types of exposures resulting from this mixture of materials, and a smoldering fire that lasted more than three months and reached temperatures as high as 1800° Fahrenheit was unprecedented.<sup>120</sup> The ongoing fires burning at the WTC Site produced a mixture of toxic gasses and ultra-fine particulates. Indeed, air samples taken from a rooftop one mile north of the WTC Site demonstrated “unprecedented ambient levels” of fine particulate matter, sulfur, acidic aerosols, heavy metals, and other dangerous compounds.<sup>121</sup>

48. Shortly after September 11, 2001, tests conducted by the United States Geological Survey (“USGS”) determined that the dust at the WTC Site was highly caustic, with a demonstrated capacity of burning tissue in the throat, eyes, and nasal passages. The dust was determined to have a pH value of 9.0 to 11.0, indicating that the dust was highly alkaline and comparable to ammonia. Some of the dust samples taken by the USGS on September 17-18, 2001, registered higher than 11.0 on the pH scale—this level was as caustic as liquid drain

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<sup>119</sup> See Plaintiffs’ Ex. 71, WTCP/PA - CMO3 - 0000921-22, “Evaluation Report: EPA’s Response to the WTC Collapse: Challenges, Successes, and Areas for Improvement” Report No. 2003-P-00012, August 21, 2003.

<sup>120</sup> See Plaintiffs’ Ex.72, Paul J. Liroy, “Characterization of the Dust/Smoke Aerosol that Settled East of the WTC in Lower Manhattan After the Collapse of the WTC 11 September, 2001,” *Envtl. Health Perspectives* 110(7):703-14 (July 2002), p. 703. Dust and vapors blanketed work site, as well as, the *entire* area surrounding the WTC Site.

<sup>121</sup> See Plaintiffs’ Ex. 73, Thomas Cahill, *et al.*, “Analysis of Aerosols from the WTC Collapse Site, New York October 2 to October 30, 2001.” *Aersol Sci., & Tech.* 38:165-183 (2004) p. 182; Laurie Garrett, “A ‘Chemical Factor’ in Skies,” *New York Newsday* (September 11, 2003). Dr. Cahill took more than 8,000 air samples, starting October 3, 2001, from a rooftop on Varick Street in Manhattan.

cleaners.<sup>122</sup> Days after September 11, 2001, the New York Environmental Law & Justice Project sent dust samples from several lower Manhattan locations to two respected laboratories. One such sample showed a 90% fiberglass content.<sup>123</sup>

49. The City established a so-called “Green Line” of demarcation, a 50-foot perimeter around the portions of WTC Site where highest exposures were anticipated to occur. Air Purifying Respirators ["APRs"] were ostensibly required within the confines Green line; however, if a worker stepped over this arbitrary demarcation, he was no longer required to wear this protection (as if the dust and particulate matter floating in the air would likewise respect the border). Accordingly, respirators were not required outside of the boundaries defined by the green line even though the defendants knew that there was contamination outside.<sup>124</sup> Further, there was no enforcement of respirator usage inside of the "green line." These failures of enforcement were each examples of the defendants' *not “...in good faith* (“emphasis added”) carrying out, complying with or attempting to comply with any law, any rule, regulation or order duly promulgated or issued pursuant to this act... .” Simply stated, there was no enforcement of respirator usage inside or outside of the borders established by the “green line.”

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<sup>122</sup> See Plaintiffs' Ex. 75, Roger Clark, *et al.*, “Environmental Studies of the WTC Area After the September 11, 2001 Attack” (USGS Open File Report OFR-01-0129) (<http://pubs.usgs.gov/of/2001/ofr-01-0429/>>), p.4; Philip Landrigan, M.D., *et al.*, “Heath and Environmental Consequences of the WTC Diaster,” *Envtl Health Perspectives* 112(6):73139, 732 (May 2004), at p.16.

<sup>123</sup> See Plaintiffs' Ex. 75, Roger Clark, *et al.*, “Environmental Studies of the WTC Area After the September 11, 2001 Attack” (USGS Open File Report OFR-01-0129) (<http://pubs.usgs.gov/of/2001/ofr-01-0429/>>), p.4; Philip Landrigan, M.D., *et al.*, “Heath and Environmental Consequences of the WTC Diaster,” *Envtl Health Perspectives* 112(6):73139, 732 (May 2004), at p.16.

<sup>124</sup> See Plaintiffs' Ex. 76, U.S. Environmental Protection Agency (EPA) Daily Summary dated October 1, 2001, OSHA-NY00027143: Community Board 1, which covers Washington Market Community Park located at Greenwich and Chambers Street (near the campus of the Borough of Manhattan Community College in Tribeca), took dust samples in the playground and sandbox and found asbestos-containing material. The community board notified EPA on Friday, September 28, and the New York City Parks Department closed the park. The next day (Saturday) the EPA took additional samples of the playground soil and sand and began cleaning up the park using HEPA filter vacuums. The cleanup operation was completed on Sunday, September 30.

50. Defendants failed to communicate information about the dangers of the WTC Site to the rescue and recovery personnel working there notwithstanding the fact that the City and other defendants knew of reports of illnesses connected to WTC dust exposure. For example, at nearby Stuyvesant High School, well outside of the “green line,” students developed bronchitis, asthma, rashes and coughs as a result of the dust from the WTC. The City learned of this outbreak.<sup>125</sup> The episode, among others, demonstrated that the arbitrarily drawn "green line" did not confine dust and particulate matter to the WTC Site; these contaminants were, instead, affecting respiratory and other health issues as far away as the Stuyvesant High School (located approximately 1/4 mile north of the WTC site). Moreover, even when the City began to receive the earliest reports of respiratory illnesses among rescue and recovery workers, it continued to fail to communicate information about the dangers that actually existed at the WTC Site.<sup>126</sup>

**b. The City of New York Knowingly and Willfully altered or Deleted Testing Results from the USEPA that Would Have Demonstrated the**

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<sup>125</sup> See Plaintiffs’ Ex. 61, Deposition Transcript of Isaac Weisfuse, M.D, September 16, 2005 at p. 92:

Q: Well, Isn’t it true that when Stuyvesant [sic] school opened on October 9<sup>th</sup> in the ensuing days and weeks parents noticed that their children were developing bronchitis, asthma, rashes, and coughs as a result of the dust from the WTC?

A: It’s true that we got reports from parents about that.

<sup>126</sup> See Plaintiffs’ Ex. 61, Weisfuse Depo. at p. 92:

Q: Okay. And if you turn to 40609, the summary of the report on - - on worker surveillance - - surveillance system summary says, “Rescue workers account for 302 (18%) of illnesses and injuries assessed.” Do you see that?

A: Yes, I see that.

Q: Okay, As a matter of fact, of those admitted, the most prevalent diagnostic categories were respiratory: isn’t that correct?

A: I’m sorry, where are you reading from? Yes, wait. Could you just show me where you are reading from?

Q: I’m reading it just to ask the question. But if you look at the second paragraph, the report itself even indicates, “of those admitted the most prevalent diagnostic categories were respiratory.” Do you see that?

A: Yes I see that.

Q: And that was true isn’t that correct?

A: That’s true.

## **Hazardous Conditions Present in and Around the WTC Site after September 11, 2001.**

51. According to one EPA official, the City deliberately concealed, altered, falsified and deleted data showing asbestos levels that both EPA and NYC declared unsafe.<sup>127, 128</sup> The City had two different versions of its air monitoring data with discrepancies between the two versions.<sup>129</sup> The reasons for doing such are addressed throughout this statement, and illustrate the *bad faith* conduct of all Defendants.

52. In the aftermath of September 11, 2001, the EPA and City “determined” that a “hazardous level of asbestos” was 70 structures per square centimeter (70 s/mm<sup>2</sup>).<sup>130</sup> That level (70 s/mm<sup>2</sup>) is not consistent with established EPA standards, and allows a level of contamination that is unsafe for human exposure.<sup>131</sup> The NYC Department of Environmental Protection [“DEP”] concealed its own electron microscope (TEM) air asbestos data for many months after the WTC collapse. When the data was ultimately released, DEP had deleted and altered significant high readings.<sup>132</sup>

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<sup>127</sup> See Plaintiffs’ Ex. 22 USEPA July 15, 2004 Introduction to Memorandum from Cate Jenkins, Ph.D., to EPA IG WTC Team [“Jenkins Memo”]. This document has no Bates stamp reference number. Dr. Jenkins is an Environmental Scientist in the Waste Identification Branch, Hazardous Waste Identification Division of the EPA’s Office of Solid Waste.

<sup>128</sup> While we will include URLs here that are noted in Dr. Jenkins’ Memorandum for referenced documents, we have noted that many of the URLs she provided are no longer viable.

<sup>129</sup> See Plaintiffs’ Ex. 22 USEPA July 15, 2004 Memorandum by Cate Jenkins, Ph.D., at p. 2.

<sup>130</sup> See <http://nyc.gov/html/doh/html/public/testi/era1126.html>, Leighton, J. (November 27, 2001) Remarks of Jessica Leighton, Ph.D. ... before the New York State Assembly Standing Committee on Environmental Conservation, Standing Committee on Health and Standing Committee on Labor. :

The standards or tolerance levels that are being used to evaluate the environmental tests are very conservative. For example, no outdoor air standards are available for asbestos. Thus, early on, the agencies jointly decided to use the most conservative standard available -- the standard that is required for re-entry into schools after asbestos removal.

<sup>131</sup> See Plaintiffs’ Ex. 22 Jenkins Memo, at p.2.

<sup>132</sup> See Plaintiffs’ Ex. 22 Jenkins Memo, at p.3.

53. The City started testing asbestos levels in the air on September 12, 2001.<sup>133</sup> As laboratories provided priority service as part of the September 11th response, these results would have been available to the City within a few hours of the testing completion. Couriers delivered the samples to the lab and those couriers often waited for the results to convey them back to their superiors.<sup>134</sup> The City would also have conveyed the results of this testing to the EPA. The City initially gave its data to the New York State Department of Environmental Conservation [“DEC”]. Thereafter, DEC transferred the data to an outside party in their November 13, 2001 response<sup>135</sup> to a Freedom of Information Law (FOIL) request, which also provided data from OSHA, Con Edison, NIOSH and other agencies.<sup>136</sup>

54. Sometime before or during early 2002, the City posted another version of its TEM asbestos data on its DEP website. Earlier, by October 24, 2001, the City posted PCM (light microscope) asbestos air data on its website.<sup>137</sup> There was no indication at that time that the TEM electron microscope data even existed.<sup>138</sup> The TEM results were the only ones related to EPA’s and the City’s stated health benchmark of 70 s/mm<sup>2</sup> for the WTC disaster.<sup>139</sup> The original version of the data at issue, from September 12, 2001 and September 29, 2001, demonstrates that 52% of the City’s TEM tests were either over or presumed to be over 70 s/mm<sup>2</sup>.<sup>140</sup> There were

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<sup>133</sup> *Id.*, at p. 3 correcting a reference in Dr. Jenkins’ lengthy report of July 4, 2003 that stated this testing had started on September 14, 2001.

<sup>134</sup> *Id.*, at p. 3.

<sup>135</sup> The entire response is at: <http://www.nyenvirolaw.org/PDF/DEC-WTC-monitoringDATA.pdf>

<sup>136</sup> See Plaintiffs’ Ex. 22 Jenkins Memo, at p.3.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* According to Dr. Jenkins, the 10/24/01 archived version of the NYC DEP website showing asbestos levels did not provide any TEM asbestos data whatsoever. See [www.archive.org](http://www.archive.org). Only the PCM light microscope data was given. Dr. Jenkins writes that this is also true for the NYC DEP web data that was captured by [www.archive.org](http://www.archive.org) on 11/7/01 and 2/2/02.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

87 outdoor air tests reported over this time period. Of these tests, the samples for which were taken up to ten blocks away from the WTC site, 45 were either over 70 s/mm<sup>2</sup> (16 tests) or classified as “overload” (29 tests).<sup>141</sup> Even if the “overload” results are ignored, this means that 18% of the 87 tests (16 out of 87) between September 12, 2001 and September 29, 2001 were over 70 s/mm<sup>2</sup>.<sup>142</sup>

55. Contrasting with the foregoing, the EPA claimed in its October 3, 2001 press release that only 6% (27 out of 442) air samples *in the immediate vicinity* of “Ground Zero” were over 70 s/mm<sup>2</sup>.<sup>143</sup> It just so happens that the City altered six of the original test results that showed asbestos over 70 s/mm<sup>2</sup>.<sup>144</sup> The City altered the data by either deleting the sampling location and accompanying data altogether, claiming that no asbestos was found (below the detection limit) or claiming that there were no TEM tests at the particular location for that day.<sup>145</sup> NYC altered 11 of the results that were overloaded.<sup>146</sup> Such samples are presumptive of concentrations over 70 s/mm<sup>2</sup>. This data was altered, the City claiming that there was no asbestos found in the data (below the detection limit) or that there were no TEM tests at the particular location for that day.<sup>147</sup>

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<sup>141</sup> *Id.* at pp. 3-4; According to an appendix annexed to Dr. Jenkins’ July 15, 2003 Memo, a sample result designated as “overload” should be presumed to be higher than 70 s/mm<sup>2</sup> for two reasons. The first, because “overload” means that there was such an excess of particulate material on the collection device that the laboratory could not even make a reading, meaning that there was a high level of all particulates, including asbestos. Secondly, whenever there were “overload” results from the TEM tests in early days, the corresponding tests at the same location using a light microscope (PCM) were much higher than the PCM levels where asbestos was verifiably over 70 s/mm<sup>2</sup>.

<sup>142</sup> *Id.*, at p. 4.

<sup>143</sup> *Id.*, (*Emphasis in the original*).

<sup>144</sup> *Id.*, at p. 4 and in appendix table.

<sup>145</sup> *Id.*, at p. 4.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

56. The City *also* altered test results where asbestos was found in the air, but at levels lower than 70 s/mm<sup>2</sup>. The City, as well as EPA, claimed that there were no detectable asbestos levels in most instances.<sup>148</sup> The altered version of the City data claimed that these levels were either “not detectable” (below the detection limit) or claimed that there were no TEM tests at the particular location for that day.<sup>149</sup> The City tests using TEM on September 12, 2001 included air samples from as far away as 10 blocks north and northeast from the perimeter of Ground Zero. Although very high levels of asbestos were found in the samples on the day after the WTC attack, NYC never returned to those locations for subsequent testing samples.<sup>150</sup>

57. The following changes were made from the original samples to the 2002 data posted on the City website:

- a) From a sample taken at Centre and Chambers streets (7 blocks northeast of the WTC perimeter, east of Broadway), the level of 123.73 s/mm<sup>2</sup> was deleted in the City web version;<sup>151</sup>
- b) From a sample taken at Spruce & Gold Street (7-8 blocks northeast of WTC perimeter, east of Broadway), the level of 157.48 s/mm<sup>2</sup>, as well as the sampling location, was deleted in the City web version;<sup>152</sup>
- c) From a sample taken at Greenwich & Chambers Streets (5 blocks north of the WTC perimeter), a sample that was designated as “overload” was included in the 2002 version of the data.<sup>153</sup>

City did not only delete the sampling data because it demonstrated high levels of asbestos contamination. Samples demonstrating contamination east of Broadway or north of Warren

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<sup>148</sup> *Id.*, at pp. 4-5.

<sup>149</sup> *Id.*, at p. 5.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

Street were also deleted, because the City was actively concealing the fact that any contamination from the WTC site had gone east of Broadway or north of Warren.<sup>154</sup>

58. A September 17, 2001 City advisory from the DOH (September 17, 2001) entitled “Health Department Offers Recommendations For Individuals Reoccupying Commercial Buildings and Residents Re-Entering Their Homes” explicitly -- and falsely -- stated that there were no contamination concerns outside of the Broadway/Warren Street boundaries:

If you were evacuated from a residence or workplace *south of Warren Street, west of Broadway, and north of Exchange Street*, and have been approved to resume tenancy by your building manager, you are advised to wear a dust mask upon entering this area to decrease the possibility of dust inhalation and throat irritation. Outside these boundaries, masks are not necessary, but may be worn for your own comfort. If there is dust present indoors, it should not be necessary to wear this mask if you follow the cleaning procedures detailed below ... . (Emphasis added).

Early EPA data corroborates the City findings of high levels of asbestos contamination further north from Ground Zero.

59. Air monitoring was conducted at the EPA Region 2 building in THE CITY (6 blocks northeast of the perimeter of WTC). EPA falsely claimed in a press release and other statements to the press that they were not concerned about the results of the air monitoring at the EPA Region 2 building in THE CITY.<sup>155</sup> This testing found significant levels of asbestos, although not over EPA’s 70 s/mm<sup>2</sup> standard at the time.<sup>156</sup> EPA’s response at its own building establishes that it found the resulting levels of asbestos to be significant indicators of

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<sup>154</sup> *Id.*, at p. 6.

<sup>155</sup> *Id.*, at p. 6

<sup>156</sup> Dr. Jenkins refers to Section “N” of her 7/4/03 report for documentation of how these levels triggered an evacuation and professional cleaning of the EPA building the week after 9/11, while at the same time, EPA was telling the press that there were no problems at the EPA building. *See Id.*, at p. 6, and report “A Documentary Basis for Litigation” by Cate Jenkins, Ph.D., at pp. 241-250.

contamination by WTC dust.<sup>157</sup> The original City data represented the actual hazards existing after September 11, 2001 -- irrelevant of whether later made alterations and deletions were clerical or the result of a “more careful examination of the data.”<sup>158</sup>

60. Statements made by EPA on September 13, 2001<sup>159</sup> and on September 14, 2001<sup>160</sup>, to the effect that either no asbestos was found or that asbestos detected was below levels of concern, were the opposite of what the CITY testing data demonstrated.<sup>161</sup> Statements made in mid-September 2001 by the EPA regarding the relative safety of the air quality in lower Manhattan was not supported by actual sampling data obtained by CITY testing. EPA had ample documentation to demonstrate that EPA had the CITY testing data as it was being generated. Result of asbestos air monitoring tests were available within hours of the individual tests being completed.<sup>162</sup> While EPA initially stated that they were coordinating their asbestos air testing efforts with the City in their September 14, 2001 “Daily Summary...”<sup>163</sup>, and again in their

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<sup>157</sup> See Plaintiffs’ Ex. 22 Jenkins Memo at p. 7.

<sup>158</sup> *Id.*

<sup>159</sup> “Monitoring and sampling conducted on Tuesday and Wednesday have been very reassuring about potential exposure of rescue crews and the public to environmental contaminants. EPA’s primary concern is to ensure that rescue workers and the public are not exposed to elevated levels of asbestos, acidic gases or other contaminants from the debris. *Sampling of ambient air quality found either no asbestos or very low levels of asbestos. ... Additional sampling of both ambient air quality and dust particles was conducted Wednesday night in lower Manhattan and Brooklyn, and results were uniformly acceptable.* ‘...EPA is greatly relieved to have learned that there appears to be no significant levels of asbestos dust in the air in New York City,’ said Administrator Whitman.” See [http://www.epa.gov/WTC/stories/headline\\_091301.htm](http://www.epa.gov/WTC/stories/headline_091301.htm) EPA Press release, September 13, 2001, emphasis added.

<sup>160</sup> “The U.S. Environmental Protection Agency and the Department of Labor’s Occupational Health and Safety Administration today announced that the majority of air and dust samples monitored at the crash site and in Lower Manhattan *do not indicate levels of concern for asbestos.* ... New OSHA data also indicates that indoor air quality in downtown buildings will meet standards. ‘Our tests show that it is safe for New Yorkers to go back to work in New York’s financial district,’ said John L. Henshaw, Assistant Secretary of Labor for OSHA. ...” See [http://www.epa.gov/WTC/stories/headline\\_091401.htm](http://www.epa.gov/WTC/stories/headline_091401.htm) EPA Press Release, September 14, 2001, emphasis added.

<sup>161</sup> *Id.*

<sup>162</sup> The September 15, 2001 “Daily Summary ...” by EPA stated: “EPA has established nine permanent air monitoring station [sic] in and around ground zero. These monitors are taking samples in 12-hour intervals and are being tested for asbestos. Samples have been sent to a lab, and results are expected late morning. ...” See Plaintiffs’ Ex. 22 Jenkins Memo, July 14, 2004, at fn. 15.

<sup>163</sup> Jenkins Memo at p. 11 and fn. 16, referring to scanned documents at [www.NYenviroLAW.org](http://www.NYenviroLAW.org)

September 18, 2001 press release<sup>164</sup>, subsequent “Daily Summar[ies]...” only described EPA and CITY joint sampling efforts for dioxins, water and other environmental media, and were silent about any coordination with the City on air asbestos testing.

61. EPA and the City concealed, altered, and deleted data showing asbestos after the collapse of the WTC towers. Neither admitted that either residents or workers were being exposed to levels over their standard of 70 s/mm<sup>2</sup>. Neither advised residents or workers to evacuate as a precaution until assured that no person would be exposed to hazardous levels of asbestos contamination.<sup>165</sup> Contrasting efforts taken in New York after September 11, 2001, upon a finding of asbestos contamination as high as 99 s/mm<sup>2</sup> in the United States Senate chamber on or about July 7, 2004, the chambers were evacuated, including press gallery and cloakrooms.<sup>166</sup>

**c. Although The City And Its Contractors Had The Resources To Properly Assess The Dangers Inherent To The Work Site And To Properly Implement And Enforce Work Site Regulations To Protect Workers' Health, Those Resources Were Either Under-Utilized or Disregarded.**

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62. Armed with the knowledge that the WTC site was essentially a huge hazardous waste field, the City assembled a team of engineers and construction companies who were involved in the construction of the towers to determine what was in the buildings that could lead to hazardous conditions at the site.<sup>167</sup> The City subcontracted Bechtel Corporation to assess

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<sup>164</sup> Press releases are available at [www.EPA.gov](http://www.EPA.gov) under “Newsroom.”

<sup>165</sup> Jenkins Memo at p. 12.

<sup>166</sup> *Id.* at p. 13 and fn. 18, Associated Press, July 7, 2004, “Senate Rooms to Reopen After Cleanup.” The same Associated Press Report reportedly stated: “Tests in the chamber found readings as high as 99 structures per square millimeter. Federal law considers anything above 70 to be a problem.”

<sup>167</sup> “I reached out to numerous people in the industry. At the same time Ken Holden was also doing a parallel effort of reaching out to people with the industry. We-between Ken and myself, we assembled probably a team of about 14 people that we thought would be needed just to do an assessment of how - - how we could help the firefighters.” *See* Defendants’ Ex. V Depo. of Michael Burton, September 8, 2005 at p. 33.

hazards at the site and develop an environmental safety and health plan for the WTC site soon after the towers collapsed on September 11, 2001.<sup>168</sup> <sup>169, 170</sup>

63. Working with the City, Bechtel developed two preliminary Environmental Health and Safety Plans for the site.<sup>171</sup> After the first week, Bechtel's involvement at the site was minimized by the City as AMEC, Bovis, Turner, and Tully pressured the City to remove Bechtel from the WTC project. These contractors feared that Bechtel was using the debris removal operation as an opportunity to enter the CITY construction market. Each contractor, as well as the City's DDC, lobbied against Bechtel remaining at the site.<sup>172</sup> Accordingly, Defendants willfully ignored Bechtel's advice on health and safety so as to undermine their effectiveness and

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<sup>168</sup> "An overall site assessment for environmental safety and health (ES&S) concerns was conducted by Bechtel ES&H personnel on 9/19/01" See Plaintiffs' Ex. 77, WTC Site Evaluation at CITYCM3-00075041.

<sup>169</sup> See Testimony before the Environmental Committee of the New York City Council on the Public Health Concerns Resulting From Exposures in the Wake of the Collapse of the WTC Towers, See OSHA-NY00042920

<sup>170</sup> "Bechtel has been awarded a 90-day contract to develop the WTC Disaster Project Environmental Safety and Health Plan." See Plaintiffs' Ex.63, CITYCM3-0004459.

<sup>171</sup> Bechtel circulated two draft WTC Emergency Project Environmental Safety and Health Plans. See OSHA-NY00042921

<sup>172</sup> See Defendants' Ex. V, Burton Depo., p. 130:

Q: Was it Bechtel backed out or was it that Bechtel was forced out at that point?

A: They clearly wanted a more excited role. There was consideration given to expanding their role. It was actually discussed with - - with City Hall, with Ken Holden, with regard to what an expanded role would mean. The - at that point in time I would say the - - we had gotten to a point where order - - some semblance of order or had been established, or I should say some significant progress is probably a better way to categorize it, in reducing some of the risks that were there from the original - the original days of the 9/11 attack. They ended up soliciting an unsolicited proposal to City Hall, as I recall. Or possibly Ken, may have gone directly to Ken Holden, I'm not actually sure who it was addressed to. We reviewed that proposal, and jointly with City Hall we came to the concurrence, that we would ask the other four remaining contractors to submit a - another proposal, an alternative proposal, and also to give Bechtel additional time to submit a proposal to see who would be the best team to move forward. There definitely was some concerns about switching, if there was a switch, losing consistency, and what that would do potentially safety issues. There was an evaluation done by a committee, and they chose to retain the four contractors that were still there.

force Bechtel out of the job.<sup>173</sup> Bechtel reported the safety discrepancies they observed to Michael Burton of the City's DDC,<sup>174</sup> however, these reports were wholly ignored.

64. The City and its contractors were more concerned with preventing Bechtel from getting a foothold in the New York City market through its work at the WTC site, and with profits, than with the need to adequately assess and ameliorate the hazardous conditions at the site.<sup>175</sup> In fact, the New York City DDC deliberately refused to supply labor representatives with copies of Bechtel's preliminary plans and refused to permit them to participate in the safety and health program development process.<sup>176</sup> Numerous reports and minutes from meetings at the site demonstrate that Bechtel's input regarding environmental safety and health issues were being intentionally and willfully ignored.<sup>177</sup> In fact, attempts by Bechtel employees to enforce safety and health regulations were willfully and intentionally disregarded by the contractors. Each such failure to adhere to and follow established safety protocol was a further example of the defendants' not "...in *good faith carrying* ("emphasis added) out, complying with or attempting to comply with any law, any rule, regulation or order duly promulgated or issued pursuant to this act... ." Bechtel officially left the WTC site as late as November 7, 2001.<sup>178</sup>

65. At the time Bechtel left the WTC site, nearly two months after September 11, 2001, there was still no evidence or even suggestion that any safety and health program was

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<sup>173</sup> See Plaintiffs' Ex. 79, PA-CMO3-000550, wherein a contractor supervisor willfully dismissed a safety issue raised by Bechtel.

<sup>174</sup> See Plaintiffs' Ex. 80, CITYCM3-00064121

<sup>175</sup> See Plaintiffs' Ex. 81, FEMA-NY00093063.

<sup>176</sup> See OSHA-NY00042923

<sup>177</sup> See Plaintiffs' Ex. 82 and 83 CITYCM3-00041176; CITYCM3-00041179; and CITYCM3-00021958; these memoranda document Bechtel's attempts to implement and enforce a site health and safety plan and the lack of compliance by the City's contractors.

<sup>178</sup> See Plaintiffs' Ex. 83, WTCP-PA-CMO3-0002572.

operative at the site, indeed the very opposite seemed to be the case.<sup>179</sup> The lack of an operating safety and health program was confirmed by workers at the WTC site and various governmental officials.<sup>180</sup> Furthermore, by the time Bechtel left the WTC site, despite the known presence of hazardous substances, all agencies involved with debris removal have acknowledged that virtually none of the people working at the WTC site were or have been wearing any personal protective equipment.<sup>181</sup>

66. When Bechtel left the site, its role was transferred to Liberty Mutual.<sup>182</sup> At the time Liberty Mutual assumed the role of Bechtel, they had only one employee per shift per day.<sup>183</sup> The DDC was critical of Liberty Mutual's lack of participation during this transition period.<sup>184</sup> Therefore, in early January the responsibility to enforce environmental health and safety was transferred to Bovis.<sup>185</sup> This transition was not apparent and totally confusing to the workers at the WTC site.<sup>186</sup> Internal memoranda from Liberty Mutual and the DDC noted that Bovis had not "stepped up and assumed the role that DDC EHSS transferred to them."<sup>187, 188, 189</sup>

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<sup>179</sup> See OSHA-NY00042921

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See Plaintiffs' Ex. 85, CITYCM3-00023601.

<sup>183</sup> See Plaintiffs' Ex. 86, OSHA's WTC memorandum of October 27, 2001, OSHA-NY00044496.

<sup>184</sup> See Plaintiffs' Ex. 84, Memo From Phil Taylor of the Port Authority of New York and New Jersey dated October 25, 2001, PA-CMO3-0000558

<sup>185</sup> See Plaintiffs' Ex. 87, CITYCM3-00019356.

<sup>186</sup> *See Id*

<sup>187</sup> Plaintiffs' Ex. 88, CITYCM3-00022013, Memorandum from John Rabovsky, Liberty Mutual Technical Director, to Bob Adams, DDC Director of Environmental Health & Safety Services: "As we discussed, the Bovis CM role will also include greater oversight and responsibility for project-wide safety. While our experience with the Bovis safety team has generally been good, we have seen an alarming drop in the level of safety awareness and compliance in the past week. ...we are concerned that the Bovis safety team be given the appropriate levels of authority it will need to implement timely safety decisions."

<sup>188</sup> Plaintiffs' Ex. 89, CITY CM3-00023484, Memorandum dated February 13, 2002 from Michael Burton to Bob Adams at Environmental Health and Safety Services. The Memorandum continued, stating:

No uniform safety enforcement was performed, nor were Bovis supervisors readily available for abatement of corrective actions.<sup>190</sup> Bovis authority reached as far as having the ability to stop the work at the site if necessary, however, this authority was not used.<sup>191</sup> Bovis along with AMEC agreed to ensure that all workers receive the required and mandatory training as specified in Section 1.7 of the ESHP.<sup>192</sup>

67. On September 12, 2001, the CITY DOH, not the federal government, established a surveillance system to monitor the health and condition of those working at the WTC Site.<sup>193</sup>  
<sup>194</sup> The City DOH had the responsibility of fitting the masks and respirators to thousands of WTC Site workers.<sup>195</sup> The DOH started to provide respirators in the immediate aftermath of September 11, 2001.<sup>196</sup>

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Last Friday, Bruce Rottner chaired the Agency Site Safety Meeting. The overwhelming consensus of many parties (e.g., OSHA, FDNY, Liberty Mutual, etc.) is that the safety job is not getting done. Minutes from this meeting summarize this concern..."Universal opinion is that there is a lack of commitment by senior project management to address safety concerns in a timely manner, and hold the supervision accountable."

<sup>189</sup> See Plaintiffs' Ex. 90 CITYCM3-00022012, a Memorandum from Bruce Rottner to Michael Burton dated January 3, 2002: "As the transition progresses it has become apparent that there is a lack of commitment to assume leadership of Environmental, Safety and Health (ESH) programs by the Bovis -AMEC team. Without a strong commitment from both the Bovis - AMEC safety professionals as well as their management, there is little expectation that the programs will continue successfully without a significant presence by DDC-EHSS.

<sup>190</sup> *Id.*

<sup>191</sup> See Plaintiffs' Ex. 91, WTC Emergency Partnership Agreement Between OSHA and Bovis/AMEC OSHA-NY00043892

<sup>192</sup> *See Id.*

<sup>193</sup> See Plaintiffs' Ex. 61 Weisfuse, Depo.at pp. 42-43.

<sup>194</sup> *Id.*, at p. 44.

<sup>195</sup> See Plaintiffs' Ex.112, September 11<sup>th</sup> and Shifting Priorities of Public and Population Health in New York; *see also*, Plaintiffs' Ex. 61, Weisfuse Depo at p. 85.

<sup>196</sup> See Plaintiffs' Ex. 61, Weisfuse Depo at pp. 22

**d. The City Was Responsible For The Workers' Health and Safety; Although The City Created An Environmental Health and Safety Plan, The Plan Was Neither Enforced Nor Properly Disseminated To The Workers At the WTC Site.**

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68. In early October, 2001, the DDC and Bechtel reduced to writing the WTC project Environmental Health and Safety Plan (EH&S Plan). The EH&S Plan of October 15, 2001 was circulated and signed by Calvin Drayton of the Mayor's Office of Emergency Management,<sup>197</sup> Kelly McKinney of the NYC Department of Health,<sup>198</sup> Robert C. Adams CIH, CSP the WTC Emergency Project EH&S Director,<sup>199</sup> and Mary M. Plaskon of the PA.<sup>200</sup> The EH&S plan required full compliance with all environmental and occupational safety and health laws and regulations, establishing OSHA regulations as a minimum level of compliance for all entities working in the debris removal and recovery efforts.

69. Failure to review the EH&S plan demonstrated *bad faith and a willful disregard* for the safety and health of all employees and all workers who were lawfully present in any work area. The terms of the EH&S Plan were mandatory for all contractors, sub-contractors, City agencies, uniformed services, federal employees at the site, the PA, the WTC defendants, and any other person who entered the project's boundaries.

70. The EH&S Plan mandated compliance with OSHA regulations for all contractors. The EH&S Plan required contractors and governmental agencies alike to abide by all local, state, and federal safety and health laws. However, the City never effectively implemented the plan. The DDC failed to advise the defendants of the EH&S Plan. For example, William Ryan, the Corporate Safety and Health Director for Tully Construction and all Tully entities testified that

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<sup>197</sup> See Plaintiffs' Ex. 92 PA-CMO3-0000049

<sup>198</sup> See *Id.*

<sup>199</sup> See *Id.*

<sup>200</sup> See *Id.*

he never even read the EH&S plan.<sup>201</sup> Three and a half years after the fact, William Ryan did not even know whether the EH&S plan was adopted and in fact, testified that the plan was never adopted while Tully was working on the site.<sup>202</sup> Mr. Ryan testified that Tully's workers were never trained in the EH&S plan.<sup>203</sup> In fact, the same scenario existed for all contractors.

71. In addition to the DDC and its EH&S Plan, other City agencies, including the DOH, also issued requirements for PPE.<sup>204</sup> As of March 2002, the DDC committed "to continue to oversee safety health and environmental issues to ensure that those working at the WTC remain safe and healthy."<sup>205</sup> From September 11, 2001 through June 30, 2002, the DDC continuously oversaw environmental health and safety issues for workers at the WTC Site, further exemplifying the City's control.<sup>206</sup>

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<sup>201</sup> See Defendants' Ex. AE, William Ryan Depo. at p. 260

Q. And what is that understanding based on?

A. Based on had he signed this and if it was presented to me that it was 100 percent accepted and you will follow this plan, then I would have done training on it.

Q. Did you ever read each and every page of this plan?

A. No.

Q. So how did you know your plan was sufficient in relation to this plan?

A. Well, I know that this plan is derived from my plan, in that the very first days of the project, they collected my plan and they said they were going to do a compilation of the four plans and produce this plan.

Q. Weren't you -- weren't you -- didn't you have any interest in seeing if this plan covered some issues that your plan did not?

A. My issue was that the plan is for the moment. And the WTC was such a constantly changing environment, that you would have to amend this plan every week.

<sup>202</sup> See Defendants' Ex. AE, William Ryan Depo. at p. at pp. 256-258.

<sup>203</sup> *Id.*, at p. 260: " A. Based on had he signed this and if it was presented to me that it was 100 percent accepted and you will follow this plan, then I would have done training on it."

<sup>204</sup> For example, on October 22, 2001, the DOH issued the following directive: "Personal Protective Equipment Required in Debris Area: Hardhat or helmet; Respirator (half-face reusable) with P100/organic vapor/acid gas (OVAG) filter cartridges)." See Plaintiffs' Ex.97, CITYCM3-00007286.

<sup>205</sup> *Id.*

<sup>206</sup> See Plaintiffs' Ex. 98, CITYCM3-00041296: October 11, 2001, E-mail from Benjamin Mojica, then Deputy Commissioner of the City DOH: "We need to enforce this plan, as no other agency is responsible or able to

72. An organizational chart, included in the DDC's EH&S Plan, depicts the DDC at the very top of a complex hierarchy of agencies and contractors charged with health and safety oversight, strong evidence of the City's lead role and control of the operation.<sup>207</sup> The City ostensibly required that all construction managers, general contractors, prime contractors and subcontractors report non-compliance with the EH&S Plan, as well as all unsafe work practices or incidents, to the DDC.<sup>208</sup> Further exemplifying control by the DDC is the fact that the EH&S Plan vested the City agency with the power to stop work in the event of workplace hazard.<sup>209</sup> The DDC's power to stop work was reiterated in public statements made by Lou Mendez of the agency during one of many meetings held during the WTC debris removal operation.<sup>210</sup> *The DDC never utilized its authority to stop work.*

73. In violation of OSHA regulations, made mandatory by the EH&S Plan, defendants failed to verify that workplace hazard assessment had been performed through a written certification identifying: a) the location of the workplace evaluated; b) the person certifying that the evaluation had been performed; and c) the date(s) of the hazard assessment.<sup>211</sup> Defendants allowed defective or damaged personal protective equipment to be used, an additional violation.<sup>212</sup> They also failed to provide adequate training for employees required to

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do so." Similarly, the City was responsible for monitoring and enforcing the use of Personal Protective Equipment at the WTC Site.

<sup>207</sup> See Plaintiffs' Ex. 100, CITYCM3-00041687.

<sup>208</sup> See Plaintiffs' Ex. 102, CITYCM3-00041706.

<sup>209</sup> "1.3.3-Stop Work Authority - Any DDC ES&H officer has the authority to stop work in imminent danger situations, or in any situation deemed unsafe or unhealthful to those working on the site." See Plaintiffs' Ex. 100, CITYCM3-00041687.

<sup>210</sup> See Plaintiffs' Ex. 101, DVD film: "Bovis Lend Lease WTC Recovery;" previously marked as Burton Exhibit 5.

<sup>211</sup> OSHA 29 CFR 1910.132 (d)(2)

<sup>212</sup> OSHA 29 CFR 1910.132 (e)

use PPE.<sup>213</sup> Among defendants' violations of EH&S-mandated regulations was their failure to train recovery workers: (i) when PPE is necessary; (ii) what PPE is necessary; (iii) how to properly don, doff, adjust and wear PPE; (iv) the limitations of the PPE; and (v) the proper care, maintenance, useful life and disposal of the PPE.<sup>214</sup>

74. Defendants violated the New York State Labor Law by failing to provide for the reasonable and adequate protection of the lives, health and safety of all persons they employed at the WTC Site or of those persons lawfully frequenting the WTC Site.<sup>215</sup>

75. In January 2002, worker health and safety at the WTC Site was a secondary or even a tertiary concern as compared to the speed of debris removal.<sup>216</sup> If supervisors from other agencies were approached regarding abatement actions for worker health and safety issues, typical responses were to "tell Bovis" or "that's Bovis' responsibility."<sup>217</sup> As of January 2002, as few as 20% of workers wore the required respiratory protective equipment at the site.<sup>218</sup> This low compliance rate of respirator usage is a direct result of the general contractor's failure to provide enough safety officers on site.<sup>219</sup> For example, it was noted in January 2002 that Tully did not have a safety officer on site for several days.<sup>220</sup> In an intra-agency memo from Bob Adams of the DDC to Deputy Commissioner Michael Burton, Adams wrote, "generally discussion followed that there is a minimal follow-through by project management on safety. Universal opinion is that there is a lack of commitment by senior project management to address

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<sup>213</sup> OSHA 29 CFR 1910.132 (f)

<sup>214</sup> OSHA 29 CFR 1910.132 (f)

<sup>215</sup> New York State Labor Law § 200.

<sup>216</sup> *See* Plaintiffs' Ex. 89, CITYCM3-00023484.

<sup>217</sup> *See* Plaintiffs' Ex. 87, CITYCM3-00019356- CITYCM3-00019358.

<sup>218</sup> *See Id.*

<sup>219</sup> *See Id.*

<sup>220</sup> *See Id.*

safety concerns in a timely manner, and hold the supervision accountable. *Project appears to only address safety issues when convenient for the schedule of the project.*<sup>221</sup>

76. There was minimal follow-through by project management on safety at the WTC Site. Universal opinion at the WTC Site was that there was a lack of commitment by senior project management to: A) address safety concerns in a timely manner; and B) hold the supervision accountable. The City, the DDC and the contractors appeared to only address safety issues when doing so was convenient for the schedule of the project.

77. Although the City and its contractors learned of many safety breaches at the WTC Site, the reports of low compliance rates of respiratory PPE use were perceived to be nothing more than “background noise” by the defendants.<sup>222, 223</sup> PA Police Department supervisors were noted to be non-compliant with usage of respirators.<sup>224</sup> Safety representatives also recognized non-compliance with respirator use by members of the upper management of the contractors -- noting that this non-compliance "sends a bad message to employees."<sup>225 226</sup>

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<sup>221</sup> See Plaintiffs' Ex. 89 CITYCM3-00023484.

<sup>222</sup> See Plaintiffs' Ex. 103 PA-CMO3-0000808, (emphasis in original) Plainly, the City was aware of the decline in respiratory compliance. In a Memorandum dated January 3, 2002 from Bruce Rottner to DDC Field Staff, Rottner wrote: "DDC-EHSS has observed a considerable decline in the use of respirators within the debris filed. Current estimates are approximately 29% compliance. DDC needs to set the example for complying with our own policies. In order to effect change onsite, we request all of your cooperation." .

<sup>223</sup> See Plaintiffs' Ex. 104 CITYCM3-00062037, Memorandum dated December 16, 2001 from Robert Adams at DDC to Michael Burton: "It is clear to me that the current Public Agency Safety Inspection and Reporting process is no longer effective and I am planning to amend how we handle this going forward. We are getting virtually no reaction from agency management receiving our daily reports. I believe these reports are nothing more than background noise during this period of transition."

<sup>224</sup> See Plaintiffs' Ex. 105 Correspondence April 10, 2002, from Bruce Rottner at DDC to Allan Hicks at the Port Authority. CITYCM3-00016573, stating in relevant part: "It is unfortunate that this was allowed given the fact that the PAPD Safety Officer, Lt. Ryan, escorted the film crew. Lt. Ryan did eventually put on his PPE as indicated in one of the photographs. Although it is unfortunate, it is not entirely unexpected since compliance with the PPE requirements by uniformed services, which includes the PAPD was at 28% for respirators and 21% for eye protection for the week of 3-25-02 through 3-20-02."

<sup>225</sup> See Plaintiffs' Ex. 157 OSHA-NY00061325.

<sup>226</sup> Robert Adams, the Head of Health and Safety for DDC, reported that a supervisor from one of the prime contractor[s] questioned a DDC inspector saying "why are we going to follow OSHA rules now since we haven't

**e. The City, Its Agencies and The Contractors Advised the Workers That Conditions In and Around The WTC Site Were Safe -- Resulting In Minimal Compliance By The Workforce With Respirator Usage and Other Protective Equipment/Safety Practices.**

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78. All construction managers, general contractors, prime contractors and subcontractors were required to report worker health complaints to the City DOH. The EH&S Plan mandated that "all exposure data shall be provided to DOH who will provide a report to the DDC EH&S Director."<sup>227</sup> The City and its contractors were responsible for compliance with all of the applicable federal, state and local statutes and regulations relating to worker safety.<sup>228</sup>

79. The New York City Department of Environmental Protection ["NYDEP"] also conducted numerous tests on an ongoing basis, determining that the air at and around the WTC Site was contaminated with toxic contaminants. The Associate Commissioner of Regulatory and Environmental Health Services for the City *discounted* testing results that appeared to show safe air quality at the Trade Center site.<sup>229</sup> The City DOH knew that even though test results may have looked good the air was contaminated. Although DOH determined communicating

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followed them so far, why should we start now." See Plaintiffs' Ex. 107 OSHA-NY00046451, relating to fall protection, but demonstrating the general attitude toward safety and regulatory compliance by the Contractors.

<sup>227</sup> See Plaintiffs' Ex.109, CITYCM3-00041712.

<sup>228</sup> See Plaintiffs' Ex. 110, CITYCM3-00030568 - CITYCM3-00030657DDC revised draft of the contracts with the four primary contractors dated October 11, 2001, indicating that: "2.2 The Contractor shall comply with *all local, State and Federal laws, rules, regulations and orders* issued pursuant to any Emergency Declaration applicable to this Agreement and to the work to be done hereunder. ... the Contractors further agree to indemnify the City of New York for any work related injuries and are provided with a general liability policy." (Emphasis added).

See Plaintiffs' Ex. 111, CITYCM3-00009918 - CITYCM3-00009919. The City's documents expressly state that "All work performed must be in compliance with appropriate regulations from EPA, US DOL, OSHA, NYSDOL, ELAP [and] NYCDEP."

<sup>229</sup> "We wanted them to be in respirators, and we pushed for respirators...we knew there was a lot of stuff in the air. I would never say that the air quality was good down there, because it wasn't... We had a big problem. Because the data looked good, we wanted to communicate the risks but we didn't really want to communicate the data *per se*, because the data was so good a lot of savvy workers would say, 'Look, if the data is that good, why do I have to wear a respirator?' Rosner, David and Markowitz, Gerald, "September 11 and the Shifting Priorities of Public and Population Health in New York" May 2003. See <http://www.milbank.org/reports/911/911.html>

good results would encourage workers not to wear their respirators, the DOH communicated such results anyway. Most importantly, the adverse results were never communicated to workers at the site. The City DOH acknowledged the importance of communication of potential hazards at the WTC Site and the necessity of appropriate PPE.<sup>230</sup> Although communication of a clear message concerning the dangers and risks of work at the WTC Site would have helped ensure usage of such equipment, including respirators,<sup>231</sup> the DOH failed to communicate such a warning.

80. The City's knowledge of the contaminants in the atmosphere at and around the WTC site is reflected in toxic exposure reports (CD-73s) filed on behalf of all NYC Fire Fighters who operated at the WTC site.<sup>232</sup> The City's knowledge that the air was unsafe is evidenced by the worker health and exposure data collected through the Health Surveillance Program established by the DOH. The surveillance program documented pulmonary and respiratory

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<sup>230</sup> See Plaintiffs' Ex. 61 Weisfuse Depo at p. 57.

<sup>231</sup> *Id.*

<sup>232</sup> See [http://www.ufalocal94.org/652\\_main/652\\_2005/652\\_37of05.html](http://www.ufalocal94.org/652_main/652_2005/652_37of05.html)

Uniformed Firefighters Association of Greater New York, WTC CD-73 Agreement Reached:

An agreement was reached during recent joint labor management negotiations between the UFA, UFOA and the Dept. regarding CD-73 wording to be automatically entered for all members whose health may have been adversely affected by exposure from the WTC. The below language will automatically be entered for all affected firefighters. Members will have the ability to add to the below language on their individual CD-73s:

"I was present on multiple days during the FDNY's WTC rescue and recovery effort between September 11, 2001 and July 25, 2002. I am submitting this single CD-73 to cover all of my exposure days at the WTC site, at firehouses, the morgues, the Staten Island landfill, and on Fire Department apparatus. I had potential exposures to any or all of the following hazardous substances that have been identified by various specific authorities as being present at Ground Zero. These substances included but were not limited to: WTC particulate matter, smoke from the WTC fires, jet fuel and combustibles, asbestos, silicates, man-made vitreous fibers, polycyclic aromatic hydrocarbons (PAHs), PCBs, dioxins, heavy metals, and human remains from WTC victims. At various times during my WTC-related activities, I feel that my personal protective equipment did not provide me with adequate protection. I believe that the FDNY failed to provide me with proper respiratory protection during all or a portion of the WTC rescue and recovery effort."

symptoms and other health affects workers were experiencing at the site. Even armed with hard data of actual pulmonary and respiratory injuries to workers, the City did nothing to improve compliance with respiratory protection, fit testing<sup>233</sup> and decontamination or warn workers of said results.<sup>234</sup> Notwithstanding the results of these tests, the NYDEP and the City and its contractors advised workers including Plaintiff(s) that the air in and around the WTC Site was safe for the plaintiff(s) to inhale, ingest, contact, absorb, and touch.<sup>235</sup>

81. Even though an adequate supply of respirators and replacement cartridges may have been available-a point that plaintiffs dispute-, the defendants did not provide this equipment to the workers. Moreover, defendants did not provide workers with site-specific training regarding the specific atmospheric and dust hazards present at the WTC site. They made false statements to plaintiffs that the air at the WTC site was safe; the plaintiffs then detrimentally relied upon such statements. Defendants misrepresented to the plaintiffs that the air was “good,” that the air was “safe to breath,” and that they did not need to wear respirators.

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<sup>233</sup> See Plaintiffs’ Ex. 114, CITYCM3-00007286, posting regarding personal protective equipment from the DOH: “respirators must be fit-tested to assure a proper seal.”

<sup>234</sup> See Plaintiffs’ Ex. 115, CITYCM3-00007585: Correspondence from EPA to Kelly R. McKinney at NYDOH: “We have observed very inconsistent compliance with our recommendations, however, we do not have authority to enforce the worker health and safety policies for non-EPA/USCG employees. Therefore EPA believes the Incident Commander should adopt and enforce a site-wide Health and Safety Plan.”

<sup>235</sup> See Plaintiffs’ Ex. 116, CITY CM3-00061508, Memorandum from Robert Adams to Michael Burton dated October 17, 2001, stating “All DDC personnel should feel confident that they are not being exposed to unhealthy levels of chemicals and that air quality around the WTC is generally good.” Bob Adams also reported that there was a sign posted in the American Express Building in the World Financial Center -- well beyond the “green line” that was put up by a consultant hired by American Express. The sign suggested that respirators should be worn by people entering the building because of abnormal levels of acm.

See Plaintiffs’ Ex. 117, OSHA-NY00044788; see also Plaintiffs’ Ex. 118, OSHA-NY00046490, a Memorandum dated November 2, 2001 from Arthur Rastelli at OSHA to a number of recipients:

Liberty Mutual reported on the 8:00 am meeting that Dr. Levine from Mt. Sini [sic] spoke at. Although he said some good things, Sam felt he scared people with his comment that workers need to wear respirators any where on the site. He would like him to come back to clarify this statement and define “site”.

82. Defendants obtained 25,000 Tyvek suits, affording additional protection from toxic exposures, in the first days after September 11, 2001. Defendants failed to provide these Tyvek suits to the plaintiffs. They misrepresented in *bad faith* to plaintiffs that Tyvek suits were unnecessary. If defendants had provided Tyvek suits to plaintiffs, the additional equipment would have prevented thousands of people from being exposed to the toxic airborne contaminants. In contrast, at the Fresh Kills landfill in Staten Island, New York, Tyvek suits and respirators were readily available and compliance rates for workers wearing these types of protective equipment were high.

83. Most workers did not receive respirator fit testing at the WTC Site. Fit “checking” being performed, if any, for the workers at the WTC site, in which a worker selects a mask size, was not done pursuant to the OSHA regulations, which require far more rigorous and individualized “fit testing.”<sup>236</sup> Based on the data collected by the City DOH, the DDC and the contractors knew that workers were developing or were at risk for serious lung injuries. Workers never learned if they were wearing the correct respirators or not.<sup>237</sup>

84. The City and its agencies failed to provide adequate PPE preparation and protection to WTC site workers.<sup>238</sup> By September 22, 2001, nine days after the collapse of the

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<sup>236</sup> See Plaintiffs’ Ex. 119 OSHA-NY00056172. “Kelly indicated that they needed to establish a point where actual fit testing would be done, as opposed to the fit checks currently being done. It was agreed that contractors would be brought in to begin this process.”

<sup>237</sup> See Plaintiffs’ Ex. 120, WTCP/PA - CMO3 - 0000921-22, The Evaluation Report Conclusion stated bluntly: “The public wanted better information about air quality than they received from government sources. A NYCDOH study, other lessons learned reports, and testimony provided at various hearings suggest that the public did not receive adequate air quality information and that individuals cleaned their residences without using proper procedures and personal protection. In addition, workers at Ground Zero may not have used respirators due, in part, to inadequate EPA and other government communication.”

<sup>238</sup> By September 22, 2001, nine days after the collapse of the Twin Towers, the FDNY noted that: “OEM must develop a plan at the 0700 meeting to address overall use & respirator issue. The “we have 8,000 on order” is losing its credibility.” See Plaintiffs’ Ex. 121, CITYCM3-00048269, Memo from: Charles R. Blaich, DC WTC Logistics Officer, To: Assistant Chief Frank Cruthers, WTC Incident Commander, “Logistics Update as of 2130 Hours, 9-22-01.”

Twin Towers, the FDNY noted that: "OEM must develop a plan at the 0700 meeting to address overall use & respirator issue. The "we have 8,000 on order" is losing its credibility."<sup>239</sup>

Through its Chief Safety Officer, the FDNY had the obligation to "insure compliance with site safety and health requirements" with respect to FDNY members.<sup>240</sup> Nonetheless, while an FDNY order for over 5,000 respirators and 10,000 plus cartridges was prepared on September 28, 2001, the order was not approved *for almost two months*, until November 26, 2001.<sup>241</sup> Underscoring the urgent need for respirators, the FDNY ordered adapters that would convert 15,000 "Scott" facemasks, ordinarily connected to self-contained breathing equipment, to use with filter cartridges.<sup>242</sup> Associate Commissioner McKinney acknowledged that the City DOH was specifically charged with maintaining environmental safety and health of FDNY and Police Department personnel working at the WTC Site: "The problem is enforcement. Bechtel (a City contractor) has authority over DDC contractor personnel (*i.e.*, Turner, Tully, Bovis and AMEC and their subcontractors) but has little control over FDNY, NYPD... DOH is the lead agency under OEM for this issue, and I believe we can do more to enforce H&S protocols on the ground."<sup>243</sup>

85. Although the Defendants recognized the need for dust control, they were unable to manage the dust conditions with any degree of effectiveness. Dust suppression was rudimentary, at best.<sup>244, 245</sup> A large quantity of dust and debris was generated during the

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<sup>239</sup> See CITYCM3-00048269, Memo from: Charles R. Blaich, DC WTC Logistics Officer, To: Assistant Chief Frank Cruthers, WTC Incident Commander, "Logistics Update as of 2130 Hours, 9-22-01."

<sup>240</sup> See Plaintiffs' Ex.122, CITYCM3-0002242.

<sup>241</sup> See Plaintiffs' Ex.123, CITYCM3-00055369.

<sup>242</sup> See Plaintiffs' Ex.124, CITYCM3-00055358.

<sup>243</sup> See Plaintiffs' Ex.125, CITYCM3-00041825: City DOH Memo entitled "Health and Safety Controls at WTC Disaster Site" dated October 7, 2001.

<sup>244</sup> See Defendants' Ex. AE, William Ryan Depo. at pp. 357-358: The DDC complained to its contractors about the spread of contaminants at the WTC Site during debris removal. As Tully's Ryan explained, "as the debris

building collapses on September 11<sup>th</sup>. This material, primarily fiberglass and concrete dust, but also including trace amounts of other substances such as lead, chromium and asbestos, penetrated vehicles left in the area of the collapse of the towers and was “identified as representing potential health concerns for owners and occupants of these vehicles.”<sup>246</sup> Dust conditions at the WTC Site required the deployment of additional water-spraying equipment.<sup>247</sup> This concern translated into the use of only one additional water-spraying truck for the entire sixteen acre WTC Site.<sup>248</sup>

86. The New York City Department of Health expressed its concern to the contractors over the hazards caused by re-suspension of dust into the air as a result of the debris removal.<sup>249</sup> For example, an assistant commissioner “was very concerned with dust...being concerned with dust caused by the trucks transporting debris from the pile...one of the recommendations...was to have a significant -- I’ll call it a wetting down program whereby hoses were used to dampen the dust on—not only on the site, but also on the trucks.”<sup>250</sup> At an October 25, 2001 Safety

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was cleared, as the steel was taken from the debris pile, it exposed more broad areas of the dirt on the WTC property. And as it is very windy over there, as it dried out, that would cause dust clouds which were basically dirt.” Although Ryan attempted to characterize the “dust” as “dirt,” he acknowledged that the dust was not analyzed and its concentrations of toxic contaminants were unknown. (*Id.*)

<sup>245</sup> “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 Plaintiffs’ Ex. 126 WTC Emergency Project Bechtel Environmental Safe and Health Report dated 10/29/01. CITY CM3-00068751.

<sup>246</sup> See Plaintiffs’ Ex. 127, FEMA-NY00071426-NY00071427, DDC Memorandum dated January 17, 2003 from Robert Adams to William Cole, included appendices regarding guidelines for methods to clean vehicles found at the Trade Center site.

<sup>247</sup> See Plaintiffs’ Ex.128, CITY CM3-00021958, October 25, 2001 Memorandum from Bill Ryan, Safety Director of Tully Construction Company to Bob Adams, Safety Director of the DDC.

<sup>248</sup> *Id.*

<sup>249</sup> See Plaintiffs’ Ex. 129, FEMA-NY00038491: WTC Dust Study -- Estimate of Ratio of Dust Emissions Directly Caused by the September 11, 2001 Disaster vs. Dust Emissions From Debris Removal Activities. See also FEMA-NY00038492: “During clean-up, dust emissions were created by traffic at the WTC site, by material handling of debris, and by wind erosion of the construction site.” The World Health Organization determined that dust particles of this nature are potentially carcinogenic upon inhalation.

<sup>250</sup> See Defendants’ Ex. V, Burton Depo. at pp. 282-283

Meeting, Bechtel gave out their daily site evaluation report, stating that dust suppression is still a problem, with Bovis and Tully being the "main offenders."<sup>251</sup> As DDC Commissioner Holden explained, dust control was crucial to the environmental safety of WTC Site workers. Dust control was necessary "to minimize the amount of dust that was in the air so that employees, workers on the site...would be exposed to the smallest amount of dust possible."<sup>252</sup> On July 5, 2002, the meeting minutes from the Labor-Management Health & Safety Committee stated under "New Business" that "Don from Nickelson complained that he has seen a change in the site since last week. There is a lack of employees wearing PPE, inadequate lighting in Building 6 and lack of dust suppression. ... It is important to remember that the project is not completed and workers on the site must still be protected and work safely."<sup>253</sup>

**f. Although the City, State and Federal Laws Required Defendants to Protect The Workers From Hazardous Materials, These Rules, Regulations and Statutes Were Largely Ignored.**

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87. Under the Labor Law of the State of New York and other applicable city, state and federal statutes, law, rules and regulations including General Municipal Law §§ 205-a and 205-e, it was each Defendants' duty to provide for the safety, protection and well-being of persons lawfully working at the WTC Site.

88. Under General Municipal Law §205-a, any person, whether an owner of property or one in control thereof, who violates any statute, ordinance, rule, order or regulation, and such violation causes, either directly or indirectly, injury to a firefighter, that person is absolutely liable to the firefighter.<sup>254, 255</sup> The imposition of liability based on GML § 205-a arises as a

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<sup>251</sup> See Plaintiffs' Ex. 130, OSHA-NY00051472.

<sup>252</sup> See Defendants' Ex. U, Holden Depo. at p.232-233.

<sup>253</sup> See Plaintiffs' Ex. 130, OSHA-NY00051472.

<sup>254</sup> Section 205-a of the General Municipal Law provides:

result of the violation of an underlying statute, ordinance or rule. Identical protections are extended to police officers through GML § 205-e. The responsible party need not have been actually cited for a violation at the time of the occurrence. Rather, the existence of an uncorrected violation alone triggers liability. "Section 205-a of the General Municipal Law provides for a cause of action for the injury to or death of a fireman caused '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 requirement 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.' <sup>256</sup>

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**SECTION 205-a. ADDITIONAL RIGHT OF ACTION TO CERTAIN INJURED OR REPRESENTATIVES OF CERTAIN DECEASED FIREMEN.**

In addition to any other right of action or recovery under any other provision of law, in the event any accident causing injury, 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, members, 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, or to pay to the wife and children or to pay to the parents, or to pay to the brothers and sisters, being the surviving heirs at law of any deceased person thus having lost his life, a sum of money, in case of injury to person, not less than ten thousand dollars, and in case of death not less than forty thousand dollars, such liability to be determined and such sums recovered in an action to be instituted by any person injured, or the family or relatives to any person killed as aforesaid.

<sup>255</sup> *Nykanen v. City of New York, supra; McGee v. Adams Paper & Twine Co.*, 26 A.D.2d 186, 271 N.Y.S.2d 698 (1st Dep't 1966), *aff'd*, 20 N.Y.2d 921, 286 N.Y.S.2d 274 (1967). The Court of Appeals' holding in *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), determined that Section 205-a liability applies "regardless of whether the alleged violator actually owned or controlled the premises." 100 N.Y.2d at 78, 760 N.Y.S.2d at 401. For example, Section 205-a liability extends not only to lessors and tenants, but to contractors as well. *Lynch v. City of New York*, 787 N.Y.S.2d. 308 (1<sup>st</sup> Dep't 2005).

<sup>256</sup> *See, Healy v. Rennert*, 33 Misc.2d 897, 226 N.Y.S.2d 876, *aff'd* 20 A.D.2d 682, 246 N.Y.S.2d 1017; *Burigo v. DiLeo*, 38 Misc.2d 8511, 239 N.Y.S.2d 166. The Legislature, in creating such additional causes of action, in the interests of protecting firemen against the hazards of such violations, may be considered as having intended to impose liability in any case where there is any practical or reasonable connection between a violation and the injury or death of a fireman. (*See Daggett v. Keshner*, (Breitel, J.), 284 App. Div. 733, 134 N.Y.S.2d 524.) As the basis for a recovery under the statute, it is not necessary that causal connection which we are accustomed to require in the field of negligence. (*Daggett v. Keshner*, p. 736, 134 N.Y.S.2d p. 528.)

89. The WTC Defendants had knowledge of low compliance rates regarding the use of personal protective equipment among the workers at the WTC Site.<sup>257</sup> OSHA surveillance reports that were issued and available to the WTC Defendants and their contractors repeatedly reported compliance rates for personal protective equipment at rates well below the acceptable rate.<sup>258</sup> Liberty Mutual surveillance report, issued to the City and all other defendants, including the contractors, repeatedly reported similar findings.

90. The rates of PPE compliance were so far below acceptable rates as to amount to a “*willful violation*” under OSHA’s standards and *bad faith* upon the part of all Defendants. The OSHA regulations define willful conduct as “an intentional violation of the Act or plain indifference to its requirements.”<sup>259</sup> Pursuant to OSHA regulations, an employer commits an intentional and knowing violation if one of its representatives: A) becomes aware of the requirements of the OSH Act or the existence of an applicable standard or regulation; B) and is also aware of a condition or practice in violation of those requirements, and did not abate the hazard.<sup>260</sup> Further, pursuant to OSHA regulations, the employer commits an intentional and knowing violation if an employer representative, although unaware of the requirements of the Act or standards, is aware of comparable legal requirements (*e.g.*, state or local law), and does not abate a hazard constituting a violation of that requirement.

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<sup>257</sup> See Plaintiffs’ Ex. 132, CITY CM3, WTC Emergency Project Bechtel Environmental Safe and Health Report dated 10/29/01: “However, there is inconsistent use by NYPD, National Guard, FDNY, visitors, and some agencies with eye and respiratory protection. Proper use of PPE by contractor personnel has improved substantially over the past few weeks particularly with respect to hard hats and eye protection; however, inconsistent use of respiratory protection continues to be an issue at the site.”

<sup>258</sup> For example, during OSHA observations from September 21, 2001 through October 7, 2001 OSHA noted a personal protective equipment compliance rate of 27 percent. Applying this rate to all of the workers at the WTC Site demonstrates that there were potentially thousands of workers working at the WTC Site without the proper personal protective equipment, and, more to the point, that the City and its Contractors, the very entities responsible for the workers’ safety, knew about it.

<sup>259</sup> [http://www.osha.gov/Firm\\_osh\\_data/100007.html](http://www.osha.gov/Firm_osh_data/100007.html), OSHA Field Inspection Reference Manual CPL 2.103, Section 7 - Chapter III. Inspection Documentation.

<sup>260</sup> See *Id.*

91. The compliance rate for personal protective equipment was only 41 percent from October 8, 2001 through October 14, 2001. This 41% compliance rate translated into thousands of workers, 59% of the workforce total, being exposed to harmful contaminants, a statistic known to the City and its contractors.

92. The PPE compliance rate decreased to 29% from October 22, 2001 through October 28, 2001 in consequence of a lack of enforcement City and its contractors. Compliance rates for PPE from September 21, 2001 through April 7, 2002 never reached more than 50 percent.<sup>261</sup> The compliance rates were as low as 27%, usually falling within a range between 30% and 40%.<sup>262</sup> <sup>263</sup> Even with these known low compliance rates for PPE, the WTC Defendants and their contractors failed to assume the responsibility for correcting the problem.

93. Defendants did not appreciate the significance of low compliance rates. Although many of the witnesses defendants have thus far produced for deposition attended health and safety meetings, they did not recall whether the compliance rates for PPE use was less than or equal to 50%. Notwithstanding her presence at many of the safety and health meetings held involving the WTC Site, Mary Plaskon, a PA Health and Safety Officer, could not recall the compliance rate of respiratory usage, a frequent topic of discussion at these conferences.<sup>264</sup>

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<sup>261</sup> See Plaintiffs' Ex.133, CITYCM3-00019196-CITYCM3-00019200. These low compliance rates for required personal protective equipment at the WTC is evidences the wholesale disregard for workers' safety by the City and its contractors.

<sup>262</sup> See CITYCM3-00019197

<sup>263</sup> See CITYCM3-00019198.

<sup>264</sup> See Defendants' Ex. AB, Plaskon Depo. at, pp. 146-149:

Q: Are you aware that week after week that the compliance rates for PPE were 50 percent or less? Are you aware of that?

A: I'm aware of inspections that were conducted and areas that were noted that needed to be addressed, but I'm not aware of a special number.

Q: Well did you discuss in meetings week after week the compliance rates for PPE were less than 50 percent for all workers?

A: I don't remember that specific discussion, number.

94. Low PPE compliance rates were reported to the City and its contractors. This issue was also discussed numerous times at daily health and safety meetings and acknowledged by the City in official memoranda.<sup>265, 266</sup> Rates remained low throughout the duration of the debris removal.

95. Deponents testified that they were aware of low compliance with respirator usage among workers at the site.<sup>267</sup> Bovis Lend Lease was aware that workers at site were not regularly wearing respirators. However, Bovis did nothing about this problem, explaining that

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Q: So you're at site safety meetings: was it discussed at all, these numbers below 50 percent week after week?

A: I don't remember the exact numbers that were discussed. The use or lack of use of respirators - - PPE use was discussed at safety meetings.

Q: What, if anything, did anybody do about it?

A: Again, I was—I would only know what Port Authority policy and procedures are. I do not know what contractors did for their employees or other agencies that were represented there.

Q: Well, did they discuss it at the site safety and health meetings, what they were doing

A: Not that I recall specifically.

Q: Well did you discuss at the site safety meetings what you were doing on behalf of the Port Authority, that there was this compliance rate of less than 50% week after week?

A: Once again, as I said, I don't remember the specific numbers that were discussed, so I can't - - really answer that.

<sup>265</sup> For example, in a memo from the City's Department of Design and Construction dated January 3, 2002, the DDC noted a considerable decline in respirator usages within debris fields reporting a 29% compliance rate. *See* Plaintiffs' Ex.134, BOVCM3-000001816.

<sup>266</sup> Although meeting minutes, OSHA reports and Liberty Mutual reports agree that compliance rates for respirator usage was consistently below 50 percent, Ms. Plaskon testified that *she could not even remember this topic being discussed*, demonstrating that concern for worker safety was only secondary to the debris removal operations at the WTC Site. Safety and Health Meeting minutes noted that PPE usage was backsliding. *See* Plaintiffs' Ex. 135, CITYCM3-00018902. Liberty Mutual also observed inconsistent use of PPE at the WTC Site. *See* Plaintiffs' Ex.136, CITYCM3-00066180 – CITYCM3-00066240.

<sup>267</sup> *See* Defendants' Ex. AE, William Ryan Depo., at p. 87:

Q. Okay. And what was the issue that they were bringing to your attention?

A. Different lead employees told me that they were unable to give directions to their subordinates while wearing a mask, and they asked for permission not to wear the mask.

little short of having the workers' mothers on site to admonish them to comply would be effective.<sup>268</sup>

96. The DDC went against OSHA's recommendations to take steps necessary to allow OSHA to work in an enforcement mode.<sup>269</sup> The DDC refused to follow OSHA's

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<sup>268</sup> See Defendants' Ex. BD, Abadie Depo. at pp. 135-136:

Q. Were any subcontractors punished or kicked off the site for failure to have the workers wear respirators?

A. Subcontractors would have -- this job was done on a time and material basis so the subcontractor might have, say 20 men working on a shift. And if they had poor compliance that shift would not be paid for.

Q. Did that ever happen?

A. Yes, it did.

Q. And who did that happen to?

A. It happened to some guys from -- I can only comment on the people that were in my area. And it happened to some of the people at Grace and also at one time some people at -- some of the -- Grace and Gateway.

Q. And when did that happen?

A. I couldn't tell you.

Q. Was that in 2002, do you recall that?

A. 2001, 2002.

Q. Is there any reason why a coordination problem regarding respirator use could not have been resolved in October of 2001 between the prime contractors and subcontractors?

MR. KEARNEY: Object to the form of the question.

Q. If there was anybody?

A. Unless they've got their mother there to tell them to do it.

<sup>269</sup> See Defendants' Ex. AE, William Ryan Depo., at pp. 73-75:

A. In a normal construction site there's advanced planning and there's different things that would be relevant to a normal construction site. This particular project was never deemed a construction site so OSHA did not have the enforcement capacity that they would normally have.

And at numerous meetings with the City, Patricia Clark, mostly, Rich Mendelson, occasionally, told the City to designate it as a construction site and then OSHA would give them their teeth, that they could summons the contractors and specifically hurt us in the pocketbook. "Then I'll get them to comply."

recommendations to increase compliance with respiratory safety. The DDC's main concern was debris removal and not environmental health and safety. The DDC refused to follow OSHA's recommendations to increase compliance with respiratory safety. Scheduling debris removal was more important than safety.

97. At all times during the debris removal, compliance with applicable labor, health, safety and environmental laws and regulations, including, but not limited to, New York State Labor Law § 200, § 241, and 241(6), OSHA 29 CFR 1910.132, OSHA 29 CFR 1962 and 12 NYCRR 23 *et seq.* was not discretionary, but mandatory.

98. Defendants violated 12 NYCRR 23 *et seq.* in that: all places where employees are suffered or permitted to perform work of any kind in construction, demolition or excavation operations shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection for the lives, health and safety of such persons as well as of persons lawfully frequenting the area of such activity. To this end, all employers, owners,

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But because they didn't have those teeth, they did the statistical data and they provided data to us weekly of what they saw and where they felt our shortcomings were.

Q. Patricia Clark and the other individual you mentioned, those are OSHA officials?

A. Patricia Clark is the director of, I think it's region 1, which is the whole northeast and Puerto Rico. And Richard Mendelson was the Manhattan director for OSHA. And they were present at these nine o'clock safety meetings.

Q. Was it your understanding that it was up to the City of New York to designate the site a construction site, quote?

MR. KEARNEY: Object to the form.

MR. CARBOY: Withdrawn.

Q. Do you have an understanding as to whose authority it was, if anyone's, to designate this site as a construction site?

A. My -- my understanding was it was the mayor, and the mayor had the responsibility to designate it from rescue to recovery and then from recovery to reconstruction or rebuild. And he never went to reconstruction, because I remember when he did consider it, there were huge demonstrations. The police and the fire actually had fist fights out on the pile. They wanted to leave it as a remains recovery project and not let it go to a construction project.

contractors and their agents and other persons obligated by law to provide safe working conditions, personal protective equipment and safe places to work for persons employed in construction, demolition or excavation operations and to protect persons lawfully frequenting the areas of such activity shall provide or cause to be provided the working conditions, safety devices, types of construction, methods of demolition and of excavation and the materials, means, methods and procedures required by this part (rule). No employer shall suffer or permit an employee to work under working conditions which are not in compliance with the provisions of this Part (rule) or to perform any act prohibited by any provisions of this Part (rule).

Furthermore defendants violated the requirements of subsection (b) regarding the general requirements of competency, in that for the performance of work required by this Part (rule) to be done by or under the supervision of a designated person, an employer shall designate as such person only such as an employee as a reasonable and prudent man experienced in construction, demolition or excavation work would consider competent to perform such work. Defendants violated 12 NYCRR 23-1.8 regarding Personal protective equipment, particularly, subsection (b) regarding respirators as subsection requires an employer to provide appropriate respiratory protection. Such respirator shall be approved for the type of operation for which it is to be used and for the particular air contaminant present.

99. The debris removal and excavation performed at the WTC Site was not guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such place.<sup>270</sup> Defendants failed to provide protective equipment, including personal protective equipment for eyes, face, head and

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<sup>270</sup> New York State Labor Law § 241 (6)

extremities, protective clothing, respiratory devices, and protective shields and barriers.<sup>271</sup> In addition, defendants failed to provide for the proper storage, cleaning and maintenance of such protection.

100. Defendants also violated 12 NYCRR 23-1.9 particularly section (b) requiring change houses.

101. Defendants failed to determine when an aspect of the subcontractors' work was inferior. Defendants failed to use the "coercion of withholding payment," to effect improvement in respirator compliance. Defendants failed to do this even though this "kind of regular interaction with contractors or subcontractors was pretty standard operating procedure."<sup>272</sup> Defendants failed to use this control, exercised by the primary contractors, extended to ensuring a subcontractor's compliance with environmental safety and health requirements.<sup>273</sup>

#### POINT IV.

**UNSUCCESSFUL LOBBYING EFFORTS BY THE MAYOR  
AND THE CITY'S CORPORATION COUNSEL FOR  
FEDERAL STATUTORY IMMUNITY BELIE THE  
DEFENDANTS' PRESENT CLAIM OF SDEA IMMUNITY  
AND SUPPORT PLAINTIFFS' CONTENTIONS THAT  
SDEA IS PRE-EMPTED AND SUPERCEDED BY  
FEDERAL AND STATE STATUES, THAT SDEA IS ALSO  
INAPPLICABLE ON ITS FACE, AND FURTHER, THAT  
SDEA'S OWN WORDING FAILS TO PROVIDE THE  
DISINGENUOUSLY CLAIMED IMMUNITY.**

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102. Mayor Giuliani engaged in intensive lobbying efforts to obtain blanket immunity for the City for negligent or willful acts of the City's employees or by workers at the WTC project site. The Mayor's efforts, by letter and through live meetings, failed to provide the City with the broad immunity he sought; instead, Congress passed specific legislation allowing the

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<sup>271</sup> OSHA 29 CFR 1910.132 (a)

<sup>272</sup> *Id.*, at p. 215.

<sup>273</sup> *Id.*, at pp. 215-216.

instant cause of action, and, the Federal government, through FEMA, promised the City and others indemnification.<sup>274</sup>

103. The Air Transportation Safety System and Stabilization Act (“ATSSSA”) is an Act of Congress.<sup>275</sup> An appropriations bill enacted by Congress directed the Federal Emergency Management Agency (FEMA) to provide the City with “up to \$1,000,000,000 to establish a captive insurance company or other appropriate insurance mechanism *for claims arising from debris removal, which may include claims made by city employees.*” (emphasis added).<sup>276</sup> This grant funded what would become known as a captive insurance policy (“CIP”). A November 1, 2001 letter sent by Mayor Giuliani to members of the New York congressional delegation (“Giuliani letter”) urged adoption of amendments to the ATSSSA that would limit the City's liability.<sup>277</sup>

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<sup>274</sup> This correspondence and related conversations contain admissions against interest to the City’s current position. The claim that the City and its contractors are immune from liability for their actions or inactions in these matters were raised in hindsight years later and does not reflect the actual facts of the circumstances involving any emergency at the WTC site. These documents are important as a basis of reference; some were even cited by the United States Court of Appeals for the Second Circuit in its decision in *In re: WTC Disaster Site*, 414 F.3d 352 (2d Cir. 2005).

<sup>275</sup> Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. § 40101), amended November 2001, (§ 408(a)(1), Pub. L. 107-71, 115 Stat. 631 (2001)) and (§ 408(a)(3), Pub. L. 107-71, 115 Stat. 631 (2001)).

<sup>276</sup> See PL 108-7, 117 Stat. 11, 517-518.

<sup>277</sup> The mayor's letter stated that the proposed amendment would alleviate only " 'part' " of " 'the city's potential liability exposure,' " and "that 'the City's urgent need for indemnification in removing debris from the WTC Site is not part of this legislation.' " The pertinent section of that letter stated:

I write to offer my support of H.R. 3150 (Secure Transportation for America Act), which is currently being considered before the Congress. The measure that Chairman Young will bring to the floor will contain a managers amendment that would provide New York with much needed relief from potential liability arising out of the attacks on the WTC on September 11, 2001. Any substitute would fail to provide the City the fiscal protection it needs from potentially limitless lawsuits. ... The managers' amendment would help New York tremendously by limiting the recovery of damages arising out of the hijackings and subsequent crashes to the amount of insurance that a defendant had prior to September 11th. Passage of Chairman Young's bill *would solve one large part of the City's potential liability exposure*, and help ensure steady progress toward utilizing our resources to address critical fiscal matters. Although *the City's urgent need for indemnification in removing debris from the WTC Site is not part of this legislation, H.R. 3150 does grant us tremendously important legal coverage.*

*In re WTC Disaster Site*, 414 F.3d at 379 (2d Cir. 2005) quoting Giuliani Letter at 1 (emphasis added).

104. Assistant Corporation Counsel attorneys Kenneth Becker and Lawrence Martin drafted correspondences and lobbied to obtain immunity for the City's liabilities arising from the work performed at the WTC Site.<sup>278</sup> The City retained Ernst & Young in late September 2001 to advise it on risk and insurance relating to the WTC debris removal project.<sup>279</sup> Ernst & Young issued a Preliminary Report in November 2001. At that point in time, after estimating the City's liability from the toxic exposures, Ernst & Young recommended the purchase of \$2.8 billion in coverage for claims resulting from the WTC debris removal operations.<sup>280</sup> A subsequent risk assessment estimated the total outlay for claims as approximately \$800 million.<sup>281 282</sup>

105. In a letter dated June 20, 2002, FEMA accepted the City's proposal of May 13, 2002 for FEMA to "provide funding as needed 'for an insurance policy providing a minimum aggregate limit of liability amount equal to \$1.0 billion of non-risk transfer insurance, either in the form of finite risk or captive insurance.'<sup>283</sup> Insurance carriers have taken the position that the liabilities at issue, especially environmental, are not risks but known losses – the lawsuits and insurance costs are certain to happen – and thus they will not write traditional “risk transfer” insurance.<sup>284</sup>

106. Through ATSSSA, Congress conferred upon the City liability protection for WTC-related claims: the City's liability is capped at the greater of either \$350,000,000 or the

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<sup>278</sup> Both Michael Burton and Ken Holden testified that Larry Martin had been at the forefront of the City's lobbying efforts to obtain immunity and indemnification.

<sup>279</sup> See Plaintiffs' Ex.180, May 13, 2002 Confidential Memo from Lawrence Martin to Brad Gair of FEMA, FEMA-DC00004595.

<sup>280</sup> See Plaintiffs' Ex. 180, FEMA-DC00004595.

<sup>281</sup> See Plaintiffs' Ex.186, FEMA-NY00077193.

<sup>282</sup> See Plaintiffs' Ex.180, FEMA-DC00004593

<sup>283</sup> See FEMA-NY00079118.

<sup>284</sup> See Plaintiffs' Ex.180, FEMA-DC00004591

total of all available insurance coverage.<sup>285</sup> There is no language limiting liability of the City contractors.<sup>286</sup> The City decided to manage the debris removal activity at the WTC Site rather than transfer the Site and project to ACOE.<sup>287</sup> The City also failed to obtain rights of entry which generally contain indemnification clauses from affected property owners which were primarily large, well financed concerns.<sup>288</sup>

107. New York City affirmatively took on the responsibility of obtaining insurance coverage for itself and the contractors engaged in debris removal.<sup>289</sup> Congress envisioned that the CIP would protect the City and provide compensation for those injured in the debris removal.<sup>290</sup>

108. Assistant Corporation Counsel Kenneth Becker and Lawrence Martin are employed by the City Law Department. As derived from document and testimonial discovery had thus far in these matters, both attorneys lobbied Congress on behalf of the City for indemnification and immunity regarding claims arising from the rescue, recovery and debris removal efforts.<sup>291</sup>

109. As part of their disclosures in the WTC litigation, defendants exchanged a letter dated October 15, 2001 and signed by DDC Commissioner Holden.<sup>292</sup> The letter concerns the

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<sup>285</sup> *See Id.*

<sup>286</sup> *See Id.*

<sup>287</sup> *See* FEMA-DC00004582.

<sup>288</sup> *See Id.*

<sup>289</sup> *See Id.*

<sup>290</sup> *See* Plaintiffs' Ex.1, May 24, 2002 letter from congress to FEMA, FEMA-DC00004524.

<sup>291</sup> Kenneth Holden did testify at one point in his deposition that it was possible that another corporation counsel may also have knowledge of the immunity issues raised to Congress named David Varoli. At this time plaintiffs' counsel will withhold requesting the deposition of Mr. Varoli, without prejudice.

<sup>292</sup> *See* Plaintiffs' Ex.152, Holden Exhibit No. 16, October 15, 2001 letter to Andrew Feeney, bearing Bates Nos. CITYCM3-00072401 through CITYCM3-00072403, marked for identification.

indemnification of construction companies and OSHA's role at the WTC Site.<sup>293</sup> Holden testified that "I signed it. I didn't write it ...I know I didn't write it. I think that's *probably* accurate, a lawyer writing on my behalf."<sup>294</sup> Mr. Holden volunteered that the letter -- although signed by him -- contained the suggestions of its author, and not his own.<sup>295</sup> When asked about the purpose and intent of the letter, Mr. Holden's only comments were:

Indemnification *meant to me* that the four contractors who helped the Department Design and Construction on the afternoon of September 11th and aided immediately in rescue operations and subsequently in recovery operations would not suffer undue loss and potentially go out of business due to their Good Samaritan actions arising on September 11th.<sup>296</sup>

Mr. Holden's testimony only highlights what indemnification "meant to [him]" personally -- the plaintiffs are entitled to know what that meant to the City. The same letter discusses the one billion dollars needed to fund the project's captive insurance program. The letter says:

The City has been advised that prior to September 11th, the market capacity for a project of this scale is in the range of \$1 billion.<sup>297</sup>

110. The basis for the one billion dollar figure is information that the plaintiffs have never received. Holden testified that he did not know why the letter addressed the insurance program or what it actually referenced before signing the document:

Q: Are you aware if that's how the \$1 billion captive insurance policy came about, based upon what the market would bear?

A. I was not really involved in that, as I stated. That was pretty much handled by the City's law department.<sup>298</sup>

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<sup>293</sup> *Id.*

<sup>294</sup> See Defendants' Ex. U, Holden Depo. at pp. 294-295.

<sup>295</sup> *Id.* at p. 312.

<sup>296</sup> *Id.* at pp. 311-312 (emphasis added).

<sup>297</sup> See Plaintiffs' Ex.152, October 15, 2001 letter to Andrew Feeney, bearing Bates Nos. CITYCM3-00072401 through CITYCM3-00072403, marked for identification

111. Lawrence Martin is one of the primary persons at the Law Department who was responsible for these matters. Thus, Mr. Martin's testimony will directly address the immunity issues.

112. The Defendants maintain that OSHA controlled the debris removal operations, in conjunction with other federal agencies. The City relies on this assertion to support its claim of immunity. In testifying about an October 15, 2001 letter, however, DDC Commissioner Holden acknowledged that he was unaware of any change to OSHA's role described by Lawrence Martin. Thus, again, Lawrence Martin's testimony is critical.<sup>299</sup>

The letter states:

Moreover, since September 11th, 2001, Occupational Safety And Health Administration has not enforced its regulations on this project, but, rather, is actively *consulting* the DDC on the project. It is my understanding that in the near future this will change.<sup>300</sup>

113. Mr. Holden further testified that he did not handle the issues presented in the letter, but that Mr. Martin was responsible for those matters. Specifically, Mr. Holden testified in his deposition that Martin and another Assistant Corporation Counsel were responsible for the purchase of liability insurance.<sup>301</sup>

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<sup>298</sup> See Defendants' Ex. U, Holden Depo. at p. 315.

<sup>299</sup> *Id.* at pp. 314-315:

Q. What do you mean by "It is my understanding that in the near future this will change"?

A. I don't recall what my understanding was on October 15, 2001, when I presumably signed this letter, what that line meant.

<sup>300</sup> See Plaintiffs' Ex.152 Holden Exhibit No. 16, October 15, 2001 letter to Andrew Feeney, bearing Bates Nos. CITYCM3-00072401 through CITYCM3-00072403, marked for identification.

<sup>301</sup> See Defendants' Ex. U, Holden Depo. at p. 296.

114. Critical documents remain missing from the document exchanges the defendants have made to date. Those documents include all the correspondence (including notes and memoranda regarding meetings) to Senators, Congressman, Congress, lobbyists and others as to the city's efforts to seek indemnification, including a memorandum of understanding regarding the insurance coverage itself. All those pieces of correspondence can and do have a direct bearing on the immunity issues and must be exchanged. These letters, including the October 15, 2001 letter, were sent to third parties, so there can be no reasonable claim of privilege. At the time this letter was written there was no pending and/or past litigation regarding the subject matter of the letter.

115. Only Lawrence Martin can testify about the facts and circumstances that he relied on when he drafted the October 15, 2001 letter for Mr. Holden's signature. Mr. Martin also assisted in drafting Kenneth Holden's sworn statement to the Kean Commission.<sup>302</sup> In a startling statement prepared for him by corporation counsel, one undermining defendants' immunity defenses, Mr. Holden wrote:

Please urge congress *to enact* legislation providing for federal indemnity, making it clear that contractors can go in and do the work in the event of a disaster and not incur liability. (Emphasis added).

116. Statements made during debate on the ATSSA legislation made clear that Congress's primary goals were to: A) provide relief without litigation to individuals harmed as a result of the crashes; and to B) limit the liability of entities likely to be sued for injuries suffered in connection with the crashes and thereafter.<sup>303</sup>

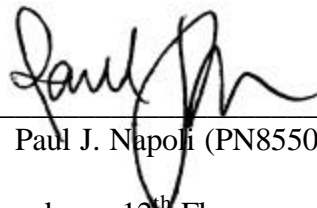
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<sup>302</sup> See Defendants' Ex. U, Holden Depo. at p. 4.

<sup>303</sup> See, e.g., 147 Cong. Rec. S9594 (Sept. 21, 2001) (statement of Sen. McCain). Even congressmen who decried the speed with which the legislation was passed accepted that those were its principal purposes. See, e.g.,

Dated: New York, New York  
April 7, 2006

Worby Groner Edelman & Napoli Bern, LLP  
*Co-Liaison Counsel for Plaintiffs*

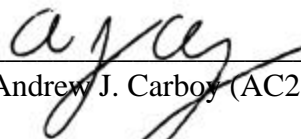


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147 Cong. Rec. H5914 (Sept. 21, 2001) (statement of Rep. Conyers); *see also In re: WTC Disaster Site*, 414 F.3d 352.