

WORBY GRONER EDELMAN & NAPOLI BERN LLP

A Partnership of Limited Liability Partnerships

350 Fifth Avenue, Suite 7413

New York, New York 10118

(212) 267-3700

April 9, 2010

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

Re: *In re: World Trade Center Disaster Site Litigations*
21 MC 100 (AKH), 21 MC 102 (AKH) and 21 MC 103 (AKH)

Dear Judge Hellerstein:

In blunt commentary during the conferences held on Friday March 12, 2010 and March 19, 2010, this Court indicated that despite the “extraordinary” and “productive” work our firm has done in moving this litigation forward and in representing our clients, our attorneys’ fees are unreasonable and will likely be cut by this Court. Your Honor’s comments were made without the benefit of an accurate picture of the true scope and depth of work we have done in these matters. Those comments have been widely disseminated in the press and, respectfully, Your Honor, their effect in stirring negative publicity and comment about our firm and the profession in general have been unmistakable. The letters Your Honor has received from several other of the individual plaintiffs’ counsel in the past week are a prime example of such negative – and unfounded -- comment. We believe that this Court and the attorneys who appear before it deserve – at a minimum – that such statements by the Court *only* be made when the Court has full knowledge of the underlying facts, rather than on premature or incomplete assumptions. Accordingly, we write to ask that this Court be somewhat more circumspect with regard to statements made in open court about the likelihood of and reasoning for any adjustment to our attorneys’ fees.

The media coverage since Friday, March 12, 2010 that has excoriated our firm in broadcast and print can not have escaped this Court’s attention. While this Court discusses “fairness and reason” with regard to the fees issue, we respectfully suggest that it is neither fair nor reasonable for this Court to provide in its commentary a basis for our firm to have been savaged in thousands of publications – not just in New York, but indeed throughout the country and around the world. We have consistently done the very best work possible to help our clients when no other law firm was willing to take on these cases. That last fact can not be emphasized too often, moreover: *we took on this case and responsibility for these heroic clients when no other law firm would touch it or them.*

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Simply stated, neither our firm nor its partners deserve the vitriol that has been directed at us. Certainly, we are sure that upon reflection this Court will agree that going forward, such opinions should be withheld until we have at least had an opportunity to present the details of the work we have performed in each case and for the common benefit of the group. Only this Court, having now publicly raised this issue twice, can effectively offer the sort of “curative” comment that may allow us to be fairly dealt with by the press and fairly assessed by the public and by our clients. The failure to do so – while making no mirror comment about the remuneration paid to the Defendants’ Liaison Counsel -- is unjust.

When this Court says things like “[t]hese are 10,000 cases which in my judgment have been brought with very little intake procedure but have been filed because people have said I’ve been injured,”¹ you do us all a huge disservice. Respectfully, that comment during the March 19th conference demonstrates beyond question that Your Honor does not have the first idea what our intake procedures entailed and -- more troubling for a jurist like yourself who enjoys a reputation for fairness – you did not take the time to investigate those facts before saying something so derisive of our firm on the record in open court. For example, our records reveal that -- of the cases we did not ultimately commence -- there were 811 claimants who were rejected outright upon the initial telephone interview, 5,623 claimants whose potential claims resulted in investigation by the firm’s staff resulting in our declining representation and 437 claimants whose claims were later rejected or discontinued upon completion of a more detailed investigation, including the ordering and review of medical and other records. *We rejected 6871 claims based on our intake procedures* – plainly, we *did not* commence a claim for every person who called and said “I’ve been injured.”

We hope to address in a more direct fashion the issue of the nature and scope of our work in the *In re: World Trade Center* matters and, more particularly, the issue of Plaintiffs’ Liaison Counsel’s attorneys’ fees, in a brief we will submit to the Court. Here, however, we address in a more concise fashion some facts the Court should ultimately consider on the issue of fees.

Effect of the Court’s Commentary On Future Litigations. This Court’s decision on the issue will affect not only the immediate situation and the attorneys and other legal personnel who have worked so hard on the clients’ behalf for these long years, but will also stand as a message to other attorneys to consider when faced with the decision as to whether they can reasonably take on such massive and complex litigations in the future. The risks and costs of these massive litigations are simply becoming prohibitive. This is particularly so where the attorney who has limited himself to a standard one-third contingency fee can not reasonably expect to be paid even that contractually based fee that the people, courts and legislature of New York have already deemed a fair and reasonable legal fee for a contingency case.

Importance of Contingency Fees In Protecting Equal Access To the Courts. As noted by eminent law professor Charles Silver in a recent Op-Ed piece published in the NEW

¹ Transcript of Conference, March 19, 2010, at p. 53, lines 13-16.

YORK DAILY NEWS², for the past six years, our office has stood *with* the plaintiffs while the City's government and its contractors stood against them--even though the federal government gave the City \$1 billion to cover the workers' losses. While we did not offer to litigate these matters on a *pro bono* basis; we have not asked for a penny more in attorneys fees than any New York lawyer would be entitled to on a basic retainer agreement. As Professor Silver noted, the contingency fee arrangement embodied in our retainer agreements was better for the workers than *pro bono* legal representation would have been. Consider this: the City took more than \$200 million from the Captive and used it to retain an outside law firm rather than its own in-house Law Department to defeat the workers' claims. We certainly need not remind this Court that litigants like the City of New York, with substantial insurance benefits, defeat poor litigants most of the time. Solely because of the availability of these contingency fee arrangements, these workers of modest financial means were able to obtain quality legal representation; the City could not defeat them by outspending them. But that's not because the City didn't try. This Court has acknowledged that the City's scorched-earth litigation tactics generated staggering legal expenses and forced our office to expend enormous amounts of time. We certainly don't have to tell this Court that our office has invested literally thousands of hours in these plaintiffs' cases without seeing a nickel in payment.

In the past, this Court has recognized that our office, working on a contingency fee arrangement for our clients, would see no remuneration for our services during the pendency of the litigation: "*Your money is at the end of discovery, not at the beginning.*" Conf. Transcript, September 18, 2009, at page 12. We are at the end of discovery now and can not help but be troubled by this Court's very public and resounding rejection of the proposed settlement during the March 19 hearing. Your Honor's statements, unfortunately, have effectively fueled the overall miasma of negativity and suspicion that have characterized recent commentary about our firm and our prospective attorneys' fees.

The Fees Are Not Unreasonable Given The Amount of Work and Investment That Has Gone Into This Litigation. The amount of work we have had to do to present these claims and defend against the City's onslaught is staggering. The Captive has questioned whether the tort system, requiring as it does, determinations of fault and proof of causation, is the right way to compensate individuals who demonstrate an injury from their debris removal or volunteer work at the WTC site. This may be a valid question, but these plaintiffs have no other system from which to seek their redress. We reviewed nearly 145,000 medical records in processing these cases amounting to millions of pages of records. Additional hours were spent reviewing and compiling the documents needed to present each case and defend against it. Defense lawyers took nearly 1,200 depositions of the plaintiffs solely on behalf of the City. Our firm also took hundreds of depositions of the defendants and their representatives, requiring the review of tens of millions of pages of documents the defendants provided in discovery that had to be tagged, reviewed, filed and organized by attorneys and professional companies. The costs of all of these activities are paid out of the attorneys' fees.

² Silver, C., "*The 9/11 Lawyers Deserve Praise: Don't Arbitrarily Slash Their Fees,*" NEW YORK DAILY NEWS, March 22, 2010.

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Notwithstanding the fact that no case has yet been tried, both sides also needed to retain medical and scientific experts to evaluate the complex issues raised in these cases. The dozens of experts required various areas of highly specialized training, which these type of experts come at no small expense. Countless motions and joint letters have been filed and argued in Court – requiring time for research on important legal questions, drafting and preparation and consultation with thousands of affected clients. The immunity motions *alone* included over 10,000 pages of exhibits and two entire days of oral argument before this Court. Those motions subsequently required briefs and yet more motions on appeal. To date we have expended over \$30 million in case costs and disbursements, while advancing tens of millions of dollars in overhead for lawyers salaries, rent, equipment and other staffing and costs. All of this before we ever got to the first trial date.

Throughout this litigation, we have complied with all deadlines and court orders and continued to march inexorably forward, fighting at every step the often overwhelming onslaught of repetitive and *often meritless* motion practice as well as the repeated – and baseless -- inferences by counsel and this Court that our office was somehow deficient in meeting deadlines. Each time this spectre has been raised, our timely and appropriate compliance has been proven upon examination of the facts.

As Your Honor is also aware, our work and our efforts in these matters have not been without extraordinary personal and professional costs to our firm and our individual attorneys and staff. We have foregone many other business opportunities because our firm was essentially turned over wholesale to the litigation of this case. The firm and its partners have undertaken mind-boggling amounts of debt to finance these matters – and make no mistake about it – there are few plaintiffs' firms in the country with the resources, expertise and experience to even begin to consider such an undertaking.

On the personal front, every one of us – attorneys and staff alike -- have missed multiple opportunities to be with our families, to enjoy long holiday weekends, to simply take a few days off and breathe – because of the incredible and overwhelming scope of this litigation and this Court's understandable desire and determination to keep all of the litigants' feet to the fire and move this case forward. These are times and opportunities that none of us will ever recapture as children mature, elderly parents age and die and life, as it must, moves forward without stopping to wait for those who may be busy drafting an urgent set of motion papers to meet a deadline coming on the heels of a holiday weekend.

This Court has said before and repeated once again at the March 19, 2010 conference that the unusual nature of this case is somehow sufficient justification for cutting the plaintiffs' counsel's fees, notwithstanding this Court's acknowledgement of the excellence of our work. Nonetheless, the unusual nature of the action and its factual underpinnings did not lead this Court to grant us a discount on the \$350 per case filing fee (roughly \$3,150,000 just to step in the courthouse door). Nor did the various vendors (TCDI, Special Masters, court reporters, medical, environmental, scientific, insurance and statistical experts) paid in this matter for their expertise and services offer spontaneously to work *pro bono* or even to cut their respective bills just because this case arose from the 9/11 attacks or because of the heroic and selfless nature of our

clients and their willingness to put their health on the line for their city. It is particularly notable that it is only the Plaintiffs' Counsel that is apparently overreaching by seeking their usual and customary contingency fees in these cases. This Court has never suggested that Defendants' Liaison Counsel should have cut *their* billable rates due to the unusual nature of these matters or that any part of the nearly \$200 million dollars in defense attorneys' fees should not have been paid.

In denying an application for a 25% attorney's fee to counsel for four late-settling plaintiffs in the *In re: September 11* litigation, this Court noted, among other things, about the attorneys in question, that

Mr. Azrael did not function in a liaison capacity. Neither he nor any lawyer in his firm appeared, according to my memory, to argue any motion or present any pleading. He or another member of his firm attended most conferences, but rarely spoke. Although the description of his services contains self-flattering statements of his contributions to the common effort, they are all conclusory and I have no perception of any contributions on his part. ...Azrael's entire strategy seems to have been to coast on the work of others, and to wait for last position before entering into any meaningful settlement discussions with respect to his clients. Azrael's strategy made little contribution to the progress of the cases before me, or to the settlements that largely have resolved this litigation; indeed, his strategy is now an affront to the hard work that others contributed in the belief that they would not be prejudiced in comparison to later settlers.

In re September 11 Litigation, 567 F.Supp.2d 611, 618-619 (S.D.N.Y., 2008). This description of an attorney's contribution to the progress and settlement of a litigation is particularly telling when compared to the work done by our office.

In stark contrast to the situation described in the excerpted language above, this Court should also consider in its future commentary the fact that, if anything, the unusual nature of this particular litigation made it *exponentially* more difficult for Plaintiffs' Counsel to successfully prosecute our clients' claims. When our first case was filed in 2004, the medical experts working in the field of workplace exposures had only just begun to realize that the Ground Zero workers were suffering from a panoply of toxic exposure illnesses that has since become emblematic of this litigation. Proving liability was anything but certain, even as the cases selected as bellwether trial cases moved toward the anticipated commencement of trial later this spring. In addition to the still-emerging science and medical knowledge on these issues, we were similarly faced with unusual, if not novel, claims of governmental and emergency immunities by the defendants that would not normally come into play in the run-of-the-mill workplace accident litigation. Even if *Daubert* hearings go forward, we anticipate that the science underlying some of our clients' claims will be difficult to prove. Nonetheless, as this Court has seen, our clients

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are genuinely suffering and deserving of compensation for their selfless contributions to the debris clean-up efforts.

These Plaintiffs Are Getting Sicker As Time Passes; Settlement Sooner Rather Than Later Should Be This Court's Goal. Despite intimations by some on the defense side and in the media that our clients are getting better as time passes, medical studies indicate just the opposite. An article published in the preeminent medical journal, the NEW ENGLAND JOURNAL OF MEDICINE³ on April 8, 2010, reported the results of a follow up study of all FDNY firefighters and EMS workers who arrived at the World Trade Center site between September 11, 2001 and September 24, 2001. It should be noted that one of the lead authors of the study was David J. Prezant, M.D., a physician who is employed by defendant the City of New York and one of the lead physicians for the FDNY. The study revealed that of the 12,781 FDNY personnel included in the study⁴, the investigators:

observed little or no recovery of average lung function during the 6-year follow-up period. Indeed, from 2002 through 2008, FEV₁ values continued to decline, so that the overall loss in lung function from early 2001 until late 2008 averaged almost 600 ml for firefighters who had never smoked and more than 500 ml for EMS workers who had never smoked. From 2002 to 2008, FEV₁ values continued to decline, with an average rate of 25 ml per year for firefighters who had never smoked and 40 ml per year for EMS workers who had never smoked.⁵

Throughout this long and tortuous litigation, every one of us at the firm have stepped up to the plate, shouldered our particular burdens and continued to effectively represent our clients' interests before this Court and, as well, in the Court of public opinion where we and our clients were often denied the basic rules of fairness that we always had before Your Honor. Thus, we ask that this Court consider all of the foregoing, as well as the more detailed and supported information that you will be provided shortly in our legal and factual Memoranda addressing the Attorneys' Fees issue.

As noted in the opening of this letter, Your Honor was kind enough to say during both of the last two conferences that our work and Mr. Napoli's motivation of this entire litigation have been "extraordinary" and "productive." This Court's acknowledgment of our efforts gratifies us all. Nonetheless, this Court's subsequent commentary on the attorneys' fees and expenses has been utilized as a launch pad to support the public's and the pundits' contention that our fees were both unreasonable and unconscionable. For example, one such article on March 21, 2010,

³ Aldrich, T., et al., "*Lung Function In Rescue Workers At The World Trade Center After 7 Years*," NEW ENGLAND JOURNAL OF MEDICINE, 362;14, April 8, 2010, pp. 1263-1271, ("Aldrich").

⁴ There were 13,954 FDNY personnel present at the WTC site between September 11 and September 24, 2001, but of those, 1173 (8/4%) were not included in the study because they had either not undergone spirometric measurement or their results were inadequate. Aldrich, T., at pp. 1265-1266.

⁵ Aldrich, at p. 1270.

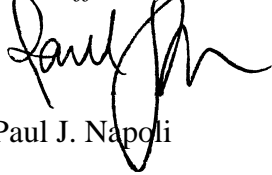
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in the New York Post called our firm “greedy 9/11 lawyers,” and said that we are looking out for our own best interests. We trust that this Court will agree that such commentary is both undeserved and unjust.

Most importantly, we particularly ask this Court to be ever-mindful in its commentary, both written and verbal, that the public and the media are only too happy to latch on to any basis for further excoriation of this firm and its fees for work done on behalf of these worthy clients and to be similarly derisive of the legal profession in general. Lastly, we respectfully reiterate our request that this Court provide on the record a “curative instruction” to restore our good name; certainly, a statement vacating this Court’s prior observations about the quality of our intake procedures would also not be out of line.

Respectfully submitted,

WORBY GRONER EDELMAN & NAPOLI BERN, LLP
Plaintiffs’ Liaison Counsel



Paul J. Napoli



Denise A. Rubin

Enclosures

Professor Charles Silver’s New York Daily News Op Ed, March 22, 2010
Aldrich Study from NEJM.

cc:

Defendants’ Liaison Counsel
Margaret Warner, Esq.
Andrew J. Carboy, Esq.
Nicholas Papain, Esq.