

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

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PRELIMINARY STATEMENT

Plaintiffs, by Plaintiffs' Liaison Counsel Worby Groner Edelman & Napoli Bern, LLP and Sullivan Papain Block McGrath & Cannavo P.C., respectfully submit the within Offer of Proof pursuant to this Court's directive at a conference held in chambers on September 9, 2005.

The contentions set forth herein relate specifically to the issues raised -- or anticipated to be raised -- in the defendants' forthcoming immunity motions and in plaintiffs' recent motions for discovery pursuant to this Court's CMO 3. It is undisputed that plaintiffs have not received full discovery of documents, accordingly, plaintiffs will be unable to list each document or testimonial reference they believe will support each particular contention. When defendants provide the additional requested discovery, the discovery will support plaintiffs' contentions to deny defendants' immunity motions. The pertinent discovery goes to four topics: 1) the City of New York, the Port Authority of New York and New Jersey, and the World Trade Center defendants' control of the WTC Site beginning on September 11, 2001 and continuing thereafter; 2) the lack of any federal discretionary function over the work at any site and therefore the lack of merit of any proposed discretionary act immunity claim; 3) that the State Defense Emergency Act, hereinafter "SDEA", is not only wholly inapplicable to the instant litigation, and fails to provide immunity to the defendants due to a variety of reasons (including its very own language), but has, in fact been, preempted by State and Federal Statutes that also grant no

immunity whatsoever to the defendants; and 4) that, even if a vestige of the SDEA is found to apply and survives preemption, the immunity provisions were never triggered as a matter of law, as a plethora of questions of fact abound as to whether the instant defendants' actions were "...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 this act...", as mandated by the Act.¹

While plaintiffs are confident they can defeat these motions on the materials currently in their possession, where the drastic remedy of dismissal of all plaintiffs claims is sought, nothing short of full and complete disclosure will suffice to protect the claims of those injured while working in the recovery and clean-up efforts at the site.

Plaintiffs reserve the right to amend and/or supplement this Offer of Proof as necessary based on incoming or as yet unknown evidence that may become available.²

¹ NY CLS Unconsol Laws of NY, Ch. 131, §113(1).

² Plaintiffs have filed three motions with this Court seeking further discovery of the defendants pursuant to CMO 3. These include: (1) Plaintiffs' Motion to Compel Compliance With All Prior Demands And Orders For Discovery And For Discovery Sanctions Against Defendants For Their Failure To Comply With Their Obligation To Identify And Produce Documents, filed on or about August 29, 2005 (denied without prejudice to renew); (2) Plaintiff's Notice Of Motion To Hold Defendant Bechtel In Contempt For Failure To Comply With Lawfully Issued Subpoenas For The Production Of Documents, filed on or about August 30, 2005 (denied without prejudice to renew); and (3) Plaintiffs' Notice Of Motion To Compel The Depositions Of Ken Becker And Lawrence Martin, filed on or about September 6, 2005. Subsequently, plaintiffs' counsel met with the defendants' attorneys and defendants agreed to provide certain materials which counsel has continued to fail to produce or to explain their failures to date, despite their apparent agreement to produce these items.

In addition, plaintiffs' liaison counsel served on September 27, 2005 a second request for production of documents in anticipation of defendants' motion on issues of alleged immunity to which defendants have failed to respond. Defendants have also recently alleged certain documents are privileged which have been used at depositions and exchanged for approximately six months. Aside from not being privileged the defendants have insisted on not providing a privilege log to plaintiffs to detail the documents they have continued to withhold from plaintiffs view. It is this group of documents requested by plaintiffs, that plaintiffs believe will further substantiate plaintiffs' position as to the lack of merit of defendants' motions.

PLAINTIFFS' OFFER OF PROOF

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 ENTITIES³

- 1) Defendant Port Authority of New York and New Jersey ["Port Authority"] was and is the fee owner and lessor of the approximately 16-acre site of the former World Trade Center.⁴
- 2) The World Trade Center Defendants⁵ were lessors, and leased office space in the commercial World Trade Center buildings to tenants.⁶
- 3) Silverstein WTC Mgmt. Co., LLC was the managing agent for the four commercial buildings, 1 World Trade Center, 2 World Trade Center, 4 World Trade Center and 5 World Trade Center at the World Trade Center and had, *inter alia*, the right to lease office space in such buildings to tenants.

³ "DDC, working with the Port Authority of New York and New Jersey, has been managing the demolition, excavation and debris removal at the World Trade Center Complex." Memorandum from Commissioner of the DDC Kenneth Holden to Mayor Michael Bloomberg dated March 6, 2002. CITYCM3-00072305-CITYCM300072309.

⁴ See Testimony of Michael Levy, May 23, 2005, at pp. 65-66:

Q. In entering into this lease with the port authority, what is your understanding as to who the owner of the property was at the WTC Site?

A. The Port Authority.

⁵ When the term "World Trade Center Defendants" is used it is meant to denote the following entities, World Trade Center Properties LLC, 1 World Trade Center LLC, 2 World Trade Center LLC, 4 World Trade Center LLC, 5 World Trade Center LLC, 1 WTC Holdings LLC, 2 WTC Holdings LLC, 4 WTC Holdings LLC, 5 WTC Holdings LLC, Silverstein WTC Properties LLC, Silverstein WTC LLC, Silverstein WTC Mgmt. Co. LLC, Silverstein WTC Facility Manager LLC and Silverstein Properties, Inc. If anyone of these entities is named separately that paragraph or allegation shall just apply to that entity so named.

⁶ See 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 Port Authority was and is the fee owner and lessor of the approximately 16-acre site of the former World Trade Center Complex. Silverstein WTC Facility Manager LLC managed commercial World Trade Center buildings and the concourse retail space, including the performance of maintenance and cleaning.

4) Silverstein Properties Inc., was the managing agent for 7 WTC LP, an entity that contracted for debris removal.⁷

5) Silverstein Properties, Inc. was the managing agent for 7 World Trade Center.⁸

6) World Trade Center Properties LLC is the owner of the four net leases of the World Trade Center.⁹

7) 1 World Trade Center LLC, 2 World Trade Center LLC, 4 World Trade Center LLC, and 5 World Trade Center, LLC, are the entities that hold the leases for 1 World Trade Center, 2 World Trade Center, 4 World Trade Center and 5 World Trade Center respectively.¹⁰

8) 1 WTC Holdings LLC is the owner of 1 World Trade Center LLC, which is owned by World Trade Center Properties LLC.¹¹

9) 2 WTC Holdings LLC is the owner of 2 World Trade Center LLC, which is owned by World Trade Center Properties LLC.¹²

10) 4 WTC Holdings LLC is the owner of 4 World Trade Center LLC, which is owned by World Trade Center Properties LLC.¹³

⁷ See Deposition of Michael Levy, p. 51; *see also* Contract between Silverstein Properties, Inc., and Seasons Industrial Contracting, WTCP-CMO3-0002894-WTCP-CMO3-0002925.

⁸ See Michael Levy Dep., May 23, 2005, Tr. p. 41: "Q. And with regard to 7 World Trade Center, can you tell us what entity, if any entity, managed 7 World Trade Center? A. Silverstein Properties, Inc., managed 7 World Trade Center;" *see also* Michael Levy Dep., May 23, 2005, at pp. 40-41:

Q. And the next entity, Silverstein WTC management company LLC [colloquy omitted]... Okay. And you can tell us what the entity did?

A. The entity was created to manage four commercial office building at the WTC Site.

Q. And which four building at the World Trade Center was that?

A. 1 World Trade Center, 2 World Trade Center, 4 World Trade Center, and 5 World Trade Center.

⁹ Testimony of Michael Levy at p. 31.

¹⁰ Testimony of Michael Levy, pp. 37-39

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

- 11) 5 WTC Holdings, LLC is the owner of 5 World Trade Center LLC, which is owned by World Trade Center Properties LLC.¹⁴
- 12) Silverstein WTC Properties LLC has an ownership interest in World Trade Center Properties LLC.¹⁵
- 13) Silverstein WTC LLC has an investment interest in Silverstein WTC Properties LLC.¹⁶
- 14) Silverstein WTC Mgmt. Co., LLC managed 1 World Trade Center, 2 World Trade Center, 4 World Trade Center and 5 World Trade Center.¹⁷
- 15) Silverstein Properties Inc. managed 7 World Trade Center.¹⁸
- 16) Silverstein WTC Facility Manager LLC managed 1 World Trade Center, 2 World Trade Center, 4 World Trade Center, 5 World Trade Center, including the concourse and the plaza.¹⁹
- 17) Silverstein Development Corp is a partner of 7 World Trade Center along with Silverstein 7 World Trade Company.²⁰
- 18) 7 World Trade Company, LP was the entity that held the net lease at 7 World Trade Center.²¹
- 19) Silverstein Properties and Silverstein Development Corporation were used interchangeably at the WTC Site.^{22, 23}

¹⁴ *Id.*

¹⁵ Testimony of Michael Levy, at p. 39.

¹⁶ *Id.*, at p. 40.

¹⁷ *Id.*, at p. 41.

¹⁸ *Id.*

¹⁹ *Id.*, at p. 42.

²⁰ *Id.*, at pp. 44-45.

²¹ *Id.*, at pp. 45-46.

20) The scope and complexity of the WTC disaster required the City of New York to assume management, and coordination and control of work and debris removal operations. The City's Department of Design and Construction ["DDC "] contracted with four construction managers ["CMs"] and their tiers of sub-contractors to perform the debris removal and assist with recovery operations.²⁴

21) The New York City DDC, working with the Port Authority of New York and New Jersey, managed and controlled the demolition, excavation and debris removal at the World Trade Center Complex.^{25, 26}

22) Following the attacks of September 11, 2001, the WTC Site was controlled by the City of New York (primarily through its Department of Design and Construction ["DDC"]) and the four CMs or "primary contractors" in conjunction with the Port Authority of New York and New Jersey until on or about June 30, 2002 when total physical control of the site was returned to the Port Authority.²⁷

²² *Id.*, pp. 48-51;

²³ *See* Testimony of Jack Klein, pp. 169-186.

²⁴ 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* FEMA-DC00004560.

²⁵ Memorandum from Kenneth Holden of the DDC to Mayor Michael Bloomberg dated 3/6/2002 discussing the DDC's World Trade Center Debris Removal project. *See* CITYCM3-00072305.

²⁶ "It will be the responsibility of the DDC to determine which Contractor should undertake work in each area." *See* CITY CM3-00014395.

²⁷ *See* Declaration of Richard A. Williamson, Es q. 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 World Trade Center at approximately 8:46 a.m. on September 11, 2001 and retained such control over the site until June 30, 2002 (except for 7 World Trade Center, the control of which was returned to the Port Authority on May 10, 2002). *See also* Testimony of Jack Klein for Silverstein Properties, Inc., September 14, 2005, Tr. pp. 25-26; 28-30; 39-41. *See also* documents: BOVCM3-000000911-1359: *DDC World Trade Center Debris Removal Policy Binder*; CITYCM3-00025030-31; CITYCM3-00025030: *OEM Update Memorandum* of November 14, 2001 addressed to all agencies; AMECM3-000000298-326: WTC Recovery Project-Turner/Plaza Sector Summary Report; control structure diagram for the WTC Recovery Team, stamped BOVCM3-000000868.

23) During the period of time described above, the City and its contractors determined not only who would have access to the WTC Site, but also how that access would take place and under what constraints.^{28, 29, 30}

24) Even personnel affiliated with Federal agencies required passes issued by the City to access the site.³¹

25) The debris removal efforts were accomplished by the City of New York and its contractors.³²

26) The City financed the work of the primary contractors.³³

27) The four prime contractors and the subcontractors were not volunteers -- they were paid tens of millions of dollars for the work performed.

28) From September 11, 2001 and thereafter, the primary contractors were paid by the City for their work at the WTC Site.³⁴

²⁸ 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 CITYCM3-00041825.

²⁹ 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..." CITYCM3-00041737.

³⁰ "I had -- in order to get into any portion of 7 World Trade Center, 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." Testimony of Jack Klein, Silverstein Development Corporation, Sept. 14, 2005, at p. 40.

³¹ An undated facsimile message from the State Department to Ted Monette regarding international participation at the World Trade Center project (FEMA-DC00001677) 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.

³² "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." FEMA-DC0013239.

³³ See Testimony of Ken Holden, August 10, 2005, 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.

29) Checks for this work were issued by the Comptroller's office.³⁵

30) On September 20, 2001, the City forwarded a check in the amount of Ten Million Dollars (\$10,000,000) to AMEC Construction.³⁶

31) By January 25, 2002, payments to AMEC from the City totaled nearly sixty million dollars.³⁷

32) By March 18, 2002, Bovis Lend Lease estimated that total construction dollars “will be of the order of 225 million.”³⁸

33) Notwithstanding the City’s role in controlling the WTC site, the Port Authority was and remained responsible for the WTC Site.^{39, 40, 41}

³⁴ See Testimony of Ken Holden, August 10, 2005, at p. 45:

Q Okay. Now, these four contractors, were they paid for their work at the World Trade Center project?

A Yes, they were.

Q And from what day would they have begun being able to get paid for? Was it September 11th, 12th, 13th?

A I think they were able to get paid when they started work performing work that warranted [sic] payment so if people -- 23 people did work on the 11th, they were eligible to be paid for work they performed on the 11th.

³⁵ See Ken Holden Testimony, August 10, 2005 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.

³⁶ See AMECM3-000000183: September 20, 2001 Correspondence from DDC to AMEC enclosing initial payment.

³⁷ See AMECM3-000000634.

³⁸ AMECM3-000000631.

³⁹ Testimony of Ken Holden, August 10, 2005, transcript pp. 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

34) Neither Silverstein Properties, or any of the World Trade Center Property defendants or, the Port Authority ever received any written communication that the lease between the entities was no longer in effect, either from the federal, state or local governments after September 11, 2001.

35) Notwithstanding the City's control of the Trade Center site, the Silverstein entities' obligations under their lease with the Port Authority have continued without interruption from September 11, 2001 continuously up to the present.⁴²

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."

⁴⁰ Testimony of Michael Levy, 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.

⁴¹ 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 World Trade Center site (CE00000173), 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.

⁴² Testimony of Michael Levy, at pp. 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?

MR. WILLIAMSON: Again, to the extent that you're asking the witness for legal conclusions pursuant to a legal contracts, it seems to me it's an inappropriate question and set of questions to be putting to him. But subject to that objection he can answer as to what he understands.

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.

36) Among other things, the Silverstein entities' responsibilities under the lease for the World Trade Center include rebuilding the buildings, no matter what the cause of their destruction.⁴³

37) Furthermore, the Silverstein entities had an obligation under the lease to take all reasonable safety precautions necessary to protect persons or property on the premises pending the completion of any necessary repairs.⁴⁴

38) The Port Authority, and the World Trade Center Defendants consented to the involvement and direction of the City of New York in the rescue, recovery and debris removal operations at the World Trade Center Disaster Site.

39) The Silverstein defendants and the WTC property defendants benefited from the debris removal operations performed by the City.

40) From September 11, 2001 through June 30, 2002, the City took no action that, in effect or by design, involuntarily or voluntarily divested the Port Authority from possession and control of the WTC Site.⁴⁵

41) From September 11, 2001 through June 30, 2002, the Port Authority did not relinquish any property interest it held and continues to hold in the World Trade Center site.

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.

⁴³ Michael Levy Testimony 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.

⁴⁴ Net Lease between Port Authority and 1 World Trade Center LLC, page 161.

⁴⁵ See Testimony of Michael Levy, May 23, 2005, at p. 100:

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

A: I don't believe so.

42) From September 11, 2001 through June 30, 2002, the Port Authority did not announce, publicly, that it had ceded control of the WTC Site to the City.

43) From September 11, 2001 through June 30, 2002, the Acting Executive Director/ Executive Director of the Port Authority did not issue any directives, orders and instructions transferring control of the WTC Site to the City.

44) From September 11, 2001 through June 30, 2002, the Board of Commissioners of the Port Authority did not issue any resolutions transferring control of the WTC Site to the City.

45) From September 11, 2001 through June 30, 2002, the Governors of New York and/or New Jersey never approved a transfer of the WTC Site to the City of New York.

46) From September 11, 2001 through June 30, 2002, the Board of Commissioners of the Port Authority did not present a decision to transfer control of the WTC Site to the City for approval by the Governors of New York and/or New Jersey.

47) During the demolition and debris removal, the City required the permission of the Port Authority to raze certain structures at the WTC Site.⁴⁶

⁴⁶ See Testimony of Ken Holden, August 10 2005, at 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 World Trade Center 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 World Trade Center. 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...

48) Representatives of the Port Authority, assumed a role in the control and direction of work performed at the WTC Site, including the assurance of occupational and environmental safety and health.⁴⁷

49) Representatives of the WTC defendants and Silverstein Properties assumed a role in the control and direction of work performed at the WTC Site, including the assurance of occupational and environmental safety and health.

50) Silverstein Properties attended and participated in the World Trade Center Infrastructure Recovery Coordination Meetings.

51) Walter Weems and Tony Rubino, both representatives of Silverstein, were on the list of attendees from the meeting minutes.^{48, 49}

52) As of November 2001, all debris removal operations by the City of New York and its contractors was completed at 7 WTC.⁵⁰

⁴⁷ The Port Authority, the World Trade Center Defendants and the Silverstein entities named as defendants herein consented to the involvement and direction of the City of New York in the rescue, recovery and debris removal operations at the World Trade Center Disaster Site. For example, approval from both the Port Authority and the City was necessary before Consolidated Edison could perform work at 7 WTC in November 2001. *See*, WTCP-CMO3-0002778: Subsurface Investigation Work Plan/7 World Trade Center.

⁴⁸ *See* Bates Number CityCM3-00035234 - CityCM3-00035235.

⁴⁹ Testimony of Jack Klein, September 14, 2005, 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 World Trade Center 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.

⁵⁰ Testimony of Jack Klein, September 14, 2005, at pp. 63:

Q. And subsequent to your mid-October visit to the World Trade Center site, when was the next time you were there?

A. If I had to guess, it was sometime around November.

- 53) After November 2001, Silverstein Development Corp assumed control of 7 WTC.
- 54) After November 2001, Silverstein Properties Inc assumed control of 7 WTC.
- 55) After November 2001, World Trade Center Property defendants assumed control of 7 WTC.
- 56) Silverstein Development Corp. was responsible for inspecting 7 WTC after November 2001.
- 57) Silverstein Development Corp. was responsible for planning 7 WTC after November 2001.
- 58) Silverstein Development Corp. conducted inspections at 7 WTC after November 2001.
- 59) Silverstein Development Corp. conducted planning at 7 WTC after November 2001.
- 60) Silverstein Development Corp. had access to the WTC site on September 11, 2001.
- 61) Silverstein Development Corp. had access to the WTC site after September 11, 2001.

-
- Q. Okay, Early November, Late November?
- A. Early November?
- Q. And what was your reason for being there in early November?
- A. Wanted to confirm that - -that Bob Motway was correct.
- Q. Was he correct?
- A. He was correct?
- Q. They were Complete?
- A. Yeah.
- Q. And it is fair to say?
- A. Substantially complete.
- Q. Okay. Is it fair to say that as of November 1st, they were - - they were complete?
- A. I believe they were yes.

- 62) Silverstein Development Corp. had access to the WTC site in October, 2001.
- 63) Silverstein Development Corp. had access to the WTC site in November, 2001.
- 64) Silverstein Development Corp. had access to the WTC site in December, 2001.
- 65) Silverstein Development Corp. had access to the WTC site in January, 2002.
- 66) Silverstein Development Corp. had access to the WTC site in February, 2002.
- 67) Silverstein Development Corp. had access to the WTC site in March, 2002.
- 68) Silverstein Development Corp. was responsible for inspecting 7 WTC after November 2001.
- 69) Silverstein Properties Inc. was responsible for planning 7 WTC after November 2001.
- 70) Silverstein Properties Inc. conducted inspections at 7 WTC after November 2001.
- 71) Silverstein Properties Inc. conducted planning 7 WTC after November 2001.
- 72) Silverstein Properties Inc. had access to the WTC site after September 11, 2001.
- 73) Silverstein Properties Inc. had access to the WTC site in September 11, 2001.
- 74) Silverstein Properties Inc. had access to the WTC site in October, 2001.
- 75) Silverstein Properties Inc. had access to the WTC site in November, 2001.
- 76) Silverstein Properties Inc. had access to the WTC site in December, 2001.
- 77) Silverstein Properties Inc. had access to the WTC site in January, 2002.
- 78) Silverstein Properties Inc. had access to the WTC site in February, 2002.
- 79) Silverstein Properties Inc. had access to the WTC site in March, 2002.
- 80) After November 2001, Silverstein Development Corp. was responsible for debris removal at 7 WTC.
- 81) After November 2001, Silverstein Properties Inc. was responsible for debris removal at 7 WTC.

82) After November 2001. Silverstein Development Corp. was responsible for removal of contaminated soil at 7 WTC.

83) After November 2001 Silverstein Properties Inc. was responsible for removal of contaminated soil at 7 WTC.

84) Silverstein Development Corp. retained the right to entry at the WTC Site on and after September 11, 2001.

85) Silverstein Properties Inc retained the right to entry at the WTC Site on and after September 11, 2001.

86) World Trade Center Defendants retained the right to entry at the WTC Site on and after September 11, 2001.

87) Silverstein Development Corp. exercised its right to entry at the WTC Site on and after September 11, 2001.

88) Silverstein Properties Inc. exercised its right to entry at the WTC Site on and after September 11, 2001.

89) World Trade Center defendants exercised its/their right to entry at the WTC Site on and after September 11, 2001.

90) Silverstein Properties, Inc. contracted with entities such as Seasons Industrial Contracting for remediation work at 7 WTC.⁵¹

91) The work at 7 WTC was performed within one of the four quadrants into which the WTC Site had been divided.⁵²

⁵¹ See Bates Number WTCP-CMO3-0002894 - WTCP-CMO3-0002926. This document indicates that Silverstein Properties Inc. contracted with Seasons Industrial Contracting for the removal of underground storage tanks located at 7 WTC, including mobilization and demobilization.

⁵² See Testimony of Michael Levy, pp. 117-118.

92) The work was done in the quadrant containing 7 WTC was performed by the joint partnership of Turner and Plaza Construction, with Seasons Construction working as a subcontractor.⁵³

93) At a time when compliance with safety and health regulations was at its lowest levels, contractor oversight was being cut by the DDC.^{54, 55}

94) The recovery operations required the removal of debris by the Port Authority Police Department, FDNY and NYPD.

95) Working with the City and its contractors, the Port Authority Police Department controlled access to the WTC Site by workers and others lawfully present.

96) Port Authority personnel, including engineers and occupational safety and health experts, participated in the debris removal operations at the WTC site.⁵⁶

97) "The Port Authority remained an integral part of the project providing high-level management staff to assist in planning and construction management."⁵⁷

⁵³ Testimony of Jack Klein, September 14, 2005, at p. 55:

Q. Okay. So at that time it was your understanding that seasons had responsibility for removing debris at 7 World Trade Center?

MR. WILLIAMSON: Objection to the form of the question. You can answer.

A. My understanding is that Turner and Plaza Construction had the overall responsibility for removal of the debris at 7 World Trade Center. And that Seasons was contracted to work for them.

⁵⁴ "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. FEMA-DC00004401.

⁵⁵ "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. FEMA-DC00004404.

⁵⁶ *See* Deposition of Michael Burton, September 8, 2005, at pp. 178-182.

⁵⁷ FEMA-NY00077192.

98) The City, through the DDC, sought the guidance and advice of these Port Authority personnel with respect to debris removal and the geography and design of the World Trade Center. These Port Authority personnel exercised authority to direct, control and enforce health and safety practices as to workers and others lawfully present at the WTC Site.⁵⁸

99) The Port Authority performed the role of the NYC Building Department at the WTC Site.⁵⁹

100) The City Department of Design and Construction (“DDC”) was the lead agency on safety and health matters at the WTC Site.⁶⁰

101) The Health and Safety plan was managed and enforced by Liberty Mutual under a DDC Contract.⁶¹

102) The City and its contractors were responsible for collecting information about, and enforcing, health and safety laws, rules and regulations at the World Trade Center work site.

103) The Port Authority was responsible for collecting information about, and enforcing, health and safety laws, rules and regulations at the World Trade Center work site.

104) The DDC and its contractors, most prominently, Bechtel Environmental Safety & Health (“Bechtel”), and the Port Authority, inspected the WTC Site to determine safety conditions and enforce compliance with personal protective equipment [“PPE”] requirements, set

⁵⁸ See Deposition of Mary Plaskon, July 7, 2005, at pp. 79-86.

⁵⁹ “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 CityCM3-0-0035831 - CityCM3-00035832.

⁶⁰ 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 “Air Quality and Environmental Impacts Due to the World Trade Center Disaster,” December 2001 at CITY CM3-00025297.

⁶¹ See FEMA-NY00067895.

forth by the City. These reports are extensively detailed, and were prepared throughout the recovery effort.⁶²

105) The City's contractors also accepted responsibility for the World Trade Center Project Environmental Health and Safety Plan enforcement.⁶³

106) Each prime contractor and their subcontractors were responsible for implementation, enforcement and compliance with all aspects of this World Trade Center Project Environmental Health and Safety Plan.⁶⁴

107) The City's primary contractors were not drones, taking directions blindly from the DDC and other municipal agencies. To the contrary, the primary contractors exercised discretion and authority at the WTC Site, and had full decision-making power.⁶⁵

108) The primary contractors had the authority to hire sub-contractors and disburse City funds "based on project needs and reasonable accounting practices."⁶⁶

⁶² See, e.g., CITYCM3-00014844-57 and CITYCM3-00021319-21518.

⁶³ "Each prime contractor and their subcontractors are responsible for implementation, enforcement and compliance with all aspects of this plan." (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. (CITYCM3-00041687).

⁶⁴ See EH&S Plan at PA-CMO3-0000057.

⁶⁵ See Ken Holden Deposition, August 11, 2005, 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.

⁶⁶ *Id.*

109) Official documents provided to the primary contractors by the City throughout the rescue, recovery and debris removal operation, well into 2002, confirm this ability.⁶⁷

110) Sub-contractors working at the WTC Site were hired, and paid, by the primary contractors.⁶⁸

111) In accordance with their role as “managers” of the WTC Site, each of the four primary contractors, Bovis Lend Lease, Turner/Plaza, Tully and AMEC were paid a management fee for their work.⁶⁹

112) 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 performance.⁷⁰

113) This “kind of regular interaction with contractors or subcontractors was pretty standard operating procedure.”⁷¹

114) This control, exercised by the primary contractors, could have been used to ensure a subcontractor’s compliance with environmental and occupational safety and health requirements.⁷²

115) Former Commissioner Kenneth Holden testified that he was concerned that primary contractors “would be exposed to numerous lawsuits based on hazardous materials at the site long after the project was done.”⁷³

⁶⁷ See, CITY CM3-00061065, DDC Correspondence to Bovis dated September 20, 2001; *see also*, AMEC CM3-00000634, 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*, Holden Dep., August 11, 2005 at pp. 201-202.

⁶⁸ Holden Dep., August 11, 2005, at pp. 206-207.

⁶⁹ *Id.*, at pp. 235-236.

⁷⁰ *Id.*, at pp. 214-215.

⁷¹ *Id.*, at p. 215.

⁷² *Id.*, at pp. 215-216.

⁷³ *Id.*, at pp. 219-220.

116) Contracts between the City and its four primary contractors, AMEC, Tully, Turner and Bovis were not signed.⁷⁴

117) The draft contracts, although never signed by the parties, embodied the terms of the agreement between the City and the primary contractors for the work to be performed at the WTC Site.⁷⁵

118) For this reason, the draft contracts, which accurately reflected the terms of the work to be performed, set forth the duties and responsibilities of each of the four primary contractors at the WTC Site.⁷⁶

119) 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.⁷⁷

120) No federal, state or local laws were suspended with respect to protection of workers by Mayor Giuliani.⁷⁸

121) No federal, state or local laws were suspended or revoked with respect to protection of workers by Governor Pataki.⁷⁹

122) No federal, state or local laws were suspended or revoked with respect to protection of workers by President Bush.⁸⁰

⁷⁴ *Id.*, at pp. 222-223.

⁷⁵ *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.

⁷⁶ *Id.*, at p. 240.

⁷⁷ *See*, CITYCM3-00030568 *et seq.* and CITYCM3-0001442 *et seq.*

⁷⁸ *See* Deposition of Walter Murray, July 29, 2005, 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.

⁷⁹ *Id.*

⁸⁰ *Id.*

123) New York State Labor Law § 200 was not suspended or revoked on or after September 11, 2001.⁸¹

124) New York State Labor Law § 241 *et seq.*, including §241(6) was not suspended or revoked on or after September 11, 2001.⁸²

125) General Municipal Law § 205-a was not suspended or revoked on or after September 11, 2001.⁸³

126) General Municipal Law § 205-e was not suspended or revoked on or after September 11, 2001.⁸⁴

127) Because no federal, state or local laws were suspended or revoked with respect to protection of workers, the contract 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.*⁸⁵

128) 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*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ CITYCM3-00030575 (Emphasis in the original).

*replace and adequately maintain at or about the Site suitable and sufficient protection...*⁸⁶

(Emphasis added).

129) 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 requirements applicable to the Work: (1) New York State Labor Law...”***⁸⁷ (Emphasis added).

130) All "emergency" conditions had ended by September 15, 2001 by which time it was clear to all involved that no additional living survivors would be thereafter found in the WTC Site.

131) Defendants were required to comply with New York State Labor Law §200 at all times on and after September 11, 2001.⁸⁸

132) Defendants were required to comply with New York State Labor Law § 241, including §241(6), at all times on and after September 11, 2001.

133) Defendants were required to comply with NY State Municipal Law §205a-e at all times on and after September 11, 2001.

134) As of September 29, 2001 the Mayor officially declared that it was clear that there would not be any additional survivors found at the WTC Site.⁸⁹

⁸⁶ CITY CM3-00014463.

⁸⁷ CITY CM3-00030589.

⁸⁸ See Contracts for Debris Removal - CITY CM3-00030589.

⁸⁹ Deposition of Michael Burton dated September 8, 2005 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.

135) There was never a time when the defendants were not required to comply with New York State Labor Law § 200.

136) There was never a time when defendants were not required to comply with New York State Labor Law § 241 and 241(6).

137) The defendants had access to vital services in the downtown area in as early as September 12, 2001.⁹⁰

⁹⁰ See Testimony of Michael Burton, City of New York, DDC, September 8, 2005, Transcript pp. 98-101.

Q. And when you began to assemble at P.S. 89 after September 11, 2001, what day was that approximately?

A. I think it was September 12th.

.....

Q. On September 12th at P.S. 89 did you have electric service?

A. I think we did, yes. I think - - yes.

Q. And did you have sewer service at P.S. 89 on September 12th?

A. Yes.

Q. And did you have water service at P.S. 89 on September 12th?

A. Yes.

.....

Q. And when did you move from P.S. 89 to AMEX, was there an AMEX building, or the financial center that you were moved to at some point?

A. I don't recall the exact date.

Q. Approximately?

A. Early November would be my best guess.

Q. Okay. And when you moved there in early November, did you have a landline phone service?

A. Yes.

Q. Did you have electric service?

A. Yes.

Q. Did you have sewer service?

A. Yes.

Q. Did you have water service?

A. Yes.

Q. And at that point - - What was it called, the AMEX building or financial services building?

138) Furthermore, “key” customers of Consolidated Edison had electricity services restored as of September 17, 2001.⁹¹

A. I think its actually called World Financial Center 3.

Q. Okay. So when you were at World Financial Center 3, did you have computer service?

A. Yes.

Q. And did that include email?

A. Yes.

.....

Q. And prior to being at the World Financial Center, when you were at P.S. 89 did you have any email service?

A. I think - - I think we did.

⁹¹ Rough Copy of the Deposition Transcript of Robert Donahue of Consolidated Edison dated September 27, 2005 pp. 31-34:

Q. With regards to this temporary service that you were trying to establish in the area, when was it that temporary service was restored to the downtown area for the first time after the events of September 11, 2001?

Mr. Rysavy: Objection to form. As to which system?

Mr. LoPalo: In general

Mr. Rysavy: Objection to form.

A. Well, first of all, you say downtown area. You got to - - either I'll define what I mean or you define it. I mean, downtown area is a big area. I'm not sure what you mean.

Q. Below Chambers Street.

A. Below Chambers Street. It's still - - part of that area was not out of service. The best way that I can explain it to you is that we had three substations that supplied most of the area. There were five networks in that area. When we lost the towers - - lost building No.7, two of those substations were destroyed. And the other - -other substation was taken out of service because of the loss of the high voltage supply. The first restoration that we were attempting to do was to come back on Monday, the 17th, so that the financial institutions could restart the country. And our efforts were to ensure the we had temporary supply to not only the stock exchange, but the other financial institutions that had to work for the stock market to work. And that work to get the supply back was completed on the morning of the 17th, which was the very first step of a long complex series of moves in order to try to get the system back to where it was before 9/11?

.....

Q. Do you know who those key customers were who had electricity restored by September 17th of 2001?

Mr. Rysavy: Objection to form.

A. I did at the time. I don't know who they are now.

POINT II.
**THE FEDERAL GOVERNMENT DID NOT CONTROL THE
WORK AT THE WTC SITE**

139) 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 World Trade Center Disaster site.⁹²

140) At no time on September 11, 2001 or anytime thereafter did Silverstein Properties, Inc., Silverstein Development Corp., or an 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 clean up efforts at the WTC Site.⁹³

⁹² See, e.g., Testimony of Jack Klein, Silverstein Properties, Inc., September 13, 2005, Transcript 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."

⁹³ Testimony of Michael Levy, May 23, 2005, pp. 176-177:

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

Mr. Tyrrell: Objection.

Mr. Williamson: Objection to the form of the question. Again, you're inspecific as to what site you're talking about and what work you're talking about.

Mr. Napoli: The whole site. Any work.

Mr. Williamson: Then you can answer the question as put.

A. Please restate the question.

Mr. Napoli: you can reread the question. I'm sorry.

(record read.)

A. No.

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

Mr. Tyrrell: objection.

A. No.

141) At no time on September 11, 2001 or thereafter was the City of New York's work at the WTC Site performed under the direction or control of the federal government or any of its agencies.^{94, 95}

142) The work of the debris removal was done exclusively or at the direction of the City of New York.⁹⁶

⁹⁴ See Deposition Transcript of Michael Burton September 9, 2005 p. 345:

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

Objection by Mr. Tyrell: Can I just ask again who "they" was? I'm sorry.

Mr. Floriani: OSHA

Mr. Tyrell: Thank you.

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.

⁹⁵ *See also* Deposition of Kenneth Holden, August 10, 2005, at p. 117

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

A: Did any Federal officer direct me in any way. As I said, on the late morning, early afternoon of September 11th, 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 11th itself I do not recall a Federal officer giving me specifically a direct order regarding the World Trade Center.

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.

See also Holden Testimony, 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.

⁹⁶ An undated draft for a memorandum that addresses the issue of whether several different debris removal operations' costs would be reimbursable under public assistance (FEMA-DC00004579) stated:

New York City (NYC) through its Department of Design and Construction (DDC) is in charge of the debris removal activity at the World Trade Center (WTC) site. Because of

143) Bovis' work was directed at all relevant times by the City of New York.⁹⁷

144) Turner's employees were not subject to the oversight of the federal government or its agencies.⁹⁸

145) Tully's work was not directed or controlled by the federal government or its agencies.^{99, 100}

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 Corrdinated 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).

⁹⁷ Deposition Transcript of James Abadie date July 15, 2005 p. 310:

Q: You got your direction from the DDC?

A: Yes.

⁹⁸ Deposition Testimony of Walter Murray dated July 29, 2005 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.

⁹⁹ See Deposition of William Ryan dated August 2, 2005, 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?

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

146) The Silverstein entities were at no time directed or controlled by the federal government or its agencies in their work, or the work of their contractors and sub-contractors at the WTC Site.¹⁰¹

147) The Port Authority was at no time directed or controlled by the federal government or its agencies in its work at the WTC Site.¹⁰²

148) As of September 19, 2001, if not earlier, the WTC Site was turning into a construction site with worker safety issues.^{103, 104}

¹⁰⁰ Testimony of William Ryan, Tully Construction, at pp. 182-183:

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.

¹⁰¹ John Klein Deposition, September 14, 2005, 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

¹⁰² See Deposition of Mary Plaskon, July 8, 2005, at p. 307:

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

A: Direct the way I did work?

Q: Yes.

A: No.

See also Peter Rinaldi Deposition, July 8, 2005, 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.

¹⁰³ See City CM3-00040459.

¹⁰⁴ The work at the WTC site continued to be the type of work normally done at any other construction site. See Projected Schedule, FEMA-NY00000009.

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

149) OSHA did not enforce any of its standards on the WTC worksite by agreement with the City of New York and the contractors.¹⁰⁵

150) At the City of New York's direction, OSHA did not enforce its own standards.

151) The City of New York 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 in denying OSHA the right to enforce its standards.¹⁰⁶

152) The City of New York 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 in not taking appropriate enforcement action given OSHA's consultation status.¹⁰⁷

153) The City of New York acted in bad faith in not taking appropriate enforcement action given OSHA's consultation status.

¹⁰⁵ "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 Public Hearing on Air Quality and Other Environmental Public Health Matters Resulting from the 9/11/01 Tragedy: November 26, 2001, at p. 326.

¹⁰⁶ See 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."

¹⁰⁷ See 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."

154) The City of New York denied OSHA's request to assume an enforcement role in October 2001.¹⁰⁸

155) The City of New York continued to deny OSHA's request to assume an enforcement role in November of 2001.

156) The City of New York continued to deny OSHA's request to assume an enforcement role in December of 2001.

157) The City of New York continued to deny OSHA's request to assume an enforcement role in January of 2002.

158) The City of New York continued to deny OSHA's request to assume an enforcement role in February of 2002.

159) The City of New York continued to deny OSHA's request to assume an enforcement role in March of 2002. The City of New York continue to deny OSHA's request to assume an enforcement role in April of 2002.

160) The City of New York continued to deny OSHA's request to assume an enforcement role in May of 2002.

161) The City of New York continued to deny OSHA's request to assume an enforcement role in June of 2002.

162) At all relevant times the City of New York refused to allow OSHA any authority to regulate or enforce its recommendations at the WTC site.

¹⁰⁸ "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.

163) The City of New York's continued refusal to follow OSHA's recommendations allowed countless workers, including the plaintiffs, to be exposed to deadly toxins, and become injured.

164) 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.

165) The City of New York alone designated that OSHA's role was advisory.

166) OSHA was present in a consultative, rather than an enforcement role.¹⁰⁹

167) Throughout the debris removal, OSHA's primary role continued to be one of assistance and consultation, not enforcement, within the WTC Recovery Project Area ("Green Line").¹¹⁰

168) OSHA was "absolutely NOT" in enforcement mode inside the inner zone of the emergency area.¹¹¹

169) OSHA personnel were present on the worksite and attended safety meetings, but only provided advice and information; they did not enforce their own rules and did not levy fines for non-compliance with OSHA or other safety and environmental rules.¹¹²

170) It was the City's and the primary contractors' responsibility to enforce OSHA's rules and regulations throughout debris removal.

¹⁰⁹ See CITYCM3-00074953.

¹¹⁰ Talking Points Memorandum from OSHA dated 12/31/2001. See OSHA-NY00037021.

¹¹¹ World Trade Center Emergency OSHA Response Orientation pamphlet dated 04/29/02. See OSHA-NY00042575.

¹¹² 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..." 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." TURCM3-00000879, dated September 15, 2001.

171) The City and its primary contractors failed to levy fines for non-compliance with OSHA or other safety and environmental rules.

172) The City's and contractors' failure to levy fines for non-compliance with OSHA or other safety and environmental rules permitted and, indeed, encouraged an atmosphere of non-compliance with those regulations in and around the World Trade Center site.

173) The City and its primary contractors failed in their responsibility to enforce OSHA's rules and regulations and did not levy fines for non-compliance with OSHA or other safety and environmental rules.

174) The City did not enforce safety and health rules because the City believed enforcement would interfere with and slow down the removal of the debris at the WTC Site.

175) OSHA's input was strictly advisory and not binding. For example, OSHA's recommendations exceeded the regulations the City adopted for PPE use at the WTC Site.^{113, 114},

115

¹¹³ 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." TURCM3-000000837. OSHA reported levels of contaminants. *See* BOVCM3-000002942 – BOVCM3-000002945.

¹¹⁴ 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).

¹¹⁵ See testimony of James Abadie, July 15, 2005, 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?

MS. CONNOLLY: Objection.

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]

176) OSHA's presence on the worksite did not relieve the contractors of their 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.

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?

MS. CONNOLLY: Objection.

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?

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

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?

MR. KEARNEY: Objection.

Q. Isn't that correct?

[colloquy omitted]

A. Depending on the situation.

Q. Now, at the World Trade Center, the OSHA partnership any different?

MR. KEARNEY: Objection to form of that question.

A. The OSHA partnership was similar to AOL.

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

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

A. At the World Trade Center, 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 World Trade Center project was in an advisory mode?

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

A. Yes.

Q. And when did you hear that?

A. When they first brought OSHA onto the project.

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

177) FEMA's primary role, was to provide reimbursement to the New York City and New York State agencies for the work performed.^{116, 117} FEMA was not in control of and did not direct the work of the City or its contractors at the World Trade Center site.¹¹⁸

178) 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.*).¹¹⁹

179) FEMA provided hundreds of millions of dollars to the City for the recovery effort, and FEMA itself acknowledged the City's leadership role in the recovery.¹²⁰

180) Through its Office of Management and Budget ("OMB"), the City emphasized the importance of seeking and obtaining reimbursement from FEMA and documented carefully the expenses incurred.¹²¹

¹¹⁶ 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 CITYCM3-00033810.

¹¹⁷ 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 World Trade Center was to reimburse the city for money." See Burton Testimony, September 8, 2005, 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-grante

¹¹⁸ "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." FEMA-NY00042518: State Emergency Management Office Federal Emergency Management Agency Public Assistance Program - Applicant's Handbook.

¹¹⁹ 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 (9th Cir., 2002).

¹²⁰ "[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 AMECM3-000000660: October 16, 2001 FEMA Correspondence.

¹²¹ See CITYCM3-00035875: September 18, 2001, Memo from OMB Director Adam Barsky: "To facilitate the reimbursement to the City by the Federal Emergency Management Agency for costs associated with

181) FEMA provided funding for the operation throughout its duration. In many instances, too, the City would apply for reimbursement for its payment of contractors engaged in debris removal.¹²²

182) FEMA waived limitations on the period of time in which such reimbursement could be obtained.¹²³

183) FEMA summaries reveal that the agency provided over six hundred million dollars (\$600,000,000) to the City for reimbursement of work and reconstruction.¹²⁴

184) DDC wrote to the prime contractors directing that supporting documentation for materials costs and labor payments be turned over promptly for FEMA review.¹²⁵

185) The City's work at the World Trade Center site was voluntary.¹²⁶

the World Trade Center emergency, several new event codes have been established... " *See* CITYCM3-000035877: September 18, 2001 Memo from City Office of Payroll Administration.

¹²² *See* Deposition of Kenneth Holden, August 10, 2005, 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.

¹²³ *See* 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. *See* CITYCM3-00035866: September 25, 2001 Correspondence from Commissioner Holden.

¹²⁴ *See* CITYCM3-00057674: FEMA Disaster Assistance Summary of March 15, 2002.

¹²⁵ *See* CITYCM3-00035889-94: July 31, 2002 Correspondence from Commissioner Holden to prime contractors.

¹²⁶ Rubin, Debra: "Award of Excellence Winner: Michael Burton" McGraw-Hill Construction Engineering News-Record, Publication date April 22, 2002: (Burton Exhibit 1), at p. 3: "In early January, I realized that no one ever asked me to manage the effort at Ground Zero', Burton Remembers. 'I just did what I thought had to be done and it just happened.' Adds DDC commissioner Kenneth Holden: 'We were there, no one said 'no', so we went ahead.'" Available at: http://enr.ecnext.com/free-scripts/comsite2.pl?page=enr_document&article=februar020422a

c. The Army Corp of Engineers ["ACOE"] Neither Controlled Nor Directed The Work Performed At The World Trade Center Site.

186) A typical example of the supporting role played by federal agencies is their participation in the debris removal program, where, for example, the U.S. Army Corps of Engineers only provided assistance upon specific request and direction by the City.¹²⁷

187) The United States Army Corp of Engineers did not activate any personnel under the mission assignments for debris removal at Ground Zero as of September 17, 2001.¹²⁸

188) The Army Corps Of Engineers ["ACOE"] was not involved with the stabilization of the slurry wall; the slurry wall was addressed by Bovis and its subcontractors.¹²⁹

189) ACOE was not responsible for the debris removal operation at the WTC Site.¹³⁰

190) ACOE had no direct involvement with debris removal from the WTC Site.¹³¹

191) As ACOE Area Engineer Leach testified, the City and its contractors were responsible for the removal of debris from the WTC Site.¹³²

192) The ACOE did not contract with any private concern for the removal of debris.¹³³

193) At no time did the ACOE assume responsibility for the debris removal operations.¹³⁴

¹²⁷ The U.S. Army Corps of Engineers (will) provide technical assistance to NYC on an as required basis as NYC requests this assistance." See CITY CMC-00033810 - Debris Monitoring Plan.

¹²⁸ FEMA-DC00013239

¹²⁹ "The ACOE will provide technical assistance to NYC on an as required basis as NYC requests this assistance." See CityCM3-00033810.

¹³⁰ See Testimony of ACOE's David Leach, Area Engineer for Metropolitan New York, at p. 62.

¹³¹ *Id.* at pp. 64-65.

¹³² Deposition Transcript of David Leach, US Army Corps of Engineers, dated September 16th 2005, pp. 25-26

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?

¹³³ *Id.* at pp. 69-70.

194) The City and its contractors were in charge of the planning and execution of debris removal.¹³⁵

195) Although defendants have represented otherwise to this Court, the ACOE did not have any role with respect to the slurry wall of the WTC Site.¹³⁶

196) 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.¹³⁷

197) The construction work needed to secure the sides of the slurry wall was awarded to “a contractor by the name of Nicholson.”¹³⁸

198) According to Commissioner Holden, the ACOE played no role with respect to the slurry wall.¹³⁹

d. The Environmental Protection Agency ["EPA"] Neither Controlled Nor Directed The Work Done At The World Trade Center Site.

199) As was the case with OSHA and FEMA, the EPA’s involvement at the WTC Site in the days and weeks after September 11, 2001 was minimal, and only advisory.¹⁴⁰

200) The New York 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 about the dangers preset at the site.¹⁴¹

¹³⁴ *Id.* at p. 85 .

¹³⁵ *Id.*

¹³⁶ The slurry wall is about a 3-foot thick wall that was built in 22-foot long sections...when the World Trade Center was built. That basically was the perimeter foundation walls for the World Trade Center...The concern was that as the 210-story towers collapsed, they broke the horizontal support...the Hudson River was going to flow in. *See* Ken Holden Deposition, August 11, 2005, at p. 171.

¹³⁷ *Id.* at pp. 172-173.

¹³⁸ *Id.* at p. 175.

¹³⁹ Testimony of Ken Holden, August 11, 2005, at p. 180.

¹⁴⁰ 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* WTCP/PA-CMO3-0000280: *EPA’s Response to the WTC Center Collapse; Office of the EPA Inspector General.*

201) A letter from the USEPA to NYCDOH establishes that the EPA had no control over operations at the WTC Site.¹⁴²

202) 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.¹⁴³

¹⁴¹ See Deposition of Isaac Weisfuse, M.D, September 16, 2005, at pp. 69-70

¹⁴² “We do not have the authority to enforce the worker health and safety policies for non EPA/USCG employees.” See CityCM3-00007585-CityCM3-00007586.

¹⁴³ 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 (Deposition Of James Abadie, July 15, 2005, pp. 462-463):

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

Mr. Kearney: objection to the form of the question.

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?

Mr. Kearney: objection to the form of that question.

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.

POINT III.

NOTWITHSTANDING LOCAL, STATE AND FEDERAL LABOR LAWS AND ENVIRONMENTAL RULES AND REGULATIONS, THE CITY, ITS CONTRACTORS AND THE OTHER WORLD TRADE CENTER DEFENDANTS KNOWINGLY FAILED TO IMPLEMENT REQUIRED SAFETY PROTECTIONS AND ENFORCE OSHA REGULATIONS THAT WOULD HAVE PROTECTED WORKERS AT THE WORLD TRADE CENTER 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)."

203) Within hours of the collapse of the WTC towers, the City of New York through the Mayor's Office of Emergency Management ["OEM"], the Department of Design and Construction ["DDC"], the New York City Department of Health (DOH) and the Fire Department ["FDNY"] began to assess the potential health hazards created by the dust and fires at the site.¹⁴⁴

a. The World Trade Center Buildings Contained Many Substances Known To Be Hazardous When Ingested, Inhaled or Contacted.

204) Prior to September 11, 2001, the WTC site was a large quantity generator of hazardous waste pursuant to the Resource Conservation and Recovery Act (RCRA), generating over 10,000 pounds of hazardous waste per year.

205) The buildings of the WTC site contained thousands of computers, fluorescent light fixtures, stored chemicals, underground and above ground storage tanks holding thousands of gallons of diesel fuel and fuel oil, electrical transformers laden with PCB-containing oil, asbestos, and other hazardous substances.¹⁴⁵

¹⁴⁴ See CITYCM3-0004459.

¹⁴⁵ See Deposition of Michael Burton, September 8, 2005, at pp. 49-51.

206) It was anticipated and known that the collapse of these buildings would create a toxic stew of these substances, presenting a dire health risk to all who were exposed.

207) The City of New York, through its agencies, agents and contractors, was aware that a need for protection from hazardous particulate matter, fumes and dust existed at the WTC Site.¹⁴⁶

208) 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, benzene¹⁴⁷ and various other potentially hazardous substances were released into the air."¹⁴⁸

209) However this message was confused by inaccurate reports of safe conditions from top management at the DDC.¹⁴⁹

210) The Defendants were aware that exposure to carbon monoxide may cause chronic angina and heart dysrhythmia.¹⁵⁰

¹⁴⁶ 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* 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.

¹⁴⁷ 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."

¹⁴⁸ *See* CITY CM3-000025293: *Air Quality and Environmental Impacts Due to the World Trade Center Disaster*, December 2001.

¹⁴⁹ "All DC Personnel should feel confident that they are not being exposed to unhealthy levels of chemicals and that air quality is generally good.", Bovcm3 -000001521.

¹⁵⁰ *See* TURCM3-000000219

211) Defendants knew that exposure to chromium metal and insoluble salts may cause chronic nasal septum perforation, liver and kidney damage and is a carcinogen.¹⁵¹

212) Defendants knew that exposure to Crystalline Silica (as respirable dust) may cause progressive respiratory symptoms, silicosis and is a carcinogen.¹⁵²

213) Defendants knew the exposure to Freon (R-22) may cause cardiac arrhythmia, cardiac arrest and asphyxiation.¹⁵³

214) Defendants knew that exposure to Lead (metallic and inorganic) may cause decreased gripping strength, abdominal pain, severe constipation, nausea, vomiting, paralysis of the wrist joint, kidney damage and nervous system disorders.¹⁵⁴

215) Defendants knew that exposure to mercury compounds may cause pneumonitis, tremor and gastrointestinal distress.¹⁵⁵

216) Defendants knew that exposure to PCBs may cause chemical acne, black heads, dark patches on skin, liver damage, digestive disturbances, impairment of the immune system and cancer.¹⁵⁶

217) The dust and particulate matter in and around the WTC Site was not safe for the plaintiffs to ingest.

218) The dust and particulate matter in and around the WTC Site was not safe for the plaintiffs to contact.

¹⁵¹ *See Id.*

¹⁵² *See Id.*

¹⁵³ *See Id.*

¹⁵⁴ *See Id.*

¹⁵⁵ *See Id.*

¹⁵⁶ *See Id.*

219) The dust and particulate matter in and around the WTC Site was not safe for the plaintiffs to absorb.

220) The dust and particulate matter in and around the WTC Site was not safe for the plaintiffs to touch.

221) 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.¹⁵⁷ Each such failure to inform was an example of the defendants' 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 this act... ."

222) A November 2001 report¹⁵⁸ prepared for the National Council of Structural Engineers Associations - Structural Engineering Emergency Response Plan Committee noted that the structural engineers at the WTC site had concerns about environmental contamination at the WTC site.¹⁵⁹

223) 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, contaminants, teratogens, and other harmful elements, dust, fiberglass, glass, silica, asbestos, lead, benzene, organic matter, and other hazardous chemicals, substances and elements, aerosols and fumes in the air and on surfaces.

¹⁵⁷ 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. *See* February 21, 2002 EPA National Ombudsman First Investigative Hearing on WTC Hazardous Waste Contamination.

¹⁵⁸ "World Trade Center Disaster: *Structural Engineers at Ground Zero*," August Domel, Jr., Ph.D., S.E., P.E., November 2001.

¹⁵⁹ *See* WTCP/PA - CMO3 - 0000921-22, "Evaluation Report: EPA's Response to the World Trade Center Collapse: Challenges, Successes, and Areas for Improvement" Report No. 2003-P-00012, August 21, 2003.

224) The levels and types of exposures to the workers, including rescue, recovery, construction and other workers resulting from this mixture of materials, dust, toxins, and a smoldering fire that lasted more than three months and reached temperatures as high as 1800° Fahrenheit was unprecedented.¹⁶⁰

225) 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.¹⁶¹

226) In December 2001, at an "Agency Safety Meeting," among the issues discussed was the fact that a number of Port Authority Police officers had been tested and found to have markedly elevated levels of mercury in their blood.¹⁶²

227) Of 42 Port Authority Police Officers tested, 4 PAPD officers were found to have elevated levels of mercury and the results of 14 other officers were still pending (24 officers had normal/acceptable blood levels).¹⁶³

228) 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 and thus capable of burning moist tissue in the throat, eyes, and nasal passages.

¹⁶⁰ See Paul J. Liroy, “Characterization of the Dust/Smoke Aerosol that Settled East of the World Trade Center 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.

¹⁶¹ See Thomas Cahill, *et al.*, “Analysis of Aerosols from the World Trade Center Collapse Site, New York October 2 to October 30, 2001.” *Aerosol 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.

¹⁶² CITYCM3-00018275.

¹⁶³ *Id.*

229) This 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.

230) 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 is as caustic as liquid drain cleaners.¹⁶⁴

231) 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, indicative of a high rate of contamination¹⁶⁵

232) The City established a so-called “Green Line” of demarcation, which allegedly represented a 50-foot perimeter around the WTC Site where highest exposures were anticipated to occur.

233) Air Purifying Respirators ["APRs"] were required to be worn within the Green line, but when the worker stepped over that imaginary line, 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.

234) Respirators were not required to be worn outside the green line even though the defendants knew that there was contamination outside of the "green line."¹⁶⁶

¹⁶⁴ See Roger Clark, *et al.*, “Environmental Studies of the World Trade Center 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.*, “Health and Environmental Consequences of the World Trade Center Disaster,” *Envtl Health Perspectives* 112(6):73139, 732 (May 2004), at p.16.

¹⁶⁵ See Juan Gonzalez, “Health Hazards in Air Worry Trade Center Workers,” *Daily News* (September 28, 2001); Juan Gonzalez, *Fallout.*, p. 6. The sample was taken at the corner of Church and Vesey Streets, at the northeast corner of the WTC Site.

¹⁶⁶ See, *e.g.*, 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.

235) There was no enforcement of respirator usage outside the "green line." These failures of enforcement were each examples of the defendants' 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 this act... ."

236) There was no enforcement of respirator usage inside the "green line."

237) 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, despite the fact that the City of New York and other defendants knew of reports coming from Stuyvesant High School that students were developing bronchitis, asthma, rashes and coughs as a result of the dust from the World Trade Center.¹⁶⁷

238) Plainly, the "green line" was not confining the 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).

239) 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, despite the fact that the City of New York knew that rescue and recovery workers at the WTC Site were reporting respiratory illnesses.¹⁶⁸

¹⁶⁷ See Deposition Transcript of Isaac Weisfuse, M.D, September 16, 2005 at p. 92:

Q: Well, Isn't it true that when Styvesant [sic] school opened on October 9th 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 World Trade Center?

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

¹⁶⁸ See Deposition of Isaac Weisfuse, M.D., September 16, 2005 page 122:

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.

b. 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.

240) Armed with the knowledge that the World Trade Center site was essentially a huge hazardous waste field, the City of New York 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.¹⁶⁹

241) The City hired Bechtel Corporation to assess hazards at the site soon after the towers collapsed on September 11, 2001.¹⁷⁰

242) The responsibility for developing an environmental safety and health plan for the WTC site was subcontracted out by the City of New York to Bechtel.^{171, 172}

243) Within hours of the collapse, the City began to order respirators for workers responding to the WTC site.

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.

¹⁶⁹ "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* Deposition Michael Burton, September 8, 2005 at p. 33.

¹⁷⁰ "An overall site assessment for environmental safety and health (ES&S) concerns was conducted by Bechtel ES&H personnel on 9/19/01" *See* WTC Site Evaluation at CITYCM3-00075041.

¹⁷¹ *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 World Trade Center Towers, OSHA-NY00042920

¹⁷² "Bechtel has been awarded a 90-day contract to develop the WTC Disaster Project Environmental Safety and Health Plan." CITYCM3-0004459.

244) The type and amount of protective equipment, including respirators and cartridges, ordered for the WTC site were wholly inadequate for the WTC site workforce. Such failures were additional examples of the defendants' 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 this act... ."

245) Working with the City of New York, Bechtel developed two preliminary Environmental Health and Safety Plans for the site.¹⁷³

246) 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 NYC construction market.

247) Each contractor, as well as the City's DDC, lobbied against Bechtel remaining at the site.¹⁷⁴

¹⁷³ Bechtel circulated two draft World Trade Center Emergency Project Environmental Safety and Health Plans. See OSHA-NY00042921

¹⁷⁴ Deposition Transcript of Michael Burton dated September 8, 2005, 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.

248) Defendants willfully ignored Bechtel's advice on health and safety so as to undermine their effectiveness and force Bechtel out of the job.¹⁷⁵

249) Bechtel reported the safety discrepancies they observed to Michael Burton of the City's DDC.¹⁷⁶

250) 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 World Trade Center site, and with profits, than with the need to adequately assess and ameliorate the hazardous conditions at the site.¹⁷⁷

251) In fact, the New York City Department of Design and Construction 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.¹⁷⁸

252) 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.¹⁷⁹

253) 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 out, complying with or attempting to comply with any law, any rule, regulation or order duly promulgated or issued pursuant to this act... ."

¹⁷⁵ See PA-CMO3-000550, wherein a contractor supervisor willfully dismissed a safety issue raised by Bechtel.

¹⁷⁶ For example See CITYCM3-00064121

¹⁷⁷ FEMA-NY00093063.

¹⁷⁸ See OSHA-NY00042923

¹⁷⁹ See, e.g., CITYCM3-00041176; CITYCM3-00041179; 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.

254) Bechtel officially left the WTC site as late as November 7, 2001.¹⁸⁰

255) Other documents indicate that Bechtel's last official day was as early as October 25, 2001 and their last presence at the site was on November 2, 2001.¹⁸¹

256) 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 operative at the site, indeed the very opposite seemed to be the case.¹⁸²

257) The lack of an operating safety and health program was confirmed by workers at the WTC site and various governmental officials.¹⁸³

258) 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 are or have been wearing any personal protective equipment.¹⁸⁴

259) When Bechtel left the site, its role was transferred to Liberty Mutual.¹⁸⁵

260) At the time Liberty Mutual assumed the role of Bechtel, they were only one employee per shift per day.¹⁸⁶

261) The DDC was critical of Liberty Mutual's lack of participation during this transition period.¹⁸⁷

¹⁸⁰ See WTCP-PA-CMO3-0002572.

¹⁸¹ See PA-CMO3-0000558

¹⁸² See OSHA-NY00042921

¹⁸³ See *Id.*

¹⁸⁴ See *Id.*

¹⁸⁵ See CITYCM3-00023601.

¹⁸⁶ See OSHA's WTC memorandum of October 27, 2001, OSHA-NY00044496.

¹⁸⁷ Memo From Phil Taylor of the Port Authority of New York and New Jersey dated October 25, 2001, PA-CMO3-0000558

262) In early January the responsibility to enforce environmental health and safety was transferred to Bovis.¹⁸⁸

263) This transition was not apparent and totally confusing to the workers at the WTC site.¹⁸⁹

264) 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."^{190, 191, 192}

265) No uniform safety enforcement was performed, nor were Bovis supervisors readily available for abatement of corrective actions.¹⁹³

266) Bovis was given the authority to stop the work at the site if necessary.¹⁹⁴

267) 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.¹⁹⁵

¹⁸⁸ See CITYCM3-00019356.

¹⁸⁹ See *Id*

¹⁹⁰ See 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."

¹⁹¹ See CITY CM3-00023484, Memorandum dated February 13, 2002 from Michael Burton to Bob Adams at Environmental Health and Safety Services. The Memorandum continued, stating:

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."

¹⁹² See also 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."

¹⁹³ See *Id*.

¹⁹⁴ See WTC Emergency Partnership Agreement Between OSHA and Bovis/AMEC OSHA-NY00043892

¹⁹⁵ See *Id*.

268) On September 12, 2001, the City DOH established a surveillance system to monitor the health and condition of those working at the WTC Site.¹⁹⁶

269) The federal government did not establish the health surveillance system.¹⁹⁷

270) The City Department of Health had the responsibility of fitting the masks and respirators to thousands of WTC Site workers.¹⁹⁸

271) The NYCDOH started to provide respirators in the immediate aftermath of September 11, 2001.¹⁹⁹

c. 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 World Trade Center Site.

272) In early October, 2001, the DDC and Bechtel reduced to writing the WTC project Environmental Health and Safety Plan (EH&S Plan).

273) The EH&S Plan of October 15, 2001 was circulated and signed by Calvin Drayton of the Mayor's Office of Emergency Management.²⁰⁰

274) The EH&S Plan of October 15, 2001 was circulated and signed by Kelly McKinney of the NYC Department of Health.²⁰¹

275) The EH&S Plan of October 15, 2001 was circulated and signed by Robert C. Adams CIH, CSP the WTC Emergency Project ES&H Director.²⁰²

¹⁹⁶ See Deposition of Isaac Weisfuse, M.D. of the New York City Department of Health, tr. at pp. 42-43.

¹⁹⁷ *Id.*, at p. 44.

¹⁹⁸ See September 11th and Shifting Priorities of Public and Population Health in New York; *see also*, Weisfuse, M.D. tr. at p. 85.

¹⁹⁹ See Deposition Transcript of Isaac Weisfuse, M.D., at pp. 22

²⁰⁰ See PA-CMO3-0000049

²⁰¹ *See Id.*

²⁰² *See Id.*

276) The EH&S Plan of October 15, 2001 was circulated and signed by Mary M. Plaskon of the Port Authority of New York and New Jersey.²⁰³

277) The DDC 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.

278) Pursuant to the EH&S Plan, OSHA regulations were mandatory for all contractors.

279) The EH&S Plan also required all contractors and governmental agencies to follow all local, state, and federal safety and health laws.

280) In the EH&S plan, the DDC issued specific requirements for the use of personal protective equipment and training of site workers.”²⁰⁴

281) In that plan, the DDC issued specific requirements for the use of Personal Protective Equipment [“PPE”] in its “Environmental Health and Safety Bulletins.”²⁰⁵

282) The City of New York never effectively implemented its ES&H plan.

283) The DDC failed to advise Silverstein Properties Inc. or the World Trade Center Defendants of the EH&S Plan.

²⁰³ See *Id.*

²⁰⁴ For example, in a bulletin issued in February 2002, entitled “*Respirator Requirements for Protection against Specific Hazards*,” the DDC mandated that: “A half-face respirator with P-100, organic vapor, acid gas filters/cartridges is required within the confines of the slurry wall and for any activity or area outside the slurry wall that generates dust, fumes or vapors... ” See CITYCM3-00043524; see also, CITYCM3-00019981: “DDC WTC Emergency Project-Bulletin Personal Protective Equipment [PPE] Requirements.” On September 20 and 22, 2001, the City DOH issued the criteria for minimum safety gear to wear in the recovery effort. CITYCM3-00043716 and 00041953: “*Minimum Gear that Should be Worn Prior to Entry Within the Police Line of WTC Work Area.*”

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284) William Ryan, the Corporate Safety and Health Director for Tully Construction and all Tully entities testified that he never even read the Environmental Health and Safety plan.²⁰⁶

285) Failure to review the ES&H plain demonstrated bad faith and a willful disregard for the safety and health of all Tully employees and all workers who were lawfully present in Tully's work area.

286) The World Trade Center Project Environmental Safety and Health Plan was mandatory.

287) Adhering to the World Trade Center Project Environmental Safety and Health Plan was a requirement of all contractors.

288) Adhering to the World Trade Center Project Environmental Safety and Health Plan was a requirement of all sub-contractors.

289) Adhering to the World Trade Center Project Environmental Safety and Health Plan was a requirement of all city agencies.

²⁰⁶ William Ryan Testimony, 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 World Trade Center was such a constantly changing environment, that you would have to amend this plan every week.

290) Adhering to the World Trade Center Project Environmental Safety and Health Plan was a requirement of the Port Authority.

291) Adhering to the World Trade Center Project Environmental Safety and Health Plan was a requirement of the World Trade Center Defendants.

292) Adhering to the World Trade Center Project Environmental Safety and Health Plan was a requirement of all uniformed services.

293) Adhering to the World Trade Center Project Environmental Safety and Health Plan was a requirement of all federal employees entering the world trade center project site.

294) Adhering to the World Trade Center Project Environmental Safety and Health Plan was a requirement of any person who entered the World Trade Center project site.

295) Adhering to the World Trade Center Project Environmental Safety and Health Plan was not discretionary.

296) In addition to the DDC, other City agencies, including the DOH, also issued requirements for PPE.²⁰⁷

297) As of March 2002, the DDC promised “to continue to oversee safety health and environmental issues to ensure that those working at the World Trade Center remain safe and healthy.”²⁰⁸

298) Continuously from September 11, 2001 through June 30, 2002, the DDC oversaw environmental health and safety issues for workers at the WTC Site.

299) Enforcement of occupational and environmental health and safety regulations at the WTC Site was the City’s and its contractors' responsibility.²⁰⁹

²⁰⁷ 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* CITYCM3-00007286.

²⁰⁸ *See* CITYCM3-00007286.

300) The City of New York was solely responsible for enforcing the EH&S Plan.

301) Three and a half years after the fact, William Ryan did not even know whether the ES&H plan was adopted and in fact, testified that the plan was never adopted while Tully was working on the site.²¹⁰

302) Mr. Ryan testified that Tully's workers were never trained in the ES&H plan.²¹¹

303) Defendants failed to protect the health and safety of the plaintiffs.

304) Defendants failed 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.²¹²

305) Defendants violated the World Trade Center Project EH&S Plan by not providing 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.

306) The DDC failed in its responsibility to enforce respirator use at the WTC site.

307) The DDC implemented a site-wide Environmental Health and Safety Plan setting forth the Occupational Safety and Health Administration's (OSHA) standards, (29 CFR 1910, and 29 CFR 1926) as well as state and local safety rules as the minimum level of compliance for all entities working in the recovery and debris removal operation.²¹³

²⁰⁹ See 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 do so." Similarly, the City was responsible for monitoring and enforcing the use of Personal Protective Equipment at the WTC Site.

²¹⁰ Testimony of William Ryan, Tully Construction Company, at pp. 256-258.

²¹¹ *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."

²¹² New York State Labor Law § 200.

²¹³ See PA-CMO3-0000063.

308) An organizational chart included in the DDC's Environmental Health and Safety h
["EH&S"] Plan depicts the DDC at the very top of a complex hierarchy of agencies and
contractors charged with health and safety oversight.²¹⁴

309) By the EH&S Plan's terms, the DDC alone was vested with the power to stop
work in the event of workplace hazard.²¹⁵

310) DDC's power to stop work was reiterated in public statements made by Lou
Mendez of the DDC during one of many meetings held at the WTC debris removal operation.²¹⁶

311) The DDC was required to stop work where workers were exposed to hazards.

312) The DDC never utilized its authority to stop work. The DDC's own records
document that hundreds of workers were being exposed to life threatening injuries day after day,
week after week, weeks and months after rescue operations had ceased and the job goal was to
clean the site.

313) All construction managers, general contractors, prime contractors and
subcontractors were required to report non-compliance with the EH&S Plan and all unsafe work
practices incidents, to the DDC.²¹⁷

314) Defendants violated the World Trade Center Project EH&S Plan by not providing
protective equipment, including personal protective equipment for eyes, face, head and
extremities, protective clothing, respiratory protection devices, and protective shields and
barriers.

²¹⁴ See CITYCM3-00041687.

²¹⁵ "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 CITYCM3-
00041687.

²¹⁶ DVD film: "Bovis Lend Lease WTC Recovery;" previously marked as Burton Exhibit 5.

²¹⁷ See CITYCM3-00041706.

315) Where employees provided their own protective equipment, the defendants failed to be responsible to assure its adequacy, including proper evaluation, maintenance and sanitation of such equipment.²¹⁸

316) Defendants violated the World Trade Center Project EH&S Plan by not assuring the adequacy, including proper maintenance, and sanitation of such equipment.

317) Defendants did not provide an adequate hazard assessment and equipment selection.

318) Defendants violated the World Trade Center Project EH&S Plan by not providing an adequate hazard assessment, equipment selection and training of workers at the WTC site.

319) Defendants did not assess the workplace to determine if hazards were present, or were likely to be present, which necessitate the use of personal protective equipment (PPE).²¹⁹

320) Defendants violated the World Trade Center Project EH&S Plan by not assessing the workplace to determine if hazards were present, or were likely to be present, which necessitate the use of personal protective equipment (PPE).

321) If such hazards were present, or likely to be present, defendants should have selected, and had each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment.²²⁰

322) Defendants failed to have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment.²²¹

²¹⁸ OSHA 29 CFR 1910.132 (b)

²¹⁹ OSHA 29 CFR 1910.132 (d)

²²⁰ OSHA 29 CFR 1910.132 (d)

²²¹ OSHA 29 CFR 1910.132 (d)

323) Defendants violated the World Trade Center Project EH&S Plan by not selecting and having each affected employee use, the types of PPE that would have protected the affected employee from the hazards identified in the hazard assessment.

324) If such hazards were present, or likely to be present, defendants should have communicated the selection decisions to each affected employee.²²²

325) Defendants failed to communicate the selection decisions to each affected employee.²²³

326) Defendants violated the World Trade Center Project EH&S Plan by not communicating the selection decisions to each affected employee.

327) If such hazards were present, or likely to be present, the defendants should select PPE that properly fits each affected employee.²²⁴

328) Defendants failed to select the PPE that properly fits each affected employee.²²⁵

329) Defendants violated the World Trade Center Project EH&S Plan by failing to select the PPE that properly fits each affected employee.

330) Defendants failed to verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.²²⁶

²²² OSHA 29 CFR 1910.132 (d)

²²³ OSHA 29 CFR 1910.132 (d)

²²⁴ OSHA 29 CFR 1910.132 (d)

²²⁵ OSHA 29 CFR 1910.132 (d)

²²⁶ OSHA 29 CFR 1910.132 (d)(2)

331) Defendants allowed defective or damaged personal protective equipment to be used.²²⁷

332) Defendants failed to provide adequate training, for employees required to use PPE.²²⁸

333) Defendants failed to train each employee to know at least the following: (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.²²⁹ Such failed training had catastrophic effects upon the health of the plaintiffs and each such failure to train was an example of the defendants' 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 this act...", thus denying them the benefits of any claimed immunity.

334) In early January 2002, control of the debris removal efforts at the WTC site transitioned down from four general contractors to two, Bovis and AMEC, both working at the direction of DDC.

335) This transition gave the Bovis/AMEC partnership the responsibility for the debris removal operation at the site.

336) The Bovis/AMEC responsibility also included compliance with the environmental safety and health plan.

²²⁷ OSHA 29 CFR 1910.132 (e)

²²⁸ OSHA 29 CFR 1910.132 (f)

²²⁹ OSHA 29 CFR 1910.132 (f)

337) For example, in early January 2002 the transition from DDC to Bovis in terms of controlling worker health and safety at the WTC Site was not apparent and overly confusing for the workers.

338) There was no clear line as to who was controlling, enforcing and supervising health and safety issues at the WTC site.

339) Furthermore there were clearly no Bovis supervisors visible on site to address all of the health and safety concerns of the workers at the site.²³⁰

340) In January 2002, worker health and safety was of secondary concern as compared to the debris removal at the WTC Site.²³¹

341) 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.”²³²

342) As of January 2002, it was noted that there were as few as 20% of workers wearing the required respiratory protective equipment.²³³

343) Thus, four months after September 11, 2001, there were still *thousands* of workers at the WTC Site working without the required respiratory protective equipment.²³⁴

344) This low compliance rate of respirator usage is a direct result of the general contractor’s failure to provide enough safety officers on site.²³⁵

²³⁰ See CITYCM3-00019356- CITYCM3-00019358

²³¹ See CITYCM3--00023484.

²³² See CITYCM3-00019356- CITYCM3-00019358.

²³³ See *Id.*

²³⁴ See *Id.*

²³⁵ See *Id.*

345) For example, it was noted that around this time, Tully did not have a safety officer on site for several days.²³⁶

346) In an intra-agency memo from Bob Adams of the DDC to Deputy Commissioner Michael Burton, Adams wrote, “[g]enerally 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 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.*”²³⁷

347) There was minimal follow-through by project management on safety at the WTC Site.

348) Universal opinion at the WTC Site was that there was a lack of commitment by senior project management to address safety concerns in a timely manner, and hold the supervision accountable which was so severe as to amount to bad faith.

349) The City, the DDC and the contractors appeared to only address safety issues when doing so was convenient for the schedule of the project.

350) This failure of the City of New York and their contractors to address safety issues when doing so was not convenient for the schedule of the project, was so severe as to amount to a willful violation of OSHA’s rules and regulations by the City and their contractors, and was an example of the defendants’ 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 this act...”, thus denying them the benefits of any claimed immunity.

²³⁶ See *Id.*

²³⁷ See CITYCM3-00023484 (emphasis added).

351) This failure of the Port Authority and their contractors to address safety issues when doing so was not convenient for the schedule of the project, was so severe as to also amount to a willful violation of OSHA's rules and regulations by the Port Authority and their contractors.

352) This failure of the World Trade Center Defendants and their contractors to address safety issues when doing so was not convenient for the schedule of the project, was so severe as to amount to a willful violation of OSHA's rules and regulations by the World Trade Center Defendants and their contractors.

353) This failure of Bovis and their contractors to address safety issues when doing so was not convenient for the schedule of the project, was so severe as to amount to a bad faith willful violation of OSHA's rules and regulations by Bovis and their contractors.

354) This failure of Turner and their contractors to address safety issues when doing so was not convenient for the schedule of the project, was so severe as to amount to a willful violation of OSHA's rules and regulations by Turner and their contractors.

355) This failure of Tully and their contractors to address safety issues when doing so was not convenient for the schedule of the project, was so severe as to amount to a willful violation of OSHA's rules and regulations by Tully and their contractors.

356) This failure of AMEC and their contractors to address safety issues when doing so was not convenient for the schedule of the project, was so severe as to amount to a willful violation of OSHA's rules and regulations by AMEC and their contractors.

357) While the City of New York and its contractors were aware of the many safety discrepancies at the WTC Site, the reports of low compliance rates of respiratory protection device use was nothing more than “background noise” at safety meetings.^{238, 239}

358) Port Authority Police Department supervisors were noted to be non-compliant with respirator use.²⁴⁰

359) 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."^{241, 242}

360) Bovis did not report noncompliance of any of its employees, subcontractors' employees and others lawfully present at the site failure to comply with site wide respiratory standards.

²³⁸ 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 field. 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." See PA_CMO3-0000808, emphasis in original.

²³⁹ See 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."

²⁴⁰ See 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."

²⁴¹ OSHA-NY00061325.

²⁴² 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 followed them so far, why should we start now." See OSHA-NY00046451, relating to fall protection, but demonstrating the general attitude toward safety and regulatory compliance by the Contractors.

361) Bovis never recorded any noncompliance of any of its employees, subcontractors' employees and others lawfully present at the site failure to comply with site wide respiratory standards.

362) Bovis' neglect to document the failure of its employees, subcontractors' employees and others lawfully present at the site to comply with site wide respiratory standards is only some evidence of the recalcitrant attitude of Bovis management at the site.

363) This recalcitrant attitude was demonstrated by the site safety supervisors at Bovis.

364) Bovis supervisors were not wearing respirators.²⁴³

365) Bovis did not have adequate safety coverage.²⁴⁴

366) AMEC did not report noncompliance of any of its employees, subcontractors' employees and others lawfully present at the site failure to comply with site wide respiratory standards.

367) AMEC never recorded any noncompliance of any of its employees, subcontractors' employees and others lawfully present at the site failure to comply with site wide respiratory standards.

368) AMEC's failure to document noncompliance of any of its employees, subcontractors' employees and others lawfully present at the site failure to comply with site wide respiratory standards is only some evidence of the recalcitrant attitude of AMEC's management at the site.

369) This recalcitrant attitude was demonstrated by the site safety supervisors at AMEC.

370) AMEC supervisors were not wearing respirators.

²⁴³ See CITYCM3-00019447

²⁴⁴ See *Id.*

371) Tully did not report noncompliance of any of its employees, subcontractors' employees, and others lawfully present at the site failure to comply with site wide respiratory standards.

372) Tully never recorded any noncompliance of any of its employees, subcontractors' employees, and others lawfully present at the site failure to comply with site wide respiratory standards.

373) Tully failed to document noncompliance of any of its employees, subcontractors' employees, and others lawfully present at the site failure to comply with site wide respiratory standards is only some evidence of the recalcitrant attitude of Tully management at the site.

374) This recalcitrant attitude was demonstrated by the site safety supervisors at Tully.

375) Tully supervisors were not wearing respirators.

376) Turner did not report noncompliance of any of its employees, subcontractors' employees, and others lawfully present at the site failure to comply with site wide respiratory standards.

377) Turner never recorded any noncompliance of any of its employees, subcontractors' employees and others lawfully present at the site failure to comply with site wide respiratory standards.

378) Turner's failure to document noncompliance of any of its employees, subcontractors' employees, and others lawfully present at the site failure to comply with site wide respiratory standards is only some evidence of the recalcitrant attitude of Turner management at the site.

379) This recalcitrant attitude was demonstrated by the site safety supervisors at Turner.

380) Turner supervisors were not wearing respirators.

381) All construction managers, general contractors, prime contractors and subcontractors were required to report worker health complaints to the NYC DOH.

382) 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.”²⁴⁵

383) 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.²⁴⁶

384) While the City and its agencies knew of the exposure dangers present due to smoke, dust and particulate matter at the WTC Site, the City and its agencies failed to warn the workers at the WTC Site of the true nature and extent of the dangers they faced from exposure to these toxic airborne contaminants.

385) 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 and polluted with toxic contaminants.

386) The Associate Commissioner of Regulatory and Environmental Health Services for the City of New York discounted the testing results that appeared to show safe air quality at the Trade Center site.²⁴⁷

²⁴⁵ See CITYCM3-00041712.

²⁴⁶ See DDC revised draft of the contracts with the four primary contractors dated October 11, 2001 (CITYCM3-00030568 through CITYCM3-00030657) 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). The City's documents (CITYCM3-00009918 through CITYCM3-00009919) expressly state that “All work performed must be in compliance with appropriate regulations from EPA, US DOL, OSHA, NYSDOL, ELAP [and] NYCDEP.”

²⁴⁷ “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. <http://www.milbank.org/reports/911/911.html>

387) The NYCDOH knew that even though test results may have looked good the DOH knew it really was not safe.

388) The DOH knew that communicating good results would encourage workers not to wear their respirators; the DOH communicated such results anyway.

389) The bad results were never communicated to workers at the site.

390) The City Department of Health admitted that communication of potential hazards at the WTC Site and the necessity of appropriate personal protective equipment was important.²⁴⁸

391) Communication of a clear message concerning the dangers and risks of work at the WTC Site would help to ensure usage of such equipment, including respirators.²⁴⁹

392) The DOH failed to communicate a clear message of the dangers to the workers.

393) The City of New York's knowledge as to the toxic nature of the atmosphere at and around the WTC site was documented in toxic exposure reports (CD-73s) filed on behalf of all NYC Fire Fighters who operated at the WTC site.²⁵⁰

²⁴⁸ See Weisfuse Deposition at p. 57.

²⁴⁹ *Id.*

²⁵⁰ 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 World Trade Center 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: World Trade Center 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."

See http://www.ufalocal94.org/652_main/652_2005/652_37of05.html

394) The City's knowledge that the air was unsafe is clearly 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 symptoms and other health affects workers were experiencing at the site.

395) Even armed with hard data of actual pulmonary and respiratory injuries to workers, the City did nothing to improve compliance with respiratory protection, fit testing²⁵¹ and decontamination or warn workers of said results.²⁵²

396) 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.²⁵³

²⁵¹ See CITYCM3-00007286, posting regarding personal protective equipment from the DOH: "respirators must be fit-tested to assure a proper seal."

²⁵² 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."

²⁵³ See, 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 OSHA-NY00044788; see also 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".

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

397) Even though an adequate supply of respirators and replacement cartridges may have been available, the defendants did not make them available to the plaintiffs.

398) Defendants did not provide workers with site-specific training regarding the specific atmospheric and dust hazards present at the WTC site.

399) Defendants made false statements to plaintiffs that the air at the World Trade Center site was safe and such statements were detrimentally relied upon. Defendants misrepresented to the plaintiffs that the air was “good.”

400) Defendants misrepresented to the plaintiffs that the air was “safe to breath.”

401) Defendants misrepresented to the plaintiffs that they did not need to wear respirators.

402) In fact, the air was neither safe nor good; the air was highly toxic.

403) Defendants obtained 25,000 Tyvek suits in the first days after September 11, 2001.

404) Defendants failed to provide these Tyvek suits to the plaintiffs.

405) Defendants misrepresented to plaintiffs that Tyvek suits were unnecessary.

If defendants had provided Tyvek suits to plaintiffs it would have prevented thousands of people from being exposed to the toxic airborne contaminants.

406) 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.

407) Most workers did not receive respirator fit testing at the WTC Site.

408) The types of fit testing being performed, if any, for the workers at the WTC site were not done pursuant to the OSHA regulations.²⁵⁴

409) Based on the data collected by NYCDOH, the DDC and contractors knew that workers were developing serious lung injuries at alarming rates.

410) The DDC did not advise or warn workers in any way that exposure to these toxins was causing serious lung injuries.

411) The DDC did not advise or warn these workers that exposure to these toxins could cause cancer.

412) The DDC did not advise or warn these workers that exposure to these toxins could cause death.

413) The dust and particulate matter in and around the WTC Site was not safe for the plaintiffs to inhale.

414) The report noted that although the engineers assumed the air quality was being monitored by government agencies, specific information on the results of this monitoring did not filter down to the structural engineering teams.

415) Structural engineers did not know if they were wearing the correct respirators.²⁵⁵

416) The City and its agencies failed to provide adequate PPE preparation and protection to WTC site workers.²⁵⁶

²⁵⁴ “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.” OSHA-NY00056172

²⁵⁵ 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.” See WTCP/PA - CMO3 - 0000921-22.

417) 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."²⁵⁷

418) Through its Chief Safety Officer, the FDNY had the obligation to "insure compliance with site safety and health requirements" with respect to FDNY members.²⁵⁸

419) 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, 2001.²⁵⁹

420) 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.²⁶⁰

421) 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

²⁵⁶ 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* 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."

²⁵⁷ *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."

²⁵⁸ CITYCM3-0002242.

²⁵⁹ CITYCM3-00055369.

²⁶⁰ CITYCM3-00055358.

under OEM for this issue, and I believe we can do more to enforce H&S protocols on the ground."²⁶¹

422) 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.^{262, 263}

423) A large quantity of dust and debris was generated during the building collapses on September 11th. 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 "were identified as representing potential health concerns for owners and occupants of these vehicles."²⁶⁴

424) Dust conditions at the WTC Site required the deployment of additional water-spraying equipment.²⁶⁵

425) This concern translated into the use of only one additional water-spraying truck for the entire sixteen acre WTC Site.²⁶⁶

²⁶¹ See CITYCM3-00041825: City DOH Memo entitled "Health and Safety Controls at WTC Disaster Site" dated October 7, 2001.

²⁶² The DDC complained to its contractors about the spread of contaminants at the WTC Site during debris removal. (William Ryan tr. at pp. 357-358) As Tully's Ryan explained, "as the debris was cleared, as the steel was taken from the debris pile, it exposed more broad areas of the dirt on the World Trade Center property. And as it is very windy over there, as it dried out, that would cause dust clouds which were basically dirt." (*Id.*) 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.*)

²⁶³ "Contractor implementation of required dust suppression measures on the WTC site is generally inadequate and inconsistent. Dust suppression needs to be a top priority in areas of debris handling and removal." See WTC Emergency Project Bechtel Environmental Safe and Health Report dated 10/29/01. CITY CM3-00068751.

²⁶⁴ 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.

²⁶⁵ (See, CITY CM3-00021958, October 25, 2001 Memorandum from Bill Ryan, Safety Director of Tully Construction Company to Bob Adams, Safety Director of the DDC).

²⁶⁶ *Id.*

426) The New York City Department of Health expressed its concern to the contractors over the hazards caused re-suspension of dust into the air as a result of the debris removal.²⁶⁷

427) 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.”²⁶⁸

428) At an October 25, 2001 Safety 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.”²⁶⁹

429) 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.”²⁷⁰

430) 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

²⁶⁷ FEMA-NY00038491: World Trade Center 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.

²⁶⁸ See Michael Burton Deposition at pp. 282-283

²⁶⁹ OSHA-NY00051472.

²⁷⁰ See Kenneth Holden Deposition, August 11, 2005, at p.232-233.

that the project is not completed and workers on the site must still be protected and work safely."²⁷¹

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

431) 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.

432) 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.^{272, 273}

²⁷¹ OSHA-NY00047871.

²⁷² Section 205-a of the General Municipal Law provides:

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.

433) The imposition of liability based on GML § 205-a arises as a result of the violation of an underlying statute, ordinance or rule.

434) 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.

435) "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.' ²⁷⁴

436) The DDC and contractors failed to reasonably supervise, and oversee the workers and take steps to ensure compliance with all safety regulations and directives, and that safety equipment: (a) was made available to the workers; and (b) was being used consistently and properly.

437) The PA and contractors failed to reasonably supervise and oversee the workers and take steps to ensure compliance with all safety regulations and directives, and that safety

²⁷³ *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 (1st Dep't 2005).

²⁷⁴ *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.)

equipment: (a) was made available to the workers; and (b) was being used consistently and properly.

438) The WTCP and contractors failed to reasonably supervise and oversee the workers and take steps to ensure compliance with all safety regulations and directives, and that safety equipment: (a) was made available to the workers; and (b) was being used consistently and properly.

439) Bovis and contractors failed to reasonably supervise and oversee the workers and take steps to ensure compliance with all safety regulations and directives, and that safety equipment: (a) was made available to the workers; and (b) was being used consistently and properly.

440) Turner and contractors failed to reasonably supervise and oversee the workers and take steps to ensure compliance with all safety regulations and directives, and that safety equipment: (a) was made available to the workers; and (b) was being used consistently and properly.

441) Tully and contractors failed to reasonably supervise and oversee the workers and take steps to ensure compliance with all safety regulations and directives, and that safety equipment: (a) was made available to the workers; and (b) was being used consistently and properly.

442) AMEC and contractors failed to reasonably supervise and oversee the workers and take steps to ensure compliance with all safety regulations and directives, and that safety equipment: (a) was made available to the workers; and (b) was being used consistently and properly.

443) The City of New York had knowledge of low compliance rates regarding the use of personal protective equipment among the workers at the WTC Site.

444) The Port Authority had knowledge of low compliance rates regarding the use of personal protective equipment among the workers at the WTC Site.

445) The World Trade Center Defendants had knowledge of low compliance rates regarding the use of personal protective equipment among the workers at the WTC Site.

446) Bovis had knowledge of low compliance rates regarding the use of personal protective equipment among the workers at the WTC Site.

447) Turner had knowledge of low compliance rates regarding the use of personal protective equipment among the workers at the WTC Site.

448) Tully had knowledge of low compliance rates regarding the use of personal protective equipment among the workers at the WTC Site.

449) AMEC had knowledge of low compliance rates regarding the use of personal protective equipment among the workers at the WTC Site.

450) The City of New York had knowledge of dangerously low compliance rates regarding the use of personal protective equipment among the workers at the World Trade Center site. The Port Authority also had knowledge of dangerously low compliance rates regarding the use of personal protective equipment among the workers at the WTC Site.²⁷⁵

451) The World Trade Center defendants had knowledge of dangerously low compliance rates regarding the use of personal protective equipment among the workers at the WTC Site.

452) Bovis had knowledge of dangerously low compliance rates regarding the use of personal protective equipment among the workers at the WTC Site.

²⁷⁵ CITY CM3-00068750, 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."

453) Turner had knowledge of dangerously low compliance rates regarding the use of personal protective equipment among the workers at the WTC Site.

454) Tully had knowledge of dangerously low compliance rates regarding the use of personal protective equipment among the workers at the WTC Site.

455) AMEC had knowledge of dangerously low compliance rates regarding the use of personal protective equipment among the workers at the WTC Site.

456) OSHA surveillance reports that were issued and available to New York City repeatedly reported compliance rates for personal protective equipment at rates well below the acceptable rate.²⁷⁶

457) OSHA surveillance reports that were issued and/or available to the Port Authority of New York and New Jersey repeatedly reported compliance rates for personal protective equipment at rates well below the acceptable rate.

458) OSHA surveillance reports that were issued and available to the World Trade Center Defendants repeatedly reported compliance rates for personal protective equipment at rates well below the acceptable rate.

459) OSHA surveillance reports that were issued and available to Bovis repeatedly reported compliance rates for personal protective equipment at rates well below the acceptable rate.

460) OSHA surveillance reports that were issued and available to Turner repeatedly reported compliance rates for personal protective equipment at rates well below the acceptable rate.

²⁷⁶ 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.

461) OSHA surveillance reports that were issued and available to Tully repeatedly reported compliance rates for personal protective equipment at rates well below the acceptable rate.

462) OSHA surveillance reports that were issued and available to AMEC repeatedly reported compliance rates for personal protective equipment at rates well below the acceptable rate.

463) Liberty Mutual surveillance reports that were issued and available to New York City repeatedly reported compliance rates for personal protective equipment at rates well below the acceptable rate.

464) Liberty Mutual surveillance reports that were issued and available to The Port Authority repeatedly reported compliance rates for personal protective equipment at rates well below the acceptable rate.

465) Liberty Mutual surveillance reports that were issued and available to the World Trade Center Defendants repeatedly reported compliance rates for personal protective equipment at rates well below the acceptable rate.

466) Liberty Mutual surveillance reports that were issued and available to Bovis repeatedly reported compliance rates for personal protective equipment at rates well below the acceptable rate.

467) Liberty Mutual surveillance reports that were issued and available to Turner repeatedly reported compliance rates for personal protective equipment at rates well below the acceptable rate.

468) Liberty Mutual surveillance reports that were issued and available to Tully repeatedly reported compliance rates for personal protective equipment at rates well below the acceptable rate.

469) Liberty Mutual surveillance reports that were issued and/or available to AMEC repeatedly reported compliance rates for personal protective equipment at rates well below the acceptable rate.

470) In fact they were so far below acceptable compliance rates as to be bad faith.

471) The respirator compliance was so far below acceptable rates as to amount to a “willful violation” under OSHA’s standards.

472) The respirator compliance was so far below acceptable rates for so long as to amount to bad faith.

473) The OSHA regulations define willful conduct as "an intentional violation of the Act or plain indifference to its requirements."²⁷⁷

474) Pursuant to OSHA regulations, the employer committed an intentional and knowing violation if an employer representative was aware of the requirements of the Act, or the existence of an applicable standard or regulation, and was also aware of a condition or practice in violation of those requirements, and did not abate the hazard.²⁷⁸

475) Pursuant to OSHA regulations, the employer committed an intentional and knowing violation if an employer representative was not aware of the requirements of the Act or standards, but was aware of a comparable legal requirements (*e.g.*, state or local law) and was also aware of the condition or practice in violation of that requirement, and did not abate the hazard.

476) The compliance rate for personal protective equipment only increased to 41 percent during the next reporting date, which was from October 8, 2001 through October 14, 2001.

²⁷⁷ See OSHA's Field Inspection Reference Manual.

²⁷⁸ See *Id.*

477) A 41% compliance rate meant that thousands of workers were continuously being exposed to harmful contaminants.

478) The City of New York and their contractors knew that between the period from October 8, 2001 through October 14, 2001, 59% of the workers at the site were at risk for serious lung injuries.

479) Even though the City of New York and their contractors knew that between the period from October 8, 2001 through October 14, 2001, 59% of the workers at the site were at risk for serious lung injuries the City did nothing.

480) The City of New York and their contractors, from October 8, 2001 through October 14, 2001 failed to apprise the workers of the risk of the hazards.

481) The City of New York and their contractors, from October 8, 2001 through October 14, 2001, failed to provide the workers with proper respirators, fit testing and training.

482) The City of New York and their contractors from October 8, 2001 through October 14, 2001, failed to stop the job.

483) The City of New York and their contractors from October 8, 2001 through October 14, 2001, failed to issue any fines to any of the workers.

484) The City of New York and their contractors, from October 8, 2001 through October 14, 2001, failed to have an effective means of enforcement of health and safety policies.

485) The Port Authority and their contractors knew that between the period from October 8, 2001 through October 14, 2001, 59% of the workers at the site were at risk for serious lung injuries.

486) Even though the Port Authority and their contractors knew that between the period from October 8, 2001 through October 14, 2001, 59% of the workers at the site were at risk for serious lung injuries the City did nothing.

487) The Port Authority and their contractors, from October 8, 2001 through October 14, 2001, failed to apprise the workers of the risk of the hazards.

488) The Port Authority and their contractors, from October 8, 2001 through October 14, 2001, failed to provide the workers with proper respirators.

489) The Port Authority and their contractors, from October 8, 2001 through October 14, 2001, failed to provide the workers with proper fit testing.

490) The Port Authority of New York and New Jersey and their contractors from October 8, 2001 through October 14, 2001 failed to stop the job.

491) The Port Authority of New York and New Jersey and their contractors from October 8, 2001 through October 14, 2001 failed to issue any fines to any of the workers.

492) The Port Authority of New York and New Jersey and their contractors from October 8, 2001 through October 14, 2001 failed to have an effective means of enforcement of health and safety policies.

493) The World Trade Center Defendants and their contractors knew that between the period from October 8, 2001 through October 14, 2001 59% of the workers at the site were at risk for serious lung injuries.²⁷⁹

494) The World Trade Center Defendants and their contractors knew that between the period from October 8, 2001 through October 14, 2001 59% of the workers at the site were at risk for serious lung injuries the City did nothing.

495) The World Trade Center Defendants and their contractors from October 8, 2001 through October 14, 2001 failed to apprise the workers of the risk of the hazards.

²⁷⁹ "Despite repeated assurances that health risks are minimal for workers who remain at work or who are returning to work in lower Manhattan, and despite monitoring results that indicate low levels of contaminants or none at all, many of these workers continue to experience an alarming incidence of adverse health effects." *See* Letter from Bill Heng of NYCOSH to Patricia Clark of OSHA, dated December 1, 2001, discussing health risks that were present at the WTC site. OSHA-NY00048610.

496) The World Trade Center Defendants and their contractors from October 8, 2001 through October 14, 2001 failed to provide the workers with proper respirators.

497) The World Trade Center Defendants and their contractors from October 8, 2001 through October 14, 2001 failed to provide the workers with proper fit testing.

498) The World Trade Center Defendants and their contractors from October 8, 2001 through October 14, 2001 failed to stop the job.

499) The World Trade Center Defendants and their contractors from October 8, 2001 through October 14, 2001 failed to issue any fines to any of the workers.

500) The World Trade Center Defendants and their contractors from October 8, 2001 through October 14, 2001 failed to have an effective means of enforcement of health and safety policies.

501) Bovis and their contractors knew that between the period from October 8, 2001 through October 14, 2001 59% of the workers at the site were at risk for serious lung injuries.

502) Bovis and their contractors knew that between the period from October 8, 2001 through October 14, 2001 59% of the workers at the site were at risk for serious lung injuries the City did nothing.

503) Bovis and their contractors from October 8, 2001 through October 14, 2001 failed to apprise the workers of the risk of the hazards.

504) Bovis and their contractors from October 8, 2001 through October 14, 2001 failed to provide the workers with proper respirators.

505) Bovis and their contractors from October 8, 2001 through October 14, 2001 failed to provide the workers with proper fit testing.

506) Bovis and their contractors from October 8, 2001 through October 14, 2001 failed to stop the job.

507) Bovis and their contractors from October 8, 2001 through October 14, 2001 failed to issue any fines to any of the workers.

508) Bovis and their contractors from October 8, 2001 through October 14, 2001 failed to have an effective means of enforcement of health and safety policies.

509) Turner and their contractors knew that between the period from October 8, 2001 through October 14, 2001 59% of the workers at the site were at risk for serious lung injuries.

510) Turner and their contractors knew that between the period from October 8, 2001 through October 14, 2001 59% of the workers at the site were at risk for serious lung injuries the City did nothing.

511) Turner and their contractors from October 8, 2001 through October 14, 2001 failed to apprise the workers of the risk of the hazards.

512) Turner and their contractors from October 8, 2001 through October 14, 2001 failed to provide the workers with proper respirators.

513) Turner and their contractors from October 8, 2001 through October 14, 2001 failed to provide the workers with proper fit testing.

514) Turner and their contractors from October 8, 2001 through October 14, 2001 failed to stop the job.

515) Turner and their contractors failed from October 8, 2001 through October 14, 2001 to issue any fines to any of the workers.

516) Turner and their contractors from October 8, 2001 through October 14, 2001 failed to have an effective means of enforcement of health and safety policies.

517) Tully and their contractors knew that between the period from October 8, 2001 through October 14, 2001 59% of the workers at the site were at risk for serious lung injuries.

518) Tully and their contractors knew that between the period from October 8, 2001 through October 14, 2001 59% of the workers at the site were at risk for serious lung injuries the City did nothing.

519) Tully and their contractors from October 8, 2001 through October 14, 2001 failed to apprise the workers of the risk of the hazards.

520) Tully and their contractors from October 8, 2001 through October 14, 2001 failed to provide the workers with proper respirators.

521) Tully and their contractors from October 8, 2001 through October 14, 2001 failed to provide the workers with proper fit testing.

522) Tully and their contractors from October 8, 2001 through October 14, 2001 failed to stop the job.

523) Tully and their contractors from October 8, 2001 through October 14, 2001 failed to issue any fines to any of the workers.

524) Tully and their contractors from October 8, 2001 through October 14, 2001 failed to have an effective means of enforcement of health and safety policies.

525) AMEC and their contractors knew that between the period from October 8, 2001 through October 14, 2001 59% of the workers at the site were at risk for serious lung injuries.

526) AMEC and their contractors knew that between the period from October 8, 2001 through October 14, 2001 59% of the workers at the site were at risk for serious lung injuries the City did nothing.

527) AMEC and their contractors from October 8, 2001 through October 14, 2001 failed to apprise the workers of the risk of the hazards.

528) AMEC and their contractors from October 8, 2001 through October 14, 2001 failed to provide the workers with proper respirators.

529) AMEC and their contractors from October 8, 2001 through October 14, 2001 failed to provide the workers with proper fit testing.

530) AMEC and their contractors from October 8, 2001 through October 14, 2001 failed to stop the job.

531) AMEC and their contractors from October 8, 2001 through October 14, 2001 failed to issue any fines to any of the workers.

532) AMEC and their contractors from October 8, 2001 through October 14, 2001 failed to have an effective means of enforcement of health and safety policies.

533) This compliance rate then decreased to 29% during October 22, 2001 through October 28, 2001, due to the willful lack of enforcement and leadership by the City of New York and the management of their contractors.

534) This compliance rate then decreased to 29% during October 22, 2001 through October 28, 2001, demonstrating the lack of enforcement and or encouragement by the Port Authority of New York and New Jersey and their contractors.

535) This compliance rate then decreased to 29% during October 22, 2001 through October 28, 2001, demonstrating the lack of enforcement and or encouragement by the World Trade Center Defendants and their contractors.

536) This compliance rate then decreased to 29% during October 22, 2001 through October 28, 2001, demonstrating the lack of enforcement and or encouragement by Bovis and their contractors.

537) This compliance rate then decreased to 29% during October 22, 2001 through October 28, 2001, demonstrating the lack of enforcement and or encouragement by Turner and their contractors.

538) This compliance rate then decreased to 29% during October 22, 2001 through October 28, 2001, which shows the lack of enforcement and or encouragement by Tully and their contractors.

539) This compliance rate then decreased to 29% during October 22, 2001 through October 28, 2001, which shows the lack of enforcement and or encouragement by AMEC and their contractors.

540) Pursuant to OSHA surveillance reports during the week of 9/21/01 through 10/7/01 the compliance rate for PPE use was 27 %.²⁸⁰

541) Pursuant to OSHA surveillance reports during the week of 10/8//01 through 10/14/01 the compliance rate for PPE use was 41 %.²⁸¹

542) Pursuant to OSHA surveillance reports during the week of 10/15/01 through 10/21/01 the compliance rate for PPE use was 40 %.²⁸²

543) Pursuant to OSHA surveillance reports during the week of 10/22/01 through 10/28/01 the compliance rate for PPE use was 29 %.²⁸³

544) Pursuant to OSHA surveillance reports during the week of 10/29/01 through 11/4/01 the compliance rate for PPE use was 36 %.²⁸⁴

545) Pursuant to OSHA surveillance reports during the week of 11/5/01 through 11/11/01 the compliance rate for PPE use was 37 %.²⁸⁵

²⁸⁰ See CITYCM3-00019197

²⁸¹ See *Id.*

²⁸² See *Id.*

²⁸³ See *Id.*

²⁸⁴ See *Id.*

²⁸⁵ See *Id.*

546) Pursuant to OSHA surveillance reports during the week of 11/12/01 through 11/18/01 the compliance rate for PPE use was 38 %.²⁸⁶

547) Pursuant to OSHA surveillance reports during the week of 11/19/01 through 11/25/01 the compliance rate for PPE use was 37 %.²⁸⁷

548) Pursuant to OSHA surveillance reports during the week of 11/26/01 through 12/2/01 the compliance rate for PPE use was 40 %.²⁸⁸

549) Pursuant to OSHA surveillance reports during the week of 12/3/01 through 12/9/01 the compliance rate for PPE use was 42 %.²⁸⁹

550) Pursuant to OSHA surveillance reports during the week of 12/10/01 through 12/16/01 the compliance rate for PPE use was 38 %.²⁹⁰

551) Pursuant to OSHA surveillance reports during the week of 12/17/01 through 12/23/01 the compliance rate for PPE use was 38 %.²⁹¹

552) Pursuant to OSHA surveillance reports during the week of 12/24/01 through 12/30/01 the compliance rate for PPE use was 33 %.²⁹²

553) Pursuant to OSHA surveillance reports during the week of 12/31/01 through 1/6/02 the compliance rate for PPE use was 33 %.²⁹³

554) Pursuant to OSHA surveillance reports during the week of 1/7/02 through 1/13/02 the compliance rate for PPE use was 36%.²⁹⁴

²⁸⁶ *See Id.*

²⁸⁷ *See Id.*

²⁸⁸ *See Id.*

²⁸⁹ *See Id.*

²⁹⁰ *See Id.*

²⁹¹ *See Id.*

²⁹² *See Id.*

²⁹³ *See Id.*

555) Pursuant to OSHA surveillance reports during the week of 1/14/02 through 1/20/02 the compliance rate for PPE use was 30%.²⁹⁵

556) Pursuant to OSHA surveillance reports during the week of 1/21/02 through 1/27/02 the compliance rate for PPE use was 32%.²⁹⁶

557) Pursuant to OSHA surveillance reports during the week of 1/28/02 through 2/3/02 the compliance rate for PPE use was 27%.²⁹⁷

558) Pursuant to OSHA surveillance reports during the week of 2/4/02 through 2/10/02 the compliance rate for PPE use was 27%.²⁹⁸

559) Pursuant to OSHA surveillance reports during the week of 2/11/02 through 2/17/02 the compliance rate for PPE use was 43%.²⁹⁹

560) Pursuant to OSHA surveillance reports during the week of 2/18/02 through 2/24/02 the compliance rate for PPE use was 36%.³⁰⁰

561) Pursuant to OSHA surveillance reports during the week of 2/25/02 through 3/3/02 the compliance rate for PPE use was 50%.³⁰¹

562) Pursuant to OSHA surveillance reports during the week of 3/4/02 through 3/10/02 the compliance rate for PPE use was 28%.³⁰²

563) Pursuant to OSHA surveillance reports during the week of 3/11/02 through 3/17/02 the compliance rate for PPE use was 33%.³⁰³

²⁹⁴ *See Id.*

²⁹⁵ *See Id.*

²⁹⁶ *See CITYCM3-00019198.*

²⁹⁷ *See Id.*

²⁹⁸ *See Id.*

²⁹⁹ *See Id.*

³⁰⁰ *See Id.*

³⁰¹ *See Id.*

³⁰² *See Id.*

564) Pursuant to OSHA surveillance reports during the week of 3/18/02 through 3/24/02 the compliance rate for PPE use was 36%.³⁰⁴

565) Pursuant to OSHA surveillance reports during the week of 3/25/02 through 3/31/02 the compliance rate for PPE use was 34%.³⁰⁵

566) Pursuant to OSHA surveillance reports during the week of 4/1/02 through 4/7/02 the compliance rate for PPE use was 32%.³⁰⁶

567) In fact these compliance rates for personal protective equipment from September 21, 2001 through April 7, 2002 never reached more than 50 percent.³⁰⁷

568) Even with these known low compliance rates for PPE the City of New York and their contractors failed to assume the responsibility for correcting the problem.

569) Even with these known low compliance rates for PPE the Port Authority of New York and New Jersey and their contractors failed to assume the responsibility for correcting the problem.

570) Even with these known low compliance rates for PPE the World Trade Center Defendants and their contractors failed to assume the responsibility for correcting the problem.

571) Even with these known low compliance rates for PPE Bovis and their contractors failed to assume the responsibility for correcting the problem.

572) Even with these known low compliance rates for PPE Turner and their contractors failed to assume the responsibility for correcting the problem.

³⁰³ *See Id.*

³⁰⁴ *See Id.*

³⁰⁵ *See Id.*

³⁰⁶ *See Id.*

³⁰⁷ *See CITYCM3-00019196-CITYCM3-00019200.* These low compliance rates for required personal protective equipment at the World Trade Center is evidences the wholesale disregard for workers' safety by the City and its contractors.

573) Even with these known low compliance rates for PPE Tully and their contractors failed to assume the responsibility for correcting the problem.

574) Even with these known low compliance rates for PPE AMEC and their contractors failed to assume the responsibility for correcting the problem.

575) The contractors did not want to enforce respirator use because doing so would have required them to fine themselves for instances of non-compliance.

576) This practice was encouraged by the DDC.

577) The defendants knew OSHA was not in an enforcement mode so they chose to willfully ignore respiratory safety practices.

578) The defendants willfully ignored respiratory safety practices because it would slow down the job.

579) The defendants willfully ignored respiratory safety practices because it would reduce their ability to generate profits.

580) Respirators impeded communication among workers so defendants disliked their use.

581) The contractors were placed in competition for future work, and for the opportunity to continue to work at the site.

582) That competition forced contractor management to do whatever was necessary, including ignoring safety and health of the workers to get the work done.

583) Deponents testified that they were aware of low compliance with respirator usage among workers at the site.³⁰⁸

³⁰⁸ See Testimony of William Ryan, Tully Construction Company, August 2, 2005, at p. 87:

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

584) Bovis Lend Lease was aware that workers at site were not regularly wearing respirators. Bovis did nothing about this problem, explaining that little short of having the workers' mothers on site to admonish them to comply would be effective.³⁰⁹

585) As late as January 2002 nothing was done to enforce the use of respirators by debris removal workers at the site.

586) 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%.

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.

³⁰⁹ Testimony of James Abadie, Bovis Lend Lease, July 15, 2005, 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.

587) This was confirmed in the deposition testimony of Mary Plaskon, a Health And Safety Officer at the Port Authority. Even though she was present at many of the safety and health meetings held involving the WTC Site, Ms. Plaskon could not recall the compliance rate of respiratory usage, notwithstanding the fact that the topic was mentioned and quantified in the safety and health meeting minutes.³¹⁰

588) Low compliance rates of respirator protection usage was reported to the City of New York and their contractors, and the issue was also discussed numerous times at daily health and safety meetings and acknowledged by the City in their memos.^{311, 312}

³¹⁰ See Plaskon Deposition Transcript, 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.

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.

³¹¹ 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 BOVCM3-000001816.

³¹² 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

589) Even though the meetings were held, nothing was done to correct the situation, leaving hundreds and hundreds of workers at risk for days and days leading to months of long-term exposure.

590) Although there were numerous reports notifying the City and its contractors that workers at the World Trade Center project were not complying with the required PPE, the City and its contractors took no measures to compel workers to improve compliance with PPE usage.

591) The City, its agencies and its contractors refused to follow and comply with the applicable industrial codes.

592) The DDC went against OSHA's recommendations to take steps necessary to allow OSHA to work in an enforcement mode.³¹³

CITYCM3-00018902. Liberty Mutual also observed inconsistent use of PPE at the WTC Site. *See* CITYCM3-00066180 – CITYCM3-00066240.

³¹³ Testimony of William Ryan, 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."

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

593) The DDC refused to follow OSHA's recommendations to increase compliance with respiratory safety and the City refused.

594) The DDC's main concern was debris removal and not environmental health and safety.

595) The DDC refused to follow OSHA's recommendations to increase compliance with respiratory safety.

596) Scheduling debris removal was more important than safety.

597) Complying with the laws in the World Trade Center Project Environmental Safety and Health Plan was not discretionary.

598) Complying with New York State Labor Law § 200 was not discretionary.

599) Complying with New York State Labor Law § 241 and 241(6) was not discretionary.

600) Complying with OSHA 29 CFR 1910.132 was not discretionary.

601) Complying with OSHA 29 CFR 1962 was not discretionary.

602) Complying with 12 NYCRR 23 *et seq.*, was not discretionary.

603) The construction excavation or demolition work that was being performed was not constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such place.³¹⁴

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.

³¹⁴ New York State Labor Law § 241 (6)

604) Defendants failed to provide protective equipment, including personal protective equipment for eyes, face, head and extremities, protective clothing, respiratory devices, and protective shields and barriers.³¹⁵

605) Health and safety protection for the plaintiffs were required pursuant to 12 NYCRR 23, *et seq.*

606) Health and Safety protection for the plaintiffs was required pursuant to 12 NYCRR 12, *et seq.*

607) 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.

608) To this end, all employers, owners, 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).

609) 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

³¹⁵ OSHA 29 CFR 1910.132 (a)

(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.

610) Defendants violated 12 NYCRR 23-1.8 regarding Personal protective equipment, particularly, subsection (b) regarding respirators wherein subsection (1) requires a respirator to be provided, the employer shall furnish and the employee an approved respirator.

611) Such respirator shall be approved for the type of operation for which it is to be used and for the particular air contaminant present.

612) Defendants failed to maintain such respirator in good repair and shall furnish the means for its continued proper working condition.

613) Defendants failed to provide daily inspection and cleaning and weekly disinfecting of such respirators.

614) Defendants failed to advise plaintiffs that such respirators shall be disinfected before being transferred from one person to another.

615) Defendants failed to advise plaintiffs that when not in use, respirators shall be stored in closed containers.

616) Defendants failed to maintain the cleanliness of personal protective equipment in that (1) all personal protective equipment shall be kept clean and in good repair and before being transferred from one employee to another, safety hats, foul weather hats, boots and hat and boot liners shall be washed or dry cleaned; and (2) Goggles, glasses, and welder's shield shall be disinfected before being transferred from one employee to another.

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

618) Specifically, where more than three employees change their clothes on the job site properly ventilated and illuminated change houses or other equivalent sheltered structures shall be provided.

619) Such change houses or other equivalent structures shall be of sufficient size to accommodate all the persons desiring to use such facilities.

620) During cold weather such change houses or other equivalent structures shall be heated to a temperature of at least 60 degrees Fahrenheit during any period of use.

621) Defendants also violated section (d) regarding washing facilities.

622) Specifically washing facilities, including warm water, soap and individual towels which may be of the paper type, shall be provided for all employees who are required to use or handle corrosive substances, chemicals or any other harmful substances on the basis of at least one wash basin with warm running water for every 10 such employees.

623) Where running water is not available at least five gallons of fresh, warm water and a wash basin shall be supplied for every four such employees.

624) Defendants failed in maintenance and housekeeping, specifically subsection (b) regarding the disposal of debris in that debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person frequenting such area.

625) Defendants failed to determine when an aspect of the subcontractors' work was inferior.

626) Defendants failed to use the "coercion of withholding payment," to effect improvement in respirator compliance.

627) Defendants failed to do this even though this “kind of regular interaction with contractors or subcontractors was pretty standard operating procedure.”³¹⁶

628) Defendants failed to use this control, exercised by the primary contractors, extended to ensuring a subcontractor’s compliance with environmental safety and health requirements.³¹⁷

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.**

629) The Mayor was involved 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 failed to provide the City with the broad immunity he sought; instead, Congress passed specific legislation allowing the instant cause of action, and, the Federal government , through FEMA promised the City and others indemnification.

630) The Mayor wrote letters and correspondence and had conversations with legislators for the sought after immunity or damages limitation, a tacit acknowledgement of the

³¹⁶ *Id.*, at p. 215.

³¹⁷ *Id.*, at pp. 215-216.

City's prospective liability, and cutting directly against the instant defendants' present disingenuous claim of immunity.³¹⁸

631) The Air Transportation Safety and Stabilization Act is an Act of Congress.³¹⁹

632) An appropriations bill enacted by Congress directed the Federal Emergency Management Agency (FEMA) to provide the City of New York 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).³²⁰

633) A November 1, 2001 letter sent by then-Mayor Giuliani to members of the New York congressional delegation ("Giuliani letter") urged adoption of amendments to the ATSSA that would limit the City's liability.³²¹

³¹⁸ 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: World Trade Center Disaster Site*, 414 F.3d 352 (2d Cir. 2005).

³¹⁹ 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)).

³²⁰ See PL 108-7, 117 Stat. 11, 517-518.

³²¹ 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 World Trade Center 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).

634) Assistant Corporation Counsel attorneys Kenneth Becker and Lawrence Martin were involved in drafting correspondences and were responsible for lobbying efforts supporting the City's attempts to obtain immunity for the City's liabilities arising from the work performed at the WTC Site.³²²

635) Ernst & Young was retained by the City of New York in late September 2001 - two weeks after the 9/11 disaster to advise it on risk and insurance relating to the WTC debris removal project.³²³

636) 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 the WTC CIP.³²⁴

637) A subsequent risk assessment conducted by Ernst & Young, Inc., identified the risk at a minimum of \$800 million.³²⁵

638) At this time the WTC CIP brokers found it hard to imagine claims against the City of New York that will not be covered under the WTC CIP.³²⁶

639) 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.'³²⁷

³²² 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.

³²³ See May 13, 2002 Confidential Memo from Lawrence Martin to Brad Gair of FEMA, FEMA-DC00004595.

³²⁴ See FEMA-DC00004595.

³²⁵ FEMA-NY00077193.

³²⁶ See FEMA-DC00004593

³²⁷ FEMA-NY00079118.

640) 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.³²⁸

641) The EPA confirmed that asbestos did exist in the debris. IF the asbestos or environmental exposure did not exist, then the insurance protection amount would be \$100 million or less for construction risks or an additional \$20 million of coverage for construction risks and \$100 million for professional liability which is currently excluded. The \$1.0 billion insurance requirement includes \$800 million for asbestos and environmental losses and up to \$3.5 billion on the high side (\$.2B) and \$1.9 billion at the minimum (\$.2.3B) for environmental claims.³²⁹

642) It was also noted by the City that it is impossible to project the expected number of claimants or even what their expected claim settlement may be or when it would be paid.³³⁰

643) The White House formed a working group headed by Department of Justice attorneys to address the City’s concerns. However, the Federal Government will not likely agree to indemnify the City absent the passage of special legislation.³³¹

644) The City of New York has not been given it’s requested immunity from Congress, but rather has been provided with limited liability protection for WTC related claims through the Air Transportation Safety and System Stabilization Act which limits the City of New York’s liability for all compensatory and punitive damages or for contribution or indemnity to the greater or the city’s insurance coverage or \$350,000,000.³³²

³²⁸ See FEMA-DC00004591

³²⁹ See City’s Public Assistance Request to FEMA, Bates FEMA-DC00008237.

³³⁰ See *Id.*

³³¹ See Issue and Short Answer, Bates Number – FEMA-DC00004579.

³³² See *Id.*

645) There is no language limiting liability of the New York City contractors.³³³

646) While it is certainly true that the WTC debris removal activity was extraordinary in every sense because the scope, ongoing investigations, and continuing recovery of bodies, it was the City's decision to manage the debris removal activity at the WTC Site rather than allow the United States Army Core of Engineers to manage operations.³³⁴

647) New York City also failed to obtain rights of entry which generally contain indemnification clauses from affected property owners which were primarily large, well financed concerns.³³⁵

648) New York City affirmatively took on the responsibility of obtaining insurance coverage for itself, and the contractors, subcontractors, consultants and subconsultants working on the WTC debris removal project.³³⁶

649) It was envisioned by congress that the coverage in this proposal will ensure that sufficient resources will be available to satisfy legitimate claims by individuals affected by the recovery operations while safeguarding the fiscal health of the City and the contractors.³³⁷

650) Both Mr. Becker and Mr. Martin are Assistant Corporation Counsel employed by the New York City Law Department. Upon information and belief -- as derived from document and testimonial discovery had thus far in these matters -- both attorneys were involved in lobbying the United States Congress on behalf of the City of New York for indemnification and

³³³ *See Id.*

³³⁴ *See* FEMA-DC00004582.

³³⁵ *See Id.*

³³⁶ *See Id.*

³³⁷ *See* May 24, 2002 letter from congress to FEMA, FEMA-DC00004524.

immunity regarding claims arising from the rescue, recovery and clean up efforts undertaken at the World Trade Center Disaster site following September 11, 2001.³³⁸

651) There were intensive lobbying efforts made by Corporation Counsel (including attorneys Larry Martin and Ken Becker, among others) attempting 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.

652) Attorneys with the Corporation Counsel's office wrote letters and correspondence and had conversations with legislators, reflecting that the New York City Law Department and its attorneys did not believe the City was immune from its actions at the WTC Site.

653) As part of their disclosures in the World Trade Center litigation, Defendants exchanged a letter dated October 15, 2001 and signed by Kenneth Holden from the City of New York Department of Design and Construction (DDC).³³⁹

654) The October 15, 2001 letter addresses issues relating to the indemnification of construction companies and OSHA's role at the WTC Site.³⁴⁰

655) When he was asked at his deposition about the October 15, 2001 letter, Mr. 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."³⁴¹

656) Mr. Holden volunteered that the letter -- although signed by him -- contained the "author of the memo's suggestions" not his own.³⁴²

³³⁸ 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.

³³⁹ See Holden Exhibit No. 16, October 15, 2001 letter to Andrew Feeney, bearing Bates Nos. CITYCM3-00072401 through CITYCM3-00072403, marked for identification.

³⁴⁰ *Id.*

³⁴¹ See Excerpts from the deposition transcript of Ken Holden ("Holden Dep."), at pp. 294-295 (emphasis added).

657) 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.³⁴³

658) Mr. Holden's testimony only highlights what indemnification "meant to [him]" personally -- the plaintiffs are entitled to know what that meant to the City of New York.

659) 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.³⁴⁴

660) The basis of the one billion dollar figure (*i.e.*, how the amount needed was determined), the reasons for the City needing the one billion dollar captive insurance policy and the City's plans for its use all go to the issue of what the City's positions have been on the issue of immunity.

661) 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?

³⁴² See Holden Dep., at p. 312.

³⁴³ See Holden Dep., at pp. 311-312 (emphasis added).

³⁴⁴ See Holden Exhibit No. 16, October 15, 2001 letter to Andrew Feeney, bearing Bates Nos. CITYCM3-00072401 through CITYCM3-00072403, marked for identification

A. I was not really involved in that, as I stated. That was pretty much handled by the City's law department.³⁴⁵

662) Lawrence Martin is one of the primary persons at the Law Department who was responsible for these matters. Thus, Mr. Martin's testimony goes directly to the immunity issues.

663) Mr. Martin's testimony goes as well to the issue of OSHA's control of and responsibility for safety and health issues at the Trade Center Site. Although Ken Holden was ostensibly the person who had been charged with the responsibility for the World Trade Center recovery and clean up project, he apparently had no idea what he was signing on October 15, 2001 when "he" stated in the letter:

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.³⁴⁶

664) The defendants have repeatedly said OSHA controlled the city and have relied on that "fact" to support their claim of immunity. In testifying about the October 15, 2001 letter, however, the DDC Commissioner stated that he is unaware of the change to OSHA's role that was drafted by the city law department. Thus, again, Lawrence Martin's testimony is critical.³⁴⁷

665) 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

My guess is this was either a Larry Martin or a David Viroli letter and I was not really involved in the purchasing of commercial

³⁴⁵ See Holden Dep., at p. 315.

³⁴⁶ See Holden Exhibit No. 16, October 15, 2001 letter to Andrew Feeney, bearing Bates Nos. CITYCM3-00072401 through CITYCM3-00072403, marked for identification

³⁴⁷ See Holden Dep., 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.

general liability and pollution liability excess insurance and what not. Those activities, to the best of my recollection, were being handled by Larry Martin of the city's law department.³⁴⁸

666) As it was Mr. Martin at the New York City Law Department who drafted the October 15, 2001 letter, Mr. Martin alone would know what type of indemnification was sought for contractors at the Trade Center site and -- even more critical -- why one billion dollars in indemnification was sought for a defendant that now claims it is immune from suit.

667) 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.

668) These letters, including the October 15, 2001 letter, were sent to a third parties, so there can be no reasonable claim of privilege, and indeed, the October 2001 letter has already been disclosed to the plaintiffs. At the time this letter was written there was no pending and/or past litigation regarding the subject matter of the letter.

669) 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.

670) Mr. Martin also assisted in drafting Kenneth Holden's sworn statement to the Keen Commission.³⁴⁹ In a damning statement prepared for him by corporation counsel and that undermines defendants' immunity defenses, Mr. Holden wrote that:

Please urge congress *to enact* legislation providing for federal indemnity, making it clear that contractors can go in and do the

³⁴⁸ See Deposition transcript of Ken Holden, at p. 296.

³⁴⁹ See Holden Dep., at p. 4.

work in the event of a disaster and not incur liability. (Emphasis added).

671) This correspondence and these conversations constitute admissions against interest to the City's current position raised in hindsight years later and do not reflect the actual facts or the circumstances involving any emergency at the WTC site.

672) Statements made during debate on the ATSSA legislation made clear that congress's principal goals were to provide relief without litigation to individuals harmed as a result of the crashes and to limit the liability of entities that were likely to be sued for injuries suffered in connection with the crashes.³⁵⁰

673) The City had no immunity for the negligence or willful conduct of their own employees in connection with the recovery, debris removal and remediation of the World Trade Center Disaster site.

674) Contrary to any immunity statutes, the City specifically allowed exclusions in cleanup efforts to allow lawsuits, presumably by private citizens for injuries resulting from negligence or willful conduct of state or city employees.

675) A letter from the United States Congress to Joseph M. Allbaugh, then-Administrator of FEMA urged prompt review and approval of a proposal to FEMA from the City of New York for site insurance coverage for environmental claims that might arise related to work performed at the World Trade Center Disaster site.³⁵¹

676) In the same letter, Congress wrote that

We want to underscore our appreciation to the administration for its commitment to fill the insurance gap by providing the resources that will enable the city to secure \$1 billion in insurance on its own

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

³⁵¹ Letter From Congress to Joseph M. Allbaugh of FEMA, May 24, 2002. CITYCM3-00030541.

behalf and for the contractors. The coverage envisioned in this proposal will ensure that sufficient resources will be available to satisfy legitimate claims by individuals affected by the recovery operations while safeguarding the fiscal health of the city and the contractors.³⁵²

677) The foregoing constitutes the Plaintiffs' Offer of Proof. Plaintiffs reserve the right to supplement or amend this document as necessary.

DATED: OCTOBER 5, 2005

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³⁵² *Id.*