# 06-5324-CV

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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IN RE: WORLD TRADE CENTER DISASTER SITE LITIGATION

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On Appeal from the United States District Court
for the Southern District of New York
Case No. 21 MC 100

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**BRIEF OF PLAINTIFFS-APPELLEES**

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## TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... v

STATEMENT OF THE ISSUES PRESENTED ..... 1

STANDARD OF REVIEW ..... 2

STATEMENT ..... 3

I. Factual Background ..... 4

A. Plaintiffs' Exposure To Toxins During Debris Clearance At World Trade Center Site ..... 4

B. Federal Role ..... 16

II. Procedural Background ..... 21

A. The Complaint And Immunity Motions ..... 21

B. District Court's Decision ..... 24

1. SDEA ..... 24

2. Disaster Act ..... 25

3. State Common Law ..... 26

4. Federal Common Law ..... 26

5. Stafford Act ..... 27

C. Interlocutory Appeal And Motion To Dismiss ..... 28

SUMMARY OF ARGUMENT ..... 29

ARGUMENT ..... 35

I. Defendants' Absolute Immunity Defenses Are Not Available Under The Special Statutory Regime Congress Established For Resolution Of These Claims ..... 39

II. State Statutory Immunity Defenses ..... 44

A. The Motion For Judgment On The Pleadings Fails Because It Depends On Evidence Outside Of The Pleadings ..... 44

B. Background To State Emergency Statutes ..... 48

1. War Emergency Act And SDEA ..... 48

2. Disaster Act ..... 51

C. SDEA ..... 54

1. In Failing To Comply With Basic Worker Safety Laws, Defendants Were Not Acting Pursuant To Any Qualifying Civil Defense "Law" Or "Order" ..... 54

2. Plaintiffs' Injuries Were Not The Result Of Defendants' "Carrying Out" Or "Attempting To Comply" With A Civil Defense Law Or Order ..... 61

i. The Private Contractors Were Complying With A Contract, Not Any Civil Defense Law Or Order ..... 61

ii. Plaintiffs' Injuries Were Caused By Defendants' Violation Of The Emergency Orders Governing Debris Removal ..... 69

3. There Are Material Disputes Over The Question Of Defendants' "Good Faith" ..... 72

4. Defendants Have Not Shown That All Of Plaintiffs' Injuries Occurred During The Course Of A "Civil Defense" Emergency ..... 81

D. Disaster Act ..... 88

1. The Disaster Act Immunity Provision Applies Only To A "Political Subdivision," Thereby Excluding The Private Contractors And Port Authority ..... 88

2. Plaintiffs' Injuries Do Not Arise From Defendants' Exercise Of Any Discretionary Function Or Duty In Carrying Out Section 25 Of The Disaster Act ..... 91

i. Disaster Act Immunity Is Time Limited ..... 91

ii. Defendants' Failures Do Not Fall Within The Definition Of "Discretionary Function" ..... 92

III. State Common Law Immunity ..... 101

A. Defendants Are Not Entitled To Discretionary Function Immunity ..... 101

B. The Port Authority Does Not Enjoy "Governmental Function" Immunity ..... 102

IV. Federal Statutory And Common Law Immunity ..... 106

A. This Court Lacks Jurisdiction To Resolve Defendants' Federal Immunity Claim ..... 107

B. Defendants Are Not Immune Under The Stafford Act ..... 109

C. Defendants Are Not Entitled To "Derivative" Federal Immunity ..... 112

1. *Yearsley* And Its Progeny Do Not Apply To Defendants Acting Under The "Leadership" Of A Federal Agency ..... 113

2. Federal Law Does Not Immunize Defendants Who Delegate Non-Delegable Duties To Federal Officials ..... 121

3. In Any Event, The Degree Of Federal Involvement Is A Matter Of Dispute In The Summary Judgment Record ..... 123

D. The Port Authority Is Not Entitled To Immunity For Engaging In Purportedly Delegated Federal Governmental Functions ..... 124

CONCLUSION ..... 127

CERTIFICATE OF COMPLIANCE ..... 128

PROOF OF SERVICE ..... 129

## TABLE OF AUTHORITIES

### Federal Cases

*Alaska v. United States*, 64 F.3d 1352 (9th Cir. 1995) ..... 108

*Amaker v. Weiner*, 179 F.3d 48 (2d Cir. 1999) ..... 47

*Berkovitz v. United States*, 486 U.S. 531 (1988) ..... 94, 99, 100

*Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) ..... passim

*Britt v. Garcia*, 457 F.3d 264 (2d Cir. 2006) ..... 2

*Burnett v. Grattan*, 468 U.S. 42 (1984) ..... 40

*Chambers v. Time Warner, Inc.*, 282 F.3d 147 (2d Cir. 2002) ..... 46

*Corr. Serv. Corp. v. Malesko*, 534 U.S. 61 (2001) .....117, 118

*Densberger v. United Techs. Corp.*, 297 F.3d 66 (2d Cir. 2002) ..... 122

*Dolphen Gardens v. United States*, 243 F.Supp. 824 (D. Conn. 1965) ..... 116

*Dureiko v. United States*, 209 F.3d 1345 (Fed. Cir. 2000) ..... 38, 95

*English v. Gen. Elec. Co.*, 496 U.S. 72 (1990) ..... 40

*Fox v. Cheminova, Inc.*, 387 F. Supp. 2d 160 (E.D.N.Y. 2005) ..... 89

*Gaglio v. City of N.Y.*, 143 F.2d 904 (2d Cir. 1944) ..... passim

*General Conf. Corp. of Seventh-Day Adventists v. Seventh Day Adventist Congregational Church*, 887 F.2d 228 (9th Cir. 1989) ..... 45

*Global Network Commc'ns, Inc. v. City of N.Y.*, 458 F.3d 150 (2d Cir. 2006) ..... 47

*Goldman v. Beldon*, 754 F.2d 1059 (2d Cir. 1985) ..... 46

*Helvering v. N.Y. Trust Co.*, 292 U.S. 455 (1934)..... 90

*Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) ..... 105

*Houston County Hosp. v. Blue Cross & Blue Shield*, 481 F.3d 265 (5th Cir. 2007) ..... 108

*In re Alva S.S. Co.*, 405 F.2d 962 (2d Cir. 1969) ..... 98

*In re Joint E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.2d 626 (2d Cir. 1990)..... 116, 121

*In re WTC Disaster Site*, 414 F.3d 352 (2d Cir. 2005) ..... 23

*Indian Towing Co. v. United States*, 350 U.S. 61 (1955)..... 100

*Japan Airlines Co. v. Port Auth.*, 178 F.3d 103 (2d Cir. 1999)..... 105, 106

*Johnson v. Jones*, 515 U.S. 304 (1995)..... 2, 73, 123

*Joseph v. Levitt*, 465 F.3d 87 (2d Cir. 2006) ..... 47

*Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018 (9th Cir. 1989)..... 96

*Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101 (2d Cir. 2001)..... 2

*Lauer v. City of New York*, 95 N.Y.2d 95 (2000) ..... 104

*Leberman v. John Blair & Co.*, 880 F.2d 1555 (2d Cir. 1989) ..... 73

*Miree v. DeKalb Co.*, 433 U.S. 25 (1977) ..... 114, 120

*Owen v. City of Independence*, 445 U.S. 622 (1980)..... 94

*Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67 (2d Cir. 1998)..... 126

*Phillips v. United States*, 956 F.2d 1071 (11th Cir. 1992) ..... 96

*Pullman Constr. Indus., Inc. v. United States*, 23 F.3d 1166 (7th Cir. 1994)..... 108

*Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400 (D.S.C. 1994)..... 116

*Rittenhouse v. A. Star Container Serv.*, Nos. 86-5876, 87-5830, 1988 WL 112898 (S.D.N.Y. Oct. 17, 1988) ..... 103

*Routh v. United States*, 941 F.2d 853 (9th Cir. 1991) ..... 96

*Royal Ins. Co. of Am. v. Ru-Val Elec. Corp.*, 918 F. Supp. 647 (E.D.N.Y. 1996)..... 102

*Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639 (2d Cir. 1988)..... 45, 73

*Smith v. City of Orangetown*, 150 F.2d 782 (2d Cir. 1945) ..... passim

*Smith v. Town of Orangetown*, 57 F. Supp. 52 (S.D.N.Y. 1944), *aff'd*, 160 F.2d 782 (2d Cir. 1945)..... 50, 70, 72

*United States v. Gaubert*, 499 U.S. 315 (1991) ..... 94, 95

*Watson v. Philip Morris Cos.*, 127 S. Ct. 2301 (2007) ..... 124

*Williams v. New York*, N.Y.S.2d 491 (App. Div. 1982)..... 104

**State Cases**

*Arteaga v. New York*, 72 N.Y.2d 212 (1988)..... 95

*Balsam v. Delma Eng'g Corp.*, 90 N.Y.2d 966 (1997) ..... 104

*Cuffy v. City of N.Y.*, 69 N.Y.2d 255 (1987)..... 105

*Daly v. Port Auth.*, 793 N.Y.S.2d 712 (App. Div. 2005)..... passim

*Davis v. New York.*, 691 N.Y.S.2d 668 (App. Div. 1999) ..... 95, 99

*Eiseman v. New York*, 70 N.Y.2d 175 (1987)..... 100

*Field v. Mfrs. Trust Co.*, 57 N.Y.S.2d 740 (App. Div. 1945), *rev'd on other grounds*, 62 N.Y.S.2d 740 (App. Div. 1946) ..... 50, 58, 70, 86

*Fitzgibbon v. County of Nassau*, 541 N.Y.S.2d 845 (App. Div. 1989) .. passim

*Garrett v. Holiday Inns, Inc.*, 58 N.Y.2d 253 (1983) ..... 95

*Haddock v. New York City*, 75 N.Y.2d 478 (1990)..... 101

*Henderson v. City of N.Y.*, 576 N.Y.S.2d 562, 564-65 (App. Div. 1991)..... 106

*Holmes v. Erie County*, 42 N.Y.S.2d 243 (App. Div. 1943) ..... 103

*In re Cheesebrough*, 78 N.Y. 232, 237 (1879)..... 59, 62

*In re World Trade Ctr. Bombing Litig.*, 776 N.Y.S.2d 713 (App. Div. 2004)..... 102, 103, 104

*Jankowski v. Welch*, 52 A.2d 771 (N.J. 1947)..... 58, 72, 78, 86

*Jones v. Gray*, 45 N.Y.S.2d 519 (App. Div. 1943)..... passim

*Jones v. New York*, 33 N.Y.2d 275 (1973)..... 103

*Kelly v. New York*, 395 N.Y.S.2d 311 (App. Div. 1977), *aff'd*, 45 N.Y.2d 973 (1978) ..... 100

*Kircher v. City of Jameston*, 74 N.Y.2d 251 (1989)..... 105

*McCrink v. City of N.Y.*, 296 N.Y. 99 (1947) ..... 98

*Miller v. State*, 62 N.Y.2d 506 (1984) ..... 69

*Oeters v. City of N.Y.*, 270 N.Y. 364 (1936)..... 102

*Pelaez v. Seide*, 2 N.Y.3d 186 (2004)..... 104

*Pietra v. New York*, 510 N.Y.S.2d 334 (App. Div. 1986), *aff'd*, 530 N.Y.S.2d 510 (1988)..... 95

*Riss v. City of N.Y.*, 22 N.Y.2d 579 (Ct. Cl. 1968) ..... 102, 104

*Santangelo v. New York*, 474 N.Y.S.2d 995 (App. Div. 1984)..... 101

*Scully v. Hebert*, 84 N.Y.S.2d 805 (App. Div. 1948) ..... 58, 79, 86

*Sferraza v. Port Auth.*, 777 N.Y.S.2d 645 (App. Div. 2004) ..... 96

*Smullen v. City of N.Y.*, 28 N.Y.2d 66 (1971) ..... 95

*Tango v. Tulevech*, 61 N.Y.2d 34 (1983) ..... 92, 93, 95

*Turner v. Degnon M'Lean Contracting Co.*, 90 N.Y.S. 948 (App. Div. 1906), *aff'd*, 184 N.Y. 525 (1906) ..... 102

**Federal Statutes**

Air Transportation Safety and System Stabilization Act of 2001 (ATSSSA), Pub. L. No. 107-42, 115 Stat. 230 (codified as amended at 49 U.S.C. § 40101 note) ..... passim

ATSSSA § 405 ..... 41

ATSSSA § 408(a) ..... 41, 42, 125

ATSSSA §§ 408(a)(1)-(3) ..... 41

ATSSSA § 408(b) ..... 40, 41

ATSSSA § 408(b)(2) ..... 40, 42

Consolidated Appropriations Resolution, Pub. L. No. 108-7, 117 Stat. 11 (2003) ..... 43

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121-5207 ..... 2

42 U.S.C. § 5143(b)(3) ..... 118, 125

42 U.S.C. § 5148 ..... passim

42 U.S.C. § 5149(a) ..... 125

42 U.S.C. § 5150 ..... 110

42 U.S.C. § 5170 ..... 125

42 U.S.C. § 5173(b).....111, 119, 125

**State Statutes**

Ct. Cl. Act § 8; N.Y. Unconsol. Law § 7106 ..... 103

New York State and Local Natural and Man-Made Disaster Preparedness Law (Disaster Act), N.Y. Exec. Law §§ 20-29-g (McKinney 2007) ..... 2

Disaster Act § 20(2)(a) ..... 52, 91

Disaster Act § 20(2)(f)..... 89

Disaster Act § 21 ..... 51

Disaster Act § 21(1)..... 52

Disaster Act § 21(3)(c) ..... 52

Disaster Act § 21(3)(j)..... 52

Disaster Act § 22 ..... 51

Disaster Act § 22(2)..... 52

Disaster Act § 22(3)(b)(7) ..... 52

Disaster Act § 23 ..... 52

Disaster Act § 24(g)..... 53

Disaster Act § 25(1)..... 89, 91

Disaster Act § 25(5)..... passim

Disaster Act § 28-a ..... 92

Disaster Act § 29-a(1) ..... 53

Disaster Act § 29-a(2)(b) ..... 53

Disaster Act § 29-a(2)(e) ..... 53

Disaster Act §§ 21-22 ..... 51

N.Y. Gen. Mun. L. § 209-b ..... 85

N.Y. Gen. Mun. Law § 205-a ..... 22

N.Y. Gen. Mun. Law § 205-e ..... 22

N.Y. Lab. L. § 241(6) ..... 22, 96

N.Y. Lab. Law §200 ..... 22

New York State Defense Emergency Act (SDEA), N.Y. Unconsol. Law §§ 9101-9181 (McKinney 2007) ..... passim

SDEA § 9102 ..... 48

SDEA § 9112(17) ..... 56

SDEA § 9120 ..... 49

SDEA § 9121 ..... 49, 56, 84

SDEA § 9121(4) ..... 49, 56

SDEA § 9122(3) ..... 56

SDEA § 9123 ..... 49, 52

SDEA § 9129(2) ..... 63, 68

SDEA § 9131(1) ..... 51, 65

SDEA § 9181(5) ..... 51, 57, 71

SDEA § 9193(1) ..... passim

**Federal Regulations**

29 C.F.R. § 1910.134(f) ..... 98

29 C.F.R. pt. 1910 ..... 97

44 C.F.R. § 206.223(e) ..... 125

**State Regulations**

12 N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.7 (2007) ..... 97

N.Y. Industrial Code § 23-1.8(b)(1) ..... 98

**Other Authorities**

Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE (3d ed.) ..... 45

Gulf Coast Recovery Act, S. 1761, 109th Cong., 1st Sess. (2005) ..... 67

Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) ..... 59

Port Authority of New York and New Jersey, Minutes of Board Meeting 2 (Feb. 22, 2007), *available at* http://www.panynj.gov/AboutthePortAuthority/pdf/0207_actions.pdf. ..... 35

**Federal Rules**

Fed. R. Civ. P. 10(c) ..... 46

Fed. R. Civ. P. 7(a) ..... 46

Fed. R. Civ. P. 8 ..... 46

## JURISDICTIONAL STATEMENT

For the reasons set forth in Appellees' Motion To Dismiss Interlocutory Appeal For Lack Of Jurisdiction (Motion to Dismiss), the reply brief thereto, and additional reasons provided in the body of this brief, this Court lacks jurisdiction over the district court's non-final order denying Defendants' motions for judgment on the pleadings and for summary judgment.

## STATEMENT OF THE ISSUES PRESENTED

1. Whether this Court has jurisdiction over these interlocutory appeals.

2. Whether the immunity defenses asserted by Defendants are available under the federal cause of action established by the Air Transportation Safety and System Stabilization Act of 2001 (ATSSSA), Pub. L. No. 107-42, 115 Stat. 230 (codified as amended at 49 U.S.C. § 40101 note).

3. Whether at this stage in the proceedings, Defendants have demonstrated an entitlement to immunity under

   (a) The New York State Defense Emergency Act (SDEA), N.Y. Unconsol. Law §§ 9101-9181 (McKinney 2007);

(b) The New York State and Local Natural and Man-Made Disaster Preparedness Law (Disaster Act), N.Y. Exec. Law §§ 20-29-g (McKinney 2007);

(c) New York state common law;

(d) The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121-5207; or

(e) Federal common law.

## STANDARD OF REVIEW

Ordinarily, because Defendants seek review of an order denying a motion for judgment on the pleadings and motions for summary judgment, this Court would review the decision below *de novo*. *See Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107 (2d Cir. 2001); *Britt v. Garcia*, 457 F.3d 264, 269 (2d Cir. 2006). However, on interlocutory appeal this Court lacks jurisdiction to review the district court's construction of the summary judgment evidence and must accept that court's determinations of whether there exist disputed issues of material fact precluding summary judgment. *Johnson v. Jones*, 515 U.S. 304, 316-17 (1995).

## STATEMENT

When terrorists crashed two airliners into the World Trade Centers on September 11, 2001, hundreds of New York firefighters, police officers and other workers dropped everything and rushed to the scene. For days, they labored in unspeakable conditions without rest, giving no thought to their own personal safety, searching for survivors and the remains of their comrades and fellow citizens. Nine months later, the City gave control of the property back to the Port Authority for the next stage in the rebuilding of the World Trade Center complex. In between those two dates, the site had been radically transformed from a place of chaos and public emergency to an orderly construction site not unlike those the City of New York has often seen.

In the first hours of the disaster, all thought was rightly focused on the immediate emergency and little thought was given to the safety of the men and women responding to the call of public service at the site. Quickly though, sufficient resources were mobilized that the safety of the workers at the site became the rightful subject of paramount concern. The Defendants in this case had little difficulty in deciding that compliance with basic worker safety laws – including those requiring employers to provide, and

enforce the use of, respiratory protection devices – was feasible despite the initially trying conditions at the site. The City therefore ordered its agencies and contractors to comply with all applicable state and federal safety laws throughout the duration of the operations. Those orders were flagrantly violated. Thousands of workers were never given the basic safety equipment and training they needed to keep safe and that Defendants purported to guarantee them. As a result, thousands of the men and women who worked tirelessly in the rubble of the World Trade Centers have fallen ill, and some have already died from their exposure to toxic dust and chemicals at the site. The question at the heart of this appeal is whether the law provides these heroes any remedy for the injuries they needlessly suffered in the nation's service.

## I. Factual Background

### A. Plaintiffs' Exposure To Toxins During Debris Clearance At World Trade Center Site

The collapse of the towers pulverized the contents of two skyscrapers, turning tens of thousands of tons of toxic chemicals into fine, breathable dust, including some of the most dangerous substances known: arsenic, asbestos, polychlorinated biphenyls (PCBs), lead, mercury, airborne

fiberglass, and benzene. SPA 7; Complaint ¶¶ 8, 67, 83.[1] Early tests by the United States Geological Service showed that the dust was highly caustic, having a pH level akin to ammonia or liquid drain cleaner. Complaint ¶ 82.

The City and the contractors it hired to clear the site immediately realized that without adequate protection, the toxic mix of chemicals and pollutants hanging in the air, sprayed up again with every movement of the debris pile, posed grave risks to the lives and health of the workers. *See* City Br. 16; Complaint ¶¶ 68, 72-75, 78. How to protect workers from these toxins was never in question – state and federal laws and regulations were in place precisely to inform employers what safety measures were needed in conditions such as these (which, although different in degree, were not completely different in kind from those experienced in many dangerous industries where workers are exposed to hazardous materials and toxic dust). Nor, after the initial period of extreme emergency, was there ever any question about whether implementing those life-preserving safety measures was feasible at the site or compatible with the City's other priorities in

[1] "Complaint" refers to the Amended Master Complaint Against the City of New York, found at A 9778-9853. Because the factual allegations in this complaint are the materially same as those in the complaints against the other Defendants, Plaintiffs cite only to the Master Complaint against the City.

responding to the disaster. Although state law gave the Governor the authority to suspend laws that interfered with a disaster recovery, *see* Disaster Act § 24, he never suspended any worker safety rules, and nobody asked him to. SPA 27. Instead, as part of the emergency orders issued in the aftermath of the attacks, the City ordered the contractors to comply with all applicable worker safety rules and regulations, particularly those relating to respiratory protection. SPA 14-17, 27-28.[2] Federal officials from the Occupational Health and Safety Administration (OSHA), whom the City consulted, concurred that implementation of OSHA's safety requirements, including those relating to respiratory protection, was feasible, critical to worker safety, and legally required. *See* SPA 25; A 1778-80 (OSHA Regional Director Patricia Clark Dep. 18-29); A 1768 (Clark congressional testimony).

Those initial orders were made part of permanent health and safety plans governing the cleanup operations. SPA 14-18. Thus, on October 15, 2001, the City issued the World Trade Center Emergency Project Environmental Safety and Health Plan (ES&H Plan). A 8845. That plan provided that all agencies and private contractors "shall comply with the

[2] *See also, e.g.,* A 8891-93.

requirements specified in this document" and that "OSHA Standards superseded any and all items referenced in this plan." A 8850. It further provided that the "DDC has overall responsibility for the site's ES&H program" while "[e]ach prime contractor and their subcontractors are responsible for implementation, enforcement and compliance with all aspects of this plan." *Id*. The Plan then adopted by reference OSHA standards for the selection, use, maintenance and storage of personal protective equipment (PPE), including respirators. A 8891. It further required PPE training in accordance with OSHA regulations. A 8892. *See also* A 3671 (WTC Emergency Project Partnership Agreement) (requiring compliance "with the [ES&H plan] and OSHA's 29 CFR 1926 standards"). These plans and orders functioned to assure workers that all reasonable steps were being taken to ensure their safety.

Yet, for inexplicable reasons, the safety plans and orders were not implemented as required. Complaint ¶ 204. Even as those in charge of the site found time for less important things – constructing a viewing platform for the public, conducting tours of the site for politicians and other guests, negotiating contracts, and lobbying FEMA and Congress for money and

liability protection[3] – thousands of workers were out on the debris pile, breathing in toxins without adequate protection.

The failures were not uniform. Many workers never received any respirators at all.[4] For example, Thomas Vario, a construction laborer who worked at the site for nine months starting September 12, 2007,[5] testified in his deposition:

> Q. Did anyone ever tell you that there were respirators available?
>
> A. No.
>
> Q. Did you ever see any signs anywhere regarding respirators?
>
> A. No.

---

[3] *See, e.g.*, A 8350 (noting that on or about October 1, 2001, "Congressmen and celebrities" were touring Ground Zero); A 8361 (by October 7, 2001, Port Authority had built a public viewing stand); A 8198 (by October 11, draft contracts with Contractors were being reviewed).

[4] *See* Complaint ¶ 154, 196, 200; *see also* A 8637 (Chase Sargent Dep. 152:18-24) ("I saw many, many, many people working, the whole time I was there, with not just no respiratory protection, but with no eye protection, with tennis shoes on, with short sleeved shirts, with all of the fundamental, basic personal protective gear that an employer should provide to somebody who works on that site."); A 9097 (Michael Damato Dep. 90: 15-25 ("Q. Were you ever given a respirator at all? . . . A. Never. Q. Were you ever given a dust mask? A. No. Q. Were you ever given any kind of respiratory protection? A. At the site? Q. At that site. A. No.");

[5] *See* A 8753 (Dep. 38:6-7); A 8754 (Dep. 42:12-14).

Q. And none of your supervisors ever discussed wearing a respirator with you?

A. No.

A 8761 (Dep. 73:5-13). Darren Harkins, a firefighter, similarly testified:

Q. At any time between September 2001, through March of 2002, did anyone tell you that respirators were available?

A. No.

Q. No one ever told you they were available?

A. No.

A 8818 (Dep. 150:7-17).[6] Others received only ineffectual paper dust masks or other inadequate equipment.[7] Still other workers were never tested to see if the respirator fit, as required by law, to ensure that the respirator actually provided significant protection.[8] And many never received any training on

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[6] *See also* A 8357 (memorandum from WTC Logistics Officer Charles R. Blaich to WTC Incident Commander Assistant Chief Frank Cruthers, dated Sept. 22, 2001) ("OEM must develop and implement a plan at the 0700 meeting to address overall use & respirator issue. The 'We have 8000 on order' is losing its credibility.").

[7] Complaint ¶ 154, 200.

[8] Complaint ¶ 154, 202, 207; A 8192 (report that some workers had been on site three weeks without getting fit testing).

how to use the respirators, or were given training that was plainly inadequate under OSHA regulations and the ES&H plan.[9]

A great many workers were mislead about the need to wear the hot and uncomfortable respirators while working on the pile. They were never given accurate information about how dangerous the air was, and many were told that the air was reasonably safe.[10] For example, Leo DiRubbo, a senior vice president for one of the Contractor Defendants,[11] testified that when working at the site, he only wore his respirator "at times" because he "really didn't feel [he] had to." A 4293 (Dep. 102:17-19). When asked why the felt that way, he replied:

> Because I was told everything was safe. Numerous times. I asked many times about air quality. I was told it was being monitored, and only once was I told there was a trace of Freon, and it was – the levels were safe. And other than that, I never heard another thing. And as long as I was told that there was no danger, what am I protecting myself from?

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[9] Complaint ¶ 122, 203; A 5893 (Robert Ryan Dep. 107:20-22).

[10] Complaint ¶¶ 79, 85, 147, 150, 157-59, 163-193, 197; *see also generally* A 6362 (memorandum from Cate Jenkins, EPA Environmental Scientist, entitled "NYC data concealed by EPA and NYC after 9/11, subsequently altered/selectively deleted by NYC").

[11] *See* A 4283 (Dep. 65:20-24).

A 4293 (Dep. 102:20–103:8). DiRubbo was not the only supervisor seen working on the site without a respirator.[12] The minutes of one shift overlap meeting in October 2001 reported that "PPE [personal protective equipment] continues to be problematic, Supervisors not wearing PPE and that attitude is continuing to lower tier employees. PPE is donned while OSHA is around, then it is not worn when OSHA is not around." A 8196.

And when the workers thought it was safe to work without their respirators, and followed suit, no one told them to put their respirators back on.[13] Although officials would later testify that tens of thousands of respirators had been purchased, anyone looking at the site could see that workers were not wearing them.[14] By the second week in October, compliance rates for respirator usage requirements were at 41%. Complaint ¶ 223-24; A 8372-73. By the end of the month, the rate was 29%. *Id*. Rates of 30% - 40% persisted from September 2001 through April 2002. *Id*. *See*

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[12] Complaint ¶ 131; A 8193.

[13] Complaint ¶ 204; A 8761 (Thomas Vario Dep. 73:11-13); A 8639 (Chase Sargent Dep. 159:2-19).

[14] *See, e.g.,* A 3691 (Report of the Committee on Environmental Protection, New York City Council, dated Dec. 2001) (noting that committee members visited site on December 14, 2001, and stating that "[a]t that time, it was observed that none of the rescue workers and other on-site personnel appeared to be using the protective respiratory gear").

*also* Complaint ¶ 125. This, although the danger from the dust did not dissipate during this time, for the shuffling and transporting of the debris constantly kicked up new clouds of toxins.

There were additional important safety lapses as well. Defendants failed to provide other required safety equipment – including Tyvek suits to prevent exposure to toxic substances through the skin, self-contained breathing apparatus, and eye protection to prevent absorption of chemicals through the eye membranes – when required by the situation. Complaint ¶ 199, 200(b)-(e). Defendants also failed to ensure that the equipment that *was* provided was adequately cleaned, serviced and maintained in a usable condition. Complaint ¶ 200(g). Moreover, Defendants failed to set up, and enforce the use of, decontamination stations to ensure that workers were not transporting toxic dust on their clothes or vehicles when they left the site, thereby prolonging their exposure and endangering their families. Complaint ¶ 200(f). Defendants also failed to take anything more than rudimentary steps to suppress the dust being kicked up by the debris removal process, thereby exacerbating their failure to provide workers proper respiratory protection. Complaint ¶ 215-19.

The persistent non-compliance could not be explained as necessary in light of higher priorities. By September 15, it was clear that no additional survivors would be found and the mission was quickly transformed from a search and rescue operation to a debris clearance project. *See* Complaint ¶ 70. Even before then, defendants themselves had concluded that compliance with basic worker safety requirements was feasible, important, and consistent with their other priorities. But they ignored a continuous flow of evidence – including reports from their own employees as well as federal inspectors – that the safety rules they themselves had embraced were not being implemented on the ground.[15]

There were many reasons for Defendants' failures, but no excuses. A requisition for thousands of respirators for the Fire Department, made shortly after the collapse, languished on the desks of City bureaucrats for more than *two and a half months* before it was approved and an order

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[15] *See* Complaint ¶¶ 226-27; SPA 18 & n.7 (collecting cites to record); *id*. 23; A 8192 (minutes of Labor-Management site meeting on Feb. 20, 2002, stating "Pat Clark [of OSHA], elaborating on the disturbing trend of non-compliance. . . . This was based on failure to use respirators where required. Liberty Mutual agreed that they too are finding significant non-compliance, especially with respirator use . . . again, the bottom line appears to be failure to actually implement programs that are in-place"); *see also*, *e.g.*, A 8357, 8361, 8372-73, 8376, 8378.

placed. SPA 14-15 & n.6; Complaint ¶ 212. There was in-fighting among the Contractors over responsibility for overall site safety control and monitoring. A 9886 (Construction Manager Complaint ¶ 140). When the City hired Bechtel Corporation as its overall site safety contractor, the other Prime Contractors feared the Bechtel was using the contract to break into the New York construction market. *Id*. As a result, Bechtel's findings of safety violations and recommendations were routinely ignored by the other Contractors, as they lobbied (with eventual success) to have Bechtel removed from the project. *Id*. *See also, e.g.,* A 8977 (Daily Shift Report for October 15, 2001) (Bechtel safety inspectors "are still experiencing resistance from the contractors when individuals are in serious or imminent danger situations. They are either refusing to take corrective action or are giving our team members excuses as to why we have no authority to tell them anything.").

The largest problem, however, was simply the failure of Defendants to make site safety a priority and to enforce the standards they had agreed to. None of the Prime Contractors ever came close to implementing the WTC EH&S Plan they themselves had helped create and had committed to implement. Complaint ¶ 114. In fact, the Corporate Safety and Health

Director for Tully Construction, one of the four Prime Contractors, never even read it. Complaint ¶ 112. Moreover, Defendants failed to employ sufficient numbers of safety officers to monitor compliance. Complaint ¶ 126-27; A 8196. And even when problems were detected and reported, senior managers failed to respond or to hold those responsible for safety lapses accountable. Complaint ¶¶ 127-129. In fact, some supervisors showed outright contempt for the safety plan and its implementation. It was, for example, "reported that a supervisor from one of the prime contractor[s] questioned a DDC inspector, why are we going to follow OSHA rules now since we haven't followed them so far, why should we start now[?]" A 8195. The City likewise failed to ensure that its Contractors were complying with health and safety requirements. Complaint ¶ 152.

Defendants' lack of commitment to enforcement was lamented even by employees within the City and the federal agencies involved in the project. For example, in a memorandum dated February 13, 2002, one DDC employee reported the results of multi-agency 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 the concern[:] 'General 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 management appears to only address safety issues when convenient for the schedule of the project.

A 8175. *See also*, *e.g.*, Complaint ¶ 214.

Thus, while Defendants produced numerous plans and memoranda, and held many meetings, on the ground, worker safety was subordinated to the imperative to quickly finish the debris removal process. *See* Complaint ¶¶ 124, 127, 129, 229.

In time, the exposure to these airborne toxins at Ground Zero took effect. Plaintiffs suffered a variety of respiratory and other injuries and illness because of their exposure. Complaint ¶ 240. Some have died. *Id.* ¶ 276. Mount Sinai Medical Center later tested 10,000 workers from the site and found that 70% of workers reported respiratory problems arising or exacerbated after their exposures at Ground Zero. SPA 4.

### B. Federal Role

Within days of the attack, federal agencies began to provide assistance to the City. SPA 19-21. In particular, OSHA, the Environmental Protection Agency (EPA), and the Army Corps of Engineers (Army Corps) "each

provided technical and physical assistance to the City of New York in their respective areas of expertise and authority." *Id*. at 21.

While Defendants now attempt to place blame for site safety failures at the feet of these federal agencies, it was clear from the outset that control of the project, and ultimate responsibility for worker safety, was retained by the City and its Contractors at all times. The City Department of Design and Construction (DDC) was assigned "total control over all aspects of safety, construction, demolition, and cleanup activities at the site." SPA 10.[16] The DDC thus acted as the general contractor for the debris clearance project, supervising the work of the four Prime Contractors designated as "construction managers" for the four quadrants of the site, who in turn, supervised scores of subcontractors. *Id*. at 11-12. With respect to site safety, the ES&H Plan made clear from the beginning that "the DDC has overall responsibility for the site's ES&H program" and that "[e]ach prime contractor and their subcontractors are responsible for implementation, enforcement, and compliance with all aspects of this plan." A 8186.[17]

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[16] *See also* A 8185.

[17] *See also* A 1778 (Clark Dep. 21:2-7); A 5552 (Port Authority Engineer Peter Rinaldi Dep. 342:19–343:4).

Likewise, the Contractor Defendants were given full responsibility for ensuring compliance with all applicable safety laws, rules and regulations under the terms of their draft contracts. Complaint ¶ 143; A 8192; A 4933.

The federal agencies played an important, but supporting role. OSHA provided the City advice on the proper types of respirators to use, *id*., and conducted atmospheric testing that was used by the City (along with data collected by the EPA and numerous city agencies) to establish the "geographical boundaries within which respirator use would be required and in order to determine the level of respiratory protection needed." SPA 21. Starting September 20, 2001, at the City's request, OSHA took a "lead" role in respirator distribution, fitting, and training. *Id*. This did not, however, mean that OSHA took responsibility for directly selecting, distributing, test-fitting, or training all of the Ground Zero workers. The respirators were "selected jointly with other safety and health professionals," including "the New York City Department of Health." A 1768 (congressional testimony of OSHA Regional Administrator Patricia Clark). While OSHA was assigned to be the "sole provider of respiratory protection equipment, fit-testing and training for the new shift [fire department] personnel," *id*. at 22, other agencies and the Contractors shared in the responsibility for distributing

respirators to others and conducting fit-testing.[18] Moreover, OSHA did not provide training directly to workers, but instead trained Defendants' supervisory employees who, in turn, were responsible for training the workers. SPA 22.

In the same vein, OSHA "did not assume direct supervisory power to assure workers used respiratory equipment consistently and efficiently." SPA 22.[19] Instead, OSHA was relegated to pointing out violations to Defendants and hoping for compliance. *Id*. at 22-23. In particular, OSHA made a decision, early on, that it would not exercise any of its legal enforcement authority on the project. *See, e.g.,* SPA 22 (OSHA's role was one of "'assistance and consultation, **not** enforcement'") (quoting OSHA Talking Points (A 7012); *id*. at 78. And even though City officials believed that asking OSHA to start invoking its enforcement powers would improve

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[18] *See, e.g.,* A 2226 (Walter Murray Dep. 116:17-18) (Turner distributed respirators to own employees); A 2233-34 (Walter Murray Dep. 144:21-23) (Turner conducted fit-testing); A 8700 (Depo. Patrick F. Muldoon 91:24–92:13 (AMEC distributed respirators); A 2989 (William Ryan Dep. 276:17-24) (Tully distributed respirators and conduct fit-testing).

[19] A 1778 (Patricia Clark Dep. 21:2-12) (agreeing that DDC "was responsible for the safety and health" of the workers and stating that OSHA provided only "guidance, assistance, technical support" to DDC).

the Contractor Defendants' poor safety performance, the City never made that request. Complaint ¶¶ 135-37 & n. 123, 228 & n.224.

The EPA "*in conjuction* with the City Department of Environmental Protection . . . assumed the lead role for 'hazardous waste disposal' at the World Trade Center site." SPA 23 (emphasis added). The EPA, along with OSHA and various City agencies, also conducted tests of the air at the site. *Id*. at 24. It shared those results with the "Environmental Assessment Group, a inter-agency group comprised of federal, state and City agency representatives." *Id*. But it was the Environmental Assessment Group, not EPA, that decided how to adapt workplace rules in light of the environmental data. A 1768. EPA also published the results of environmental testing on its website and at a location on the worksite. SPA 24. But it was not the only agency communicating air quality information to the workers. SPA 24; *see also* A 4293. And as was true of OSHA, the EPA had no authority to require compliance with its recommendations or any of the site safety rules. SPA 79. In fact, in one early memo, the agency lamented to the City that "[w]e have observed very inconsistent compliance with our recommendations, however we do not have authority to enforce the worker health and safety policies for non-[federal] employees." A 7297.

Finally, at the request of the City, the Army Corps of Engineers was assigned to oversee operations at the Fresh Kills landfill. SPA 25. The Corps then hired a private firm to operate the site, and another firm to help manage site safety. *Id*. at 26. The Corps, however, did not assume ultimate control or responsibility for either the site in general or for site safety. SPA 76. In particular, the Army Corps and its contractors had no enforcement authority over other agencies' employees working at Fresh Kills. A 7070-71 (David Leach Dep. 93:15–94:18). And the safety plan developed for the landfill was created in conjunction with City agencies. A 7055 (David Leach Dep. 33:1-14).

## II. Procedural Background

### A. The Complaint And Immunity Motions

Many of the sickened workers – including police officers, firefighters, and construction workers – subsequently filed this suit seeking compensation for the respiratory and other injuries they suffered as a result of their exposure to toxins at Ground Zero. They named as defendants the City of New York (City), which exercised overall control and supervision of the debris-removal process through the DDC, the Port Authority of New York and New Jersey (Port Authority), which owned the worksite at Ground

Zero, and various private companies with whom the City contracted to do much of the work (Contractor Defendants), as well as certain additional defendants not at issue in this appeal.[20] Plaintiffs based their claims on Defendants' reckless failure to implement the safety measures required by state and federal law, measures Defendants themselves decided were feasible to implement at the site and knew were critical to preserving the health and safety of the tens of thousands of public servants and private contract employees working at the site.[21]

The cases originated in state court and were eventually removed to the United States District Court for the Southern District of New York. SPA 29. The early procedural history of the case is discussed in this Court's opinion

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[20] Initially, Plaintiffs filed an ominibus complaint against all of the Defendants. *See* A 1258. Eventually, the district court ordered Plaintiffs to file separate complaints against certain defendants and groups of defendants. Plaintiffs thereafter filed separate complaints against the City (A 9778), the Construction Manager Defendants (A 9856), the other Contractor Defendants (A 9942), and the Port Authority (A 9909). Because the factual allegations largely overlap, the brief cites only to the City Complaint.

[21] In particular, Plaintiffs alleged violations of two provisions of the New York Labor Law relating to workplace safety, N.Y. Lab. Law §§200, 241(6); two provisions of the state Municipal Law relating specifically to injuries to police officers and firefighters, N.Y. Gen. Mun. Law §§ 205-a, 205-e; common law negligence; wrongful death; and a count seeking derivative relief for victims' spouses. *See* SPA 29; A 9845-52.

in *In re WTC Disaster Site*, 414 F.3d 352 (2d Cir. 2005). In February, 2005, Judge Hellerstein issued his Case Management Order No. 3, establishing a plan for limited discovery and dispositive motions asserting Defendants' immunity from Plaintiffs' claims. SPA 30; A 1138. On February 17, 2006, Defendants filed their immunity motions, asserting protection under two state laws and one federal statute – the New York State Defense Emergency Act (SDEA), N.Y. Unconsol. Law §§ 9101-9181 (McKinney 2007), the New York State and Local Natural and Man-Made Disaster Preparedness Law (Disaster Act), N.Y. Exec. Law §§ 20-29-g (McKinney 2007), and the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121-5207 – as well as state and federal common law. SPA 33. Although they conducted nearly a year of discovery, the City and Contractor Defendants chose not to move for summary judgment on their state law defenses, asking instead for judgment on the pleadings. *Id*. The Port Authority, however, moved for summary judgment on the state law defenses, and all of the Defendants moved for summary judgment on the federal defenses. *Id*.

### B. District Court's Decision

Judge Hellerstein carefully reviewed Plaintiffs' Complaints and a massive summary judgment record, held two days of oral argument, and issued his decision on October 17, 2006. SPA 34. In a lengthy opinion, the court concluded that "the Defendants are benefited by limited immunity, limited according to time and activity," but that "the issues are fact-intensive and cannot be decided on motion at this juncture." *Id*. at 2.

#### *1. SDEA*

With respect to the SDEA, the court first concluded that the statute provided all of the Defendants immunity for any conduct undertaken in a good faith attempt to respond to the emergency at Ground Zero. SPA 46-51. But the court determined that the question of good faith was fact-specific and could not be decided on the basis of the pleadings or the undisputed summary judgment evidence. SPA 60-61. The court also determined that by limiting the immunity to conduct seeking to comply with a "law relating to civil defense" or an "order issued . . . pursuant to" the SDEA, the New York Legislature plainly did not intend for that immunity to extend longer than the civil defense emergency itself. Where to draw the line delineating the scope of SDEA immunity, the court concluded, was a difficult, fact-specific

question that might well vary for different claims, given the very different natures of the work being performed at different locations within the large work site and by the various workers. SPA 56-59.

*2. Disaster Act*

Similarly, with respect to the Disaster Act, the court concluded that while "[t]here is likely to be a setting where immunity should be upheld" in this case, "the decisions cannot be made on motion, without a complete record." SPA 64. Like the SDEA, the court held, the Disaster Act applies only to efforts "necessary to cope with a disaster," plainly imposing a temporal limitation on the scope of immunity that could not be decided on the present record. *Id*. at 63-64. Moreover, the court held, the Disaster Act provides immunity only for the exercise of a "discretionary function or duty." *Id*. at 64. "Neither the City nor any other entity has discretion to violate an applicable statute," the court held, including the worker safety statutes at issue in this case. *Id*. In addition, the court held, by its plain terms, the Disaster Act was limited to "political subdivisions," and therefore provided no protection to the private Contractor Defendants in any case. *Id*. at 65-66.

*3. State Common Law*

The court likewise recognized that New York courts had long held that the state common law defense of governmental immunity did not extend to protect private contractors sued for the negligent performance of their government contracts. SPA 66. And like the Disaster Act, the doctrine protects only the exercise of discretion, *id*., which does not extend to violations of non-discretionary statutory mandates like those in the New York Labor Law. Moreover, the court held that the claim to common law immunity could not be resolved on the present state of the record. SPA 67.

*4. Federal Common Law*

Relying on the Supreme Court's decision in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), as construed by later cases including *Boyle v. United Technologies Corp*., 487 U.S. 500 (1988), the court held that Defendants might be entitled to share in the federal government's immunity if they could show that Plaintiffs' injuries arose from actions "in compliance with 'reasonably precise specifications' established by [a] federal agency, and under the supervision and control of [a] federal agency." SPA 79 (quoting *Boyle*, 487 U.S. at 512). But after carefully reviewing the summary judgment evidence, the court concluded that "the record does not show

exclusive federal control," but rather "cooperation and collaboration, with federal agencies providing assistance pursuant to a request of the City and expressly declining to assume an enforcement role, deferring instead to the City agencies and the Primary Contractors." SPA 80. While the court allowed that Defendants may be entitled to immunity to "the extent that reliance [upon], and adoption of federal standards and protocols is shown," it concluded that "[a]t this point, however, the record is not sufficiently clear to enable the court to demark the boundary between federally instructed discretionary decisions, and those made by the various Defendants." *Id*.

*5. Stafford Act*

The court also held that the Stafford Act, by its plain terms, provides immunity only to the "Federal government." SPA 80-81 (quoting 42 U.S.C. § 5148). The court rejected Defendants' plea to rewrite the statute to "encourage private actors to enlist in recovery efforts from mass disasters," noting that "the same policy has to be sensitive to the individual workers who risk their lives. The job of restoring society cannot be based on a system of rewarding businesses, but being indifferent to the health and welfare of working people." *Id*. at 81.

### C. Interlocutory Appeal And Motion To Dismiss

Defendants filed a notice of appeal, asserting jurisdiction under 28 U.S.C. § 1291 and the collateral order doctrine. Plaintiffs subsequently filed a motion to dismiss the appeal, arguing that the decision below did not fall within the limited confines of the collateral order doctrine. On March 29, 2007, a motions panel of this Court referred the motion to dismiss to this panel. A 10428.

## SUMMARY OF ARGUMENT

Those who responded to the disaster on the ground of the World Trade Center site on September 11, 2001, risked their lives in the hopes of saving their fellow New Yorkers from death or injury on the horrible day. They knew that in the first hours of the response, there was little that could be done to protect them as they struggled through the smoldering debris pile. But as time went on, and the hope for finding survivors faded and then disappeared, the workers came to rely upon assurances from the City and the companies hired to remove the debris, that reasonable steps were being taken to ensure that their continued public service would not be undertaken at the cost of their lives or their health. They had every reason to believe that those promises were true. The Governor had chosen not to suspend the workplace safety laws at the site, and the City and Contractor Defendants had in fact promised to follow them, concluding that compliance was possible at the site and important to ensure that the injuries and loss of life resulting from the attack were not added to by a reckless recovery effort. But it turned out that the promises were not kept on the ground, the only place it mattered. And as a result, thousands of workers are now suffering illnesses and injuries they would not have had to endure if Defendants had

only complied with the very terms of the emergency orders from which Defendants now seek shelter.

Defendants come to this Court looking for an unprecedented immunity of breathtaking scope. They claim to be immune from responsibility for any injury inflicted by any government agency or even private corporation in the course of restoring a disaster site, even if the injury is caused by a reckless and unjustifiable disregard for the safety rules emergency officials have established for the response, and even if months (or perhaps years) have passed since the initial emergency of the disaster has subsided. That claim is far too broad. While the law does indeed afford substantial protection to those who respond to an emergency, the scope of that protection is limited in important ways to ensure a proper balance between the need to encourage emergency responders to be zealous, and the need to protect the public and ensure that in a time of crisis, the rule of law continues to prevail.

Just how that balance is struck, this Court need not decide at this stage in the case. As described in Plaintiffs' Motion to Dismiss, Defendants have come to this Court too early, with too bare a record, to assert defenses that of necessity require the development of facts (and often a trial) to administer.

Moreover, even if this Court has jurisdiction at this time, the absolute immunity defenses Defendants assert are not available under the special statutory regime Congress created for the resolution of claims arising from the September 11 attacks. Rather than immunity, Congress has provided these Defendants caps on their liability and $1 billion in federal insurance to cover the claims in this case.

In any event, Defendants have established none of their defenses on the pleadings or summary judgment evidence. The Contractor Defendants' claims are the most easily dismissed. Legislatures and courts have long declined to use the extraordinary measure of immunity to encourage private contractors to participate in government projects, including disaster responses. By their plain terms, the Disaster Act and Stafford Act apply only to governmental entities. The New York Court of Appeals has likewise held that private contractors are not protected by the SDEA and, more generally, that the common law does not immunize government contractors for the negligent performance of their contracts.

The rationale for generally withholding immunity from private companies is simple and reasonable: contractors may be protected from the discouraging effects of the prospect of tort liability by allowing them to

purchase liability insurance and include the cost of that insurance in the price charged the government, or to seek direct indemnification for their work. That is what happened in this case. FEMA traditionally pays the cost of liability insurance included in disaster recovery contracts. And when Defendants could not obtain that insurance on the private market, Congress authorized FEMA to fund a captive insurance company for them. Providing insurance and indemnity, rather than absolute immunity, leaves in place important incentives for private contractors, who are not accountable through the political process and may feel pressure to respond to imperatives other than the public welfare. At the same time, the traditional solution leaves in place a remedy for those injured by wrongful conduct that their governments never intended and would not have condoned.

While the law has afforded a greater degree of protection to government agencies, the immunity afforded them, even in an emergency, is subject to important limitations. The SDEA and Disaster Act were created to ensure that the State would respond to an attack with discipline, in accordance with pre-determined disaster plans and the specific orders of emergency officials. The statutes were designed precisely to avoid the danger and chaos that could ensue if, in the aftermath of a disaster, public

officials and private companies were simply left to act according to their individual conceptions of what the public welfare required and what sacrifices were worth making. Defendants' assertion of immunity under these statutes is thus ironic – Plaintiffs' injuries arise solely because Defendants *violated* the emergency orders governing the response to the attack, orders that required compliance with basic safety laws Defendants themselves determined to be feasible and compatible with other recovery priorities.

It would be surprising, indeed, if the state emergency statutes rewarded such disobedience with immunity. And, as shown in this brief, they do not. The SDEA, Disaster Act, and Stafford Act – and, for that matter, the common law governmental immunity doctrine – do not immunize reckless conduct in violation of specific requirements governing *how* the agency is to conduct its operations. Officials have no discretion to disobey mandatory legal requirements like the safety statutes and regulations at issue here. And the SDEA's protection for "good faith" attempts to comply with civil defense orders does not extend to those who act with unjustifiable disregard for the safety of others, in violation of the very provision of the civil defense orders that provide a basis for immunity.

Moreover, given their extraordinary nature, it is not surprising that the disaster-specific statutes provide immunity only so long as the emergency arising from an attack persists. When that time came in this case, the district court properly concluded it could not say on the state of the pleadings (or the complex and disputed summary judgment evidence). Indeed, Defendants did not ask the district court to draw that line, making instead an all-or-nothing gamble that they could obtain immunity for injuries caused many months after the attacks when the site had become to look and operate more like an public works project than a disaster site.

Finally, the federal government's involvement in the cleanup provides Defendants' no protection from liability. The Stafford Act, by its clear text, applies only to the federal government itself. And the government contractor defense of *Yearsley* and *Boyle* applies only to government contractors, not to every person who acts on the advice or "leadership" of a government official.

## ARGUMENT

As shown below, Defendants' claims of immunity are unavailable under the cause of action Congress created for this case and, in any event, fail under the terms of the statutes they invoke and the common law doctrines upon which they rely. That result is hardly surprising given the breathtaking scope of the immunity they seek. It makes no difference, they say, whether Plaintiffs were injured many months after the attacks on the World Trade Center, long after the rush of the emergency had subsided and any excuse for ignoring worker safety had long since lost credibility. Instead, Defendants assert that immunity continues until the "recovery and rehabilitation of the state" and the "restoration of commercial and financial activities" has been accomplished, Br. 38 (citation and quotation marks omitted), a process that is projected to continue through 2015.[22] Nor does it matter, Defendants contend, whether Plaintiffs' injuries completely and needlessly arose as the result of reckless disregard for worker safety. The immunity provided, they say, is absolute so long as the Defendants were

[22] *See* Port Authority of New York and New Jersey, Minutes of Board Meeting 2 (Feb. 22, 2007) (projecting completion of rebuilding of World Trade Center site by end of 2015), *available at* http://www.panynj.gov/AboutthePortAuthority/pdf/0207_actions. pdf.

making a bona fide effort to clear the debris. Br. 46. How they conducted themselves in that endeavor, they insist, is entirely irrelevant. *Id*. Accordingly, Defendants claim that they are immune from liability even if Plaintiffs' injuries were caused by the direct violation of the City's specific orders governing the cleanup. Holding them responsible for the inexcusable violation of the very terms of the emergency orders governing the response, they say, would "unnecessarily handcuff" future responders "with manifest and inevitable detriment to the public good and safety." PA Br. 5.

It is not difficult to see the absurd consequences of this unprecedented claim of nearly limitless immunity. Under Defendants' view, a contractor would have been immune if it decided, in defiance of state law and without any reasonable excuse, to dump the toxic chemicals from the site into the Hudson River, contaminating the City's drinking water. It would be enough, in their view, that the contractor could claim that the dumping was part of a bona fide effort to prepare Ground Zero for rebuilding. Likewise, under Defendants' interpretation, contractors would be free to disregard other basic safety laws – including, for example, building codes – while reconstructing the site, secure in the knowledge that if the structures ever collapsed, they could claim immunity from all liability on the ground that they were making

a bona fide effort to comply with the general order to clear the site and rebuild its infrastructure. Even more, immunity would remain available even if the contractor acted in direct defiance of the City's rules for the project, as happened in this case. And the contractor could continue such reckless behavior without liability until the site is rebuilt.

Equally frightening, because the SDEA extends to individuals as well as governments and corporations, Defendants would provide a safe harbor for any individual working on the site to undertake the most reckless behavior imaginable – randomly tossing chunks of concrete off the pile onto their coworkers, running over pedestrians while ferrying debris from the site to the barges, etc. – while still being allowed to claim immunity because the misconduct was undertaken in the course of a bona fide attempt to clear the debris and rebuild the site. Plainly, such an interpretation creates a terrible public safety risk.

Such unconstrained immunity is completely at odds with the careful balance the state legislature has repeatedly struck between the need to encourage compliance with emergency response plans and orders and the equally important need to ensure the rule of law and the protection of the public in the aftermath of a disaster. As Judge Hellerstein observed, blanket

immunity would undermine the very purpose of immunity – to encourage prompt cooperation in disaster recovery efforts:

> individual workers also are essential to the response effort, and those who claim injury are the very individuals who, without thought of self, rushed to the aid of the City and their fallen comrades. Their efforts also must be encouraged, for their fear of injury without redress can cause such volunteers also to hold back. A delicate balance has to be struck, one that encourages both companies and individuals to come forward to clear the effects of the blows to society.

SPA 57. *Accord Dureiko v. United States*, 209 F.3d 1345, 1354 (Fed. Cir. 2000) (observing that applying Stafford Act immunity to the government's violation of contracts with private citizens would deter citizens from cooperating with disaster responses).

Defendants' position is also inconsistent with the long-established "policy of this State . . . to reduce rather than increase the obstacles to the recovery of damages for negligently caused injury or death, whether the defendant be a private person or a public body." *Abbott v. Page Airways, Inc.*, 23 N.Y.2d 502, 507 (1969) (construing SDEA immunity) (citations and footnote omitted). *See also Fitzgibbon v. County of Nassau*, 541 N.Y.S.2d 845, 849 (App. Div. 1989) (construing the SDEA's immunity provision in light of the fact that "immunity from suit is antithetical to the public policy of this state which, in the furtherance of justice and fair play, favors the

availability of redress to an injured party"). Nothing could be more offensive to basic conceptions of justice and fair play than Defendants' position in this case. In a time of emergency, these Defendants called upon Plaintiffs to risk their lives in tireless labor under harsh conditions for the public welfare. They knew the work was exceedingly dangerous, but promised Plaintiffs that the risks were manageable and that the workers at the site would be protected through implementation of basic safety rules and regulations required by law and by the specific safety plans for Ground Zero. Defendants failed to keep that promise, and thousands of workers were sickened and injured as a result.

Defendants nonetheless insist that state and federal statutes and common law doctrines require this unjust result. They are wrong.

## I. Defendants' Absolute Immunity Defenses Are Not Available Under The Special Statutory Regime Congress Established For Resolution Of These Claims

As the brief of the Sullivan Plaintiffs convincingly demonstrates, Defendants' assertions of immunity fail first and foremost because such defenses are not available under the legal regime established to govern claims arising from the attacks. Plaintiffs will not repeat that demonstration here in full, but will provide instead a short summary of the salient points.

While the ATSSSA generally adopts state law as the rule of decision, it precludes state law defenses that are "inconsistent with or preempted by Federal law." ATSSSA § 408(b)(2). A state law immunity defense is "preempted by . . . Federal law" if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990) (citations omitted). Moreover, even if a state rule is not preempted by federal law, it may nonetheless be "inconsistent with Federal law" if the rule is "inconsistent with the central objective" of the federal scheme, including Congress's intent to ensure a remedy for those injured by violations of the law. *Burnett v. Grattan*, 468 U.S. 42, 48 (1984).

Defendants' immunity defenses are fundamentally incompatible with the statutory regime Congress established for claims arising from the attacks and the important policy objectives that underlie that legislation. Congress has repeatedly acted to protect these very defendants from undue financial exposure, not by extinguishing liability – which would leave victims without compensation for their injury – but by establishing caps on liability and providing federally-funded insurance to ensure that the nation as a whole bears the cost of the attack on New York, including the cost of the injuries to

those who responded to the call of duty on the grounds of the disaster site. Defendants' claims of absolute immunity regardless of fault are thus inconsistent with the federal policy expressed through three pieces of legislation, each increasingly specific to the claims in this case.

***First***, although plainly concerned about defendants' interest in avoiding debilitating liability, Congress nonetheless established in the original version of the ATSSSA a federal cause of action for claims arising out of the September 11 attacks. *See* ATSSSA § 408(b). Congress could have provided the defendants express federal immunity to all debris removal claims. Instead, it took care to preserve victims' access to the tort system, even while creating a federally-funded Victim's Compensation Fund. *See id.* §§ 405, 408(b).

***Second***, when the City and the Port Authority sought protection from undue liability under that federal cause of action, Congress responded by providing limitations on their liability, not immunity. *Id*. § 408(a)(1)-(3). Defendants now seek to render those limitations superfluous by insisting that Congress intended to preclude any possibility of liability against these Defendants because they acted in the aftermath of a public emergency.

Where Congress has directly addressed a legal question, any state law defense that provides a different answer is plainly "inconsistent with . . . federal law." ATSSSA § 408(b)(2). Here, both Section 408(a) and the state immunity doctrines address the same question – limitations on Defendants' liability regardless of fault. Moreover, both address the same underlying policy concern – the need balance the interest in encouraging prompt disaster responses against the interest in ensuring that the wrongfully injured have a remedy. Yet, the state and federal regimes provide different answers to that same fundamental legal question and policy dilemma – state law extinguishes liability, leaving the victim without a remedy, while federal law strikes a different balance, providing a remedy while limiting the scope of some defendants' financial exposure. Under the ATSSSA, it is the federal, not the state, solution that prevails.

***Third***, when these very Defendants went to Congress seeking further protection from the cost of liability in this very lawsuit, Congress responded once again not with immunity, but with a solution that protected defendants while preserving victims' access to a remedy – Congress appropriated $1 billion to fund an captive insurance policy that would be a source of protection for the City and its contractors, as well as a source of

compensation for workers who were able to show that they had been injured in the public service by the wrongful conduct of those defendants. *See* Consolidated Appropriations Resolution, Pub. L. No. 108-7, 117 Stat. 11 (2003). This solution, like all of the legislation Congress enacted in response to this disaster, ensures that the full cost of the attacks are borne by the nation as a whole, and not by the taxpayers of New York, much less the heroes of September 11.

Defendants argued below that Congress had no such intent, that in enacting caps and providing insurance, it cared only of the welfare of potential defendants, and was entirely indifferent to whether the Ground Zero workers could ever recover for their injuries. As the repeated public statements of those involved in the enactment of this special legislation make clear, that claim is as false as it is implausible on its face. *See, e.g.*, A 10208 (letter from thirty members of Congress supporting funding) (stating that funding would "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") (emphasis added). [23]

Accordingly, this Court should affirm the decision below on the ground that Defendants' asserted immunity defenses are "pre-empted by or inconsistent with Federal law," and therefore unavailable.

## II. State Statutory Immunity Defenses

Even if state law immunity defenses were available under ATSSSA, the district court rightly concluded that Defendants have not shown that they are entitled to immunity under any of the defenses they raise at this stage in the litigation.

### A. The Motion For Judgment On The Pleadings Fails Because It Depends On Evidence Outside Of The Pleadings

Perhaps desiring to facilitate an interlocutory appeal, the City and Contractor Defendants asserted their state law affirmative defenses through a motion for judgment on the pleadings rather than summary judgment. Because a defendant's motion for judgment on the pleadings must be established on the face of the Complaint, motions based on an affirmative defense are rarely granted. *See, e.g., Sellers v. M.C. Floor Crafters, Inc.*,

[23] *See also* 10161,10165, 10319, 10321.

842 F.2d 639, 642 (2d Cir. 1988); *General Conf. Corp. of Seventh-Day Adventists v. Seventh Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989); Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE §§ 1277, 1368 (3d ed.). Unsurprisingly, Plaintiffs have not pled the elements of Defendants' affirmative defenses in their Complaint. For example, the SDEA provides a defense only to a defendant's "good faith" attempts to comply with a civil defense law or order. SDEA § 9193(1). But Plaintiffs did not allege in their complaint that their injuries were caused by the good faith conduct of Defendants.[24] Indeed, they alleged to the contrary.[25]

Defendants attempt to avoid this obvious problem by relying on declarations, documents, and other evidence produced during discovery. *See* City Br. 11 n.9.[26] The declaration Defendants cite was prepared in response to the court's third case management order, which required the parties to

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[24] The Complaint also does not allege that Defendants' conduct was undertaken to comply with any civil defense law or an order issue pursuant to the SDEA. *See* SDEA § 9193(1). Nor does the Complaint allege that Plaintiffs' injuries arose from the exercise of discretionary functions, as required to establish a defense under the Disaster Act or common law governmental immunity. *See infra*, pp. 92-101.

[25] *See, e.g.,* Complaint ¶¶ 109, 134, 147, 151, 191, 199, 211.

[26] *See also, e.g.,* Br. 17 & n.29, 18 & nn.31, 33, 34, 19 n.37, 20 n.41.

produce declarations "setting forth the key arguments" each contemplated making with respect to Defendants' purported immunity. A 1141-42. In response, Plaintiffs' counsel prepared a detailed statement summarizing the facts they intended to prove and a "timeline" consisting of a catalogue of documents they would use for that purpose at the appropriate stage in the litigation, listed in chronological order. *See* A 1171, A 1218.

These documents are not "pleadings" within the meaning of the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 7(a) (defining pleadings allowed in federal court). While "the complaint is deemed to include any written instrument *attached to it* as an exhibit or any statements or documents *incorporated in it by reference*,"[27] the declaration and documents referenced therein were not attached to the Complaint or incorporated in it by reference.[28] Defendants claim, however, that they may yet rely upon the

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[27] *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (citation omitted) (emphasis added). *See also* Fed. R. Civ. P. 10(c).

[28] In response to Defendants' repeated complaints over the alleged lack of specificity in the earlier versions of the complaints, Plaintiffs' most recent amendments added a fair amount of factual detail that was not required by Rule 8 of the Federal Rules of Civil Procedure, and included citations to some discovery documents in support of some of those allegations. But those citations were in no way intended to incorporate into the complaint by reference the entirety of the discovery evidence. *See, e.g.*, *Goldman v. Beldon*, 754 F.2d 1059, 1066 (2d Cir. 1985) ("[L]imited

discovery evidence in this case because the "Declarations were indisputably in Plaintiffs' possession and plainly relied upon in drafting the Master Complaint." Br. 11 n.9. But Plaintiffs "relied" on the documentary evidence supporting their claim only in the sense that every plaintiff relies upon whatever evidence he may have in deciding what facts to allege in his complaint. The limited exception for "integral" documents relied upon by the complaint was never intended to extend to discovery materials that simply support the general factual allegations in the complaint. *See Global Network Commc'ns, Inc. v. City of N.Y.*, 458 F.3d 150, 157 (2d Cir. 2006). Summary judgment "is the proper procedural device to consider matters outside the pleadings, such as facts unearthed in discovery, depositions, affidavits, statements, and any other relevant form of evidence." *Id*. *See also Amaker v. Weiner*, 179 F.3d 48, 50 (2d Cir. 1999).

Defendants have not argued that their affirmative defenses can be established on the face of the Complaint alone, and it is too late for them to attempt that showing now. *See, e.g.*, *Joseph v. Levitt*, 465 F.3d 87, 93-94 (2d Cir. 2006) (arguments not raised in district court or opening brief deemed

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quotation does not constitute incorporation by reference."). At any rate, Defendants do not limit their evidence to the documents cited in the complaints.

waived). The judgment denying their Rule 12(c) motion can be affirmed solely on that ground.

### B. Background To State Emergency Statutes

#### *1. War Emergency Act And SDEA*

During World War II, New York enacted the War Emergencies Act, establishing a civil defense force and governing the State's response to an enemy attack within the State. *See* 1942 Laws ch. 445. A decade later, the enemy threat had changed and, facing the real threat of nuclear attack from communist enemies, the legislature revamped the state civil defense regime by enacting the SDEA. *See* SDEA § 9102; *Fitzgibbon v. County of Nassau*, 541 N.Y.S.2d 845, 847-49 (App. Div. 1989). Although the legislature envisioned the unimaginable devastation of a nuclear attack, it did not respond by conferring extensive discretionary authority upon executive officials to declare martial law and issue emergency executive orders. Instead, the SDEA set in place an elaborate mechanism for developing and implementing plans that would govern the State after an attack under,

continuing the nation's tradition of rule of law even in the most extreme emergencies.[29]

The Act also incorporated a provision of the former War Emergency Act, which provided that:

> The state, any political subdivision, municipal or volunteer agency, or another state or a civil defense force thereof or of the federal government or of another country or province or subdivision thereof, performing civil defense services in this state pursuant to an arrangement, agreement or compact for mutual aid and assistance, or any agency, member, agent or representative of any of them, or any individual, partnership, corporation, association, trustee, receiver or any of the agents thereof, 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, any federal law, or any arrangement, agreement or compact for mutual aid and assistance or any order issued by federal or state military authorities, relating to civil defense, including but not limited to activities pursuant thereto, in preparation for anticipated attack, during attack, or following attack or false warning thereof, or in connection with an authorized drill or test, shall not be liable for any injury or death to persons or damage to property as the result thereof.

SDEA § 9193(1).

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[29] *See, e.g.*, SDEA § 9120 (reauthorizing State Civil Defense Commission, originally established during the Second World War); *id*. § 9121 (authorizing Commission to create a state-wide civil defense plan); § 9121(4) (authorizing Commission to issue rules, regulations and orders to implement its powers); *id*. § 9123 (requiring local civil defense plans made in conformance with the "plan, regulations and orders of the [state] commission").

As is clear on the face of this provision, the New York Legislature – acting in the midst of World War II when the predecessor version was passed, and in the face of a very real prospect of nuclear war when the SDEA was later enacted – chose not to provide blanket immunity for all actions taken in the aftermath of an enemy attack. *See, e.g.*, *Smith v. Town of Orangetown*, 57 F. Supp. 52, 55 (S.D.N.Y. 1944) ("[T]he statute does not blanket with immunity all those who are administering any phase of civilian protection."), *aff'd*, 160 F.2d 782 (2d Cir. 1945); *Field v. Mfrs. Trust Co.*, 57 N.Y.S.2d 740, 743 (App. Div. 1945) ("[A] blanket or total immunity was not granted, contemplated, or declared."), *rev'd on other grounds*, 62 N.Y.S.2d 740 (App. Div. 1946). Indeed, given that the SDEA extended immunity not only to government entities but also to private corporations and even individual citizens, blanket immunity would have placed the public at grave risk and undermined the government's ability to ensure that the response to an attack would be orderly and in accordance with the state emergency plans, that respect for the law would be maintained during the emergency, and that the risk posed to the public by recovery efforts would be minimized.

Instead, consistent with the Act's intense focus on pre-attack planning and post-attack implementation of specific civil defense regulations and

orders, the statute addressed only actions mandated by those plans and orders. In particular, the statute imposed criminal sanctions for violating the government's post-attack rules, regulations and orders, SDEA § 9181(5), and provided immunity for complying with them, *id*. § 9131(1). Defendants were given some leeway – criminal sanctions were available only for *willful* violations, *id*. § 9181(5), and immunity could extend to *good faith attempts* to comply, *id*. § 9193(1) – but the statute stopped well short of giving government officials, businesses, and citizens carte blanche to act according to their own conceptions of the public interest in the aftermath of an attack.

*2. Disaster Act*

The regime established by the SDEA for responding to an enemy attack was largely supplanted in 1978 when the New York legislature enacted the New York State and Local Natural Disaster and Man-Made Disaster Preparedness Law (Disaster Act), N.Y. Exec. Law §§ 20-29 (McKinney 2007). Like the SDEA, and in language closely parallel to that used in the older statute, the Disaster Act established state and local bodies responsible for developing and implementing plans for responding to disasters, *id*. §§ 21-22 (state); *id*. §§ 23-24, although the Disaster Act extended this infrastructure to address natural disasters as well as enemy

attacks, *id*. § 20(2)(a). The Act thus created a state-level "disaster preparedness commission," *id*. § 21(1), with responsibility for creating "state disaster preparedness plans." *Id*. § 21(3)(c). Among other things, the plan was to "provide for recovery and redevelopment after disaster emergencies," including "restoration of vital services and debris removal." *Id*. § 22(2), (3)(b)(7). Likewise, the Disaster Act required every city to have a disaster preparedness plan, addressing essentially the same issues previously addressed by SDEA civil defense plans. *Compare* SDEA § 9123 *with* Disaster Act § 23.[30]

In the Disaster Act, the legislature recognized that strict enforcement of some state and local laws in the context of an emergency might impede the response. At the same time, the State plainly was aware that wholesale abandonment of legal rules during the recovery from an attack could unnecessarily endanger the public, perhaps even causing greater injury and loss of life than the attack itself. Accordingly, the legislature struck a

[30] Although it reassigned much of the responsibility for responding to disasters to the newly created state and local disaster preparedness plans, the Disaster Act did not explicitly repeal the SDEA. Instead, the legislature directed that the new State Disaster Preparedness Commission should "coordinate and, to the extent possible and feasible, integrate [its] activities, responsibilities and duties with those of the civil defense commission." Disaster Act § 21(3)(j).

balance, creating a strictly limited mechanism for the suspension of laws in the aftermath of a disaster. The Act thus provides that

> [s]ubject to the state constitution, the federal constitution and federal statutes and regulations, and after seeking the advice of the commission, the governor may by executive order temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster.

Disaster Act § 29-a(1). That power, however, is subject to substantial limitations. Among other things, the Act provides "no suspension shall be made which does not safeguard the health and welfare of the public and which is not reasonably necessary to the disaster effort." *Id*. § 29-a(2)(b). Moreover, "any such suspension order shall provide for the minimum deviation from the requirements of the statute, local law, ordinance, order, rule or regulation suspended consistent with the disaster action deemed necessary," *id*. § 29-a(2)(e). The Act further provided a similar power to local chief executives to suspend the provisions of local (but not state or federal) laws and ordinances, subject to the same conditions. *See id*. § 24(g).

Finally, like the SDEA, the Disaster Act provided a defense against liability for certain disaster-related activities. The relevant provision of the Disaster Act, however, provided immunity only to a "political subdivision"

for "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of any officer or employee in carrying out the provisions of this Section." Disaster Act § 25(5).

### C. SDEA

The SDEA provides immunity only if three criteria were met: (1) the plaintiff's injury was "the result of" the defendant's "carrying out" or "attempting to comply with"; (2) a "law . . . relating to civil defense" or a "rule, regulation or order duly promulgated or issued pursuant to" the SDEA itself; and (3) the defendant's actions were in "good faith." Defendants claim that each of the many actions they took meet all three conditions with respect to each and every injury suffered by each and every plaintiff in this case. The district court rightly concluded that they could not possibly make that showing at this early stage in the case.

#### *1. In Failing To Comply With Basic Worker Safety Laws, Defendants Were Not Acting Pursuant To Any Qualifying Civil Defense "Law" Or "Order"*

Defendants claim that Plaintiffs' injuries were the result of Defendants' attempt to comply with executive orders issued by the Governor and Mayor of New York in the immediate aftermath of the attacks and with the purported "common law doctrine of *salus populi supreme lex*." Br. 35

n.71. None constitutes a qualifying civil defense law or order within the meaning of the SDEA's immunity provision.

***Order***. To provide the basis of an immunity claim, an order must be "duly promulgated or issued pursuant to this Act." SDEA § 9193(1). But as one New York state court has already held, the executive orders issued on September 11 were not issued "pursuant to" the SDEA. *See Daly v. Port Auth.*, 793 N.Y.S.2d 712, 716-17 (App. Div. 2005). Neither the Mayor nor the Governor purported to issue an order under the SDEA. Instead, each specifically invoked the authority of the Disaster Act. *See* A 1360 (Mayor's order) ("Pursuant to the powers vested in me by Executive Law § 24…."); A 1362 (same); A 1365 (same); A 1371 (Governor's order) (invoking Sections 28 and 29 of Disaster Act and directing "implementation of the State Disaster Preparedness Plan"). Moreover, neither the Mayor nor the Governor activated the civil defense forces established by the SDEA or any plan developed under that Act. *See id.* That fact is unsurprising as the Disaster Act has long since supplanted the SDEA as the vehicle through which the State has planned for and responded to emergencies. *See supra*, p. 51.

Nor did either official attempt to exercise a power assigned to him under the SDEA. The power to issue rules, regulations, and orders under the SDEA was principally given to the special councils and commissions created by the Act. *See* SDEA § 9112(17) (State Defense Council); *id*. §§ 9121(4), 9129(1) (State Civil Defense Commission). In reserving immunity for compliance with orders issued pursuant to the SDEA, the legislature thus chose not to immunize conduct undertaken to comply with the innumerable other commands that may be issued by scores, if not hundreds, of lower level public or corporate officials. To the extent the Act refers to the power of executive officers to issue orders, it required that those orders "shall be consistent with and shall conform to the plan, regulations or orders of the commission and council and those of the local office of civil defense." *Id*. § 9122(3). As far as Plaintiffs are able to determine, there are no current civil defense emergency plans to which the Mayor's or Governor's actions could conform. Certainly, Defendants have never come forward with any.

Even if the orders had been issued pursuant to the SDEA, they were not the type of orders one could "carry out" or attempt to "comply with" within the meaning of the immunity provision. None of the executive orders meaningfully identified any action that the defendants could claim they were

"carrying out" or imposed any obligation they could say they were "attempting to comply with" when they caused Plaintiffs' injuries. The Governor's order was directed solely at "State agencies and authorities over which I exercise Executive authority." A 1371. There was nothing in that order for these Defendants to "carry out" or "comply with." The Mayor's order likewise was directed solely at City agencies. A 1360. It did not require the Contractor Defendants or the Port Authority to do anything. Even with respect to the City agencies, the Mayor's order could hardly have been less constraining, requiring only the certain offices "take whatever steps are necessary to preserve the public safety and to render all required and available assistance to protect the security, well-being and health of the residents of the City." *Id*.

These are plainly not the type of "rule, regulation or order duly promulgated under" the Act that the SDEA immunity provision had in mind. The SDEA uses essentially the same language in the criminal provision, SDEA § 9181(5), but it is difficult to believe that the Legislature contemplated criminal prosecution for violation of an order to simply "take whatever steps are necessary." Moreover, to hold that such an order may confer blanket immunity upon everything done in response to the attack

would be contrary to the Act's focus on creating and enforcing detailed contingency plans, and would effectively undo the balance of interests struck in the immunity provision.

Notably, in each of the reported cases under the SDEA's predecessor, the defendant claimed compliance with a specific directive of the sort most naturally understood to be a "rule, regulation or order duly promulgated under" the Act. *See Smith v. City of Orangetown*, 150 F.2d 782, 783 (2d Cir. 1945) ("orders to report at police headquarters . . . when blackout alarm sounded"); *Jankowski v. Welch*, 52 A.2d 771, 772 (N.J. 1947) (order to report to civil defense station when air raid alarm sounded); *Jones v. Gray*, 45 N.Y.S.2d 519, 522-23 (App. Div. 1943) (same); *Gaglio v. City of N.Y.*, 143 F.2d 904, 905 (2d Cir. 1944) (regulations requiring dimming of lights during air raid drills); *Scully v. Hebert*, 84 N.Y.S.2d 805, 806 (App. Div. 1948) (police officer ordered to turn off traffic lights during air raid drill); *Field Mfrs. Trust Co.*, 62 N.Y.S.2d 716, 717 (App. Div. 1946) (apartment owner extinguished lights pursuant to city-wide blackout order), *aff'd*, 296 N.Y. 972 (1947). Defendants' inability to point to anything like these types of rules or orders forecloses immunity in this case.

***Law***. Remarkably, Defendants argued below, and the district court agreed, that even the vague executive orders were more specific than necessary to invoke the SDEA's immunity provision. Indeed, the district court held that immunity is available even if the legislature had never enacted a civil defense law and even if no executive official had issued a single order. It was enough, the court held, that the Defendants' conduct was consistent with the Roman maxim "*salus populi suprema lex*," which roughly translates into the proposition that "the welfare of the people is the highest law." SPA 49-50. As Joseph Story described, this statement is a maxim, not a law, and a dangerous one at that. *See* Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1287 (1833) (calling "*salus populi suprema lex*" a "dangerous political maxim . . . which might be used to justify the appointment of a dictator, or any other usurpation"). The maxim has not even been mentioned by the New York Court of Appeals in the last 125 years.[31] It defies imagination that this is

[31] That Court mentioned the phrase in dicta in *In re Cheesebrough*, 78 N.Y. 232, 237 (1879), while explaining the traditional scope of the police power to interfere with private property without paying just compensation. The Court did not rely on the maxim as an independent source of legal authority for government action, much less as a source of obligation with which a public official or private citizen might be said to "carry out" or

what the legislature was referring to as "law" when it enacted the SDEA. If the maxim were a source of actual legal authority or obligation, there would be no need for the immunity provision to also provide a defense for compliance with an "order" much less require that the order be "duly promulgated" under the SDEA. The Legislature could have simply extended immunity to every action relating to civil defense and been done with it.

In fact, if *salus populi* were a source of legal authority, there would have been no need for the SDEA or the Disaster Act in the first place to authorize government officials to take extraordinary measures in the event of an attack. There also would be no need for anyone to comply with the limitations in these emergency statutes, as they could always point to *salus populi* as an independent source of legal authority free from the troublesome restrictions imposed by the legislature in its emergency statutes. This "law" would be a source of chaos when order and discipline is most needed. It was precisely to avoid such prospects, and to ensure that emergency responses would be governed by established, determinate law, rather than by individual officials' conception of what was necessary for the public welfare, that the

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"comply with." *Id*. As far as Plaintiffs can determine, the phrase has never been used in an opinion of this Court.

SDEA establish such elaborate planning mechanisms and authorized the issuance of civil defense regulations and orders.

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This is not to say that the SDEA had no application to the events of September 11. City agencies implemented the general orders of the Mayor by issuing any number of specific orders relating to the attack. But Defendants have not relied on any of these more specific orders, perhaps because they realize that compliance with worker safety rules was part and parcel of those orders.

*2. Plaintiffs' Injuries Were Not The Result Of Defendants' "Carrying Out" Or "Attempting To Comply" With A Civil Defense Law Or Order*

Even if the executive orders or *salus populi* qualified as immunity-conferring civil defense laws or orders, Plaintiffs' injuries were not caused by Defendants' attempted compliance with them.

*i. The Private Contractors Were Complying With A Contract, Not Any Civil Defense Law Or Order*

The private Contractor Defendants were not directed to do anything under the executive orders or the legal maxim *salus populi*, all of which apply only to the action of government entities. *See* A 1360 (Mayor's order)

(directed solely to city agencies); A 1371 (Governor's order) (directed solely to state agencies); *In re Cheesebrough*, 78 N.Y. 232, 237 (1879) (*salus populi* describes extent of municipal police power). Instead, they performed their services pursuant to a cost-plus contract and, in return, were paid more than $200 million, SPA 11 n.2, and given $1 billion of liability insurance from the federal government. Even if their conduct might be characterized as a civil defense *activity*, the SDEA expressly protects only conduct undertaken to carry out or comply with a "law" or a "rule, regulation or order duly promulgated" under the Act. SDEA § 9193(1). Fulfillment of a contract obligation is not compliance with a civil defense law or any SDEA order.

The New York Court of Appeals held as much in *Abbott v. Page Airways, Inc.*, 23 N.Y.2d 502 (1969). In that case, a civil defense official hired a private helicopter to fly him over the site of a riot. The helicopter crashed, killing Abbott and others. *Id*. at 506. The defendant contractor asserted that it was immune under the SDEA. The Court of Appeals concluded that it could "dispose, quite briefly, of the defendant's claim to immunity*," id.* at 507, explaining:

> The simple fact is that, in providing a helicopter and pilot for the use of Abbott, the defendant, Page Airways, was not

> complying with any "law * * * rule, regulation or order * * * promulgated or issued" under the Defense Emergency Act or under any other statute. *It was doing nothing more, it is clear from the record, than engaging in its regular business of providing air transportation for hire.* Mr. Abbott, in arranging for the flight, did not, even by implication, issue an order to Page Airways or commandeer the helicopter; he asked if it was 'available' and only when, after some delay, he was told that it was, did he go forward with plans for its use. He had been authorized by the City Manager to obligate the City for payment for the rental of the aircraft. The manifestly self-serving conduct of the defendant after the accident, when it forbore to present a bill to the City and claimed, instead, that the aircraft had been commandeered, was not enough to bar the trial court from determining, as matter of law, that *the rental was voluntary and in the ordinary course of the defendant's business.*

*Id*. at 508 (emphasis added).

The same reasoning and result obtains here. Although the SDEA allows public officials to commandeer private property and services during an emergency, SDEA § 9129(2), the Contractor Defendants in this case were not impressed into service, but hired pursuant to contracts that guaranteed them a fixed profit margin. *See* A 8252-53. They acted to comply with the terms of their contract, not the mandates of any civil defense law or order.

The district court nonetheless held that the Contractor Defendants were eligible for immunity under the SDEA for two reasons, both of them mistaken. *First*, the court concluded that the result in *Page Airways* turned

on the nature of the services provided, not on whether the services were hired rather than commandeered. SPA 51. The defendant in *Page Airways*, the court concluded, "was involved in the emergency response in the most limited and peripheral sense," and therefore could be said to be engaged in its "regular course" of business. *Id*. That view cannot be squared with the text of the Court of Appeals' opinion or the SDEA.[32] While the Court of Appeals did state that the defendant in that case was "doing nothing more . . . than engaging in its regular business of providing air transportation for hire," 23 N.Y.2d at 508, the district court misconstrued the significance of that observation. The Court of Appeals' point was contained in the last words of the sentence, noting that the services were hired, not commanded. It made that point clear in the sentence that immediately followed, emphasizing that the state official "did not, even by implication, issue an order to Page Airways or commandeer the helicopter." *Id*. And the court likewise made a point of rejecting the defendant's assertion that it had, in

[32] Judge Hellerstein was skeptical that the riot in *Page Airways* was comparable to the disaster in this case. SPA 51. The Court of Appeals likewise doubted whether the riot was covered by the SDEA. *See* 23 N.Y.2d at 508. But the Court expressly declined to base its decision on that basis. *Id*. Accordingly, its decision cannot be distinguished from the present case on that ground.

fact, been commandeered, a question that would have been irrelevant if the critical question under the Act was whether the defendant had simply been "engaging in [the] regular course" of its business. SPA 51. *See also* 23 N.Y.2d at 508-509 (rejecting defendant's attempted analogy "between this case and the calling of private persons into service by a peace officer to assist in making an arrest or curbing a public disorder").[33]

The district court's ruling – denying immunity when contractors provide services "in the regular course of their respective businesses" but allowing immunity when the services are unusual – also has no basis in the text of the statute. Nothing in the immunity provision turns on what the defendant normally does or does not do. *See* SDEA § 9193(1). The Court of Appeals in *Page Airways* was not creating an extratextual exception to the immunity provided, but rather construing the words "*comply[] with* any 'law . . . rule, regulation or order . . . promulgated or issued' under the [SDEA]." 23 N.Y.2d at 508 (quoting SDEA § 9131(1)) (emphasis added)).

*Second*, the district court concluded that excluding private contractors from the purview of the immunity provision was inconsistent with the

[33] In any case, the services in *Page Airways* were hardly routine – the accident occurred because the helicopter was flying low over the scene of a riot. 23 N.Y.2d at 506.

SDEA's implicit recognition of the necessity of private participation in disaster responses. SPA 51. But there is nothing inconsistent with recognizing the importance of private contracting while limiting immunity to those acting to comply with the compulsion of a law or order. Private companies have long been encouraged to participate in public projects, including disaster responses, not by the promise of immunity, but by the opportunity to include the cost of liability insurance into the price of their services or by seeking indemnification from their public contracting partner. *See, e.g.*, A 10206 (letter from FEMA explaining that "FEMA's authority to pay debris removal related insurance costs stems from the fact that these costs are built into the debris removal contracts and are therefore part of the cost of that item of work"); A 5680 (same). Unlike volunteers or conscripts, a private contractor that is paid for its services, and able to pass along the cost of liability protection to the government, does not need the extraordinary incentive of immunity to be persuaded to participate in a recovery project. Private companies have been participating in disaster responses without incident for decades, even though Defendants have been unable to cite a single case in which a private contractor has been afforded immunity in a disaster response. Thus, when contractors recently went to

Congress seeking legislation to immunize their conduct in the aftermath of Hurricane Katrina, one witness testified that

> for every contractor that you find who is hesitant to accept billions of dollars in contract[s], I can find hundreds who will. In fact, there was nearly a riot at a recent meeting in Baton Rouge with all the large companies who received no-bid contracts to work after Katrina by local businessmen who lost everything looking for work.

A 5768. The bill was never enacted. *See* Gulf Coast Recovery Act, S. 1761, 109th Cong., 1st Sess. (introduced Sep. 22, 2005, no further action taken).

Defendants and their amici complain that reimbursing contractors for the cost of insurance, rather than forcing accident victims to bear the cost of their own injuries, could increase the cost of the services to the government. But that is precisely as it should be, and as the State of New York intended it to be. While it would undoubtedly be cheaper for the government to bestow unlimited tort immunity on all of its contractors, it has long been understood that simple justice requires that the taxpayer bear the full cost of the services and products its government purchases, including the cost of injuries.

Defendants and their amici also assert that the traditional method of protecting contractors is wholly inadequate in the context of civil defense emergencies because valuable time would be lost while the terms of the contract and insurance or indemnity were negotiated. One would hope that

this is just a lawyer's argument and that these corporate citizens are not suggesting that they would, in fact, drag their feet in responding to another attack. But to the extent there is any realistic threat of hesitation, New York law has provided a ready answer – in a crisis, the government may commandeer private property and services and negotiate or litigate the terms of compensation later. *See* SDEA § 9129(2).

There is good reason to protect private contractors through insurance or indemnity, rather than immunity. Doing so leaves in place important incentives to protect worker and public safety, in counterbalance to competing private interest (such as lowering costs or completing the work quickly). It also ensures a remedy for the wrongfully injured, while still accommodating the need to encourage private participation in disaster responses.

It is thus unsurprising that the modern state and federal disaster statutes both include immunity provisions that by their plain terms exclude private contractors. *See* Disaster Act § 25(5); Stafford Act, 42 U.S.C. § 5148.

### *ii. Plaintiffs' Injuries Were Caused By Defendants' Violation Of The Emergency Orders Governing Debris Removal*

Even if the Contractors could generally qualify for protection under the SDEA immunity provision, they do not do so in this case because Plaintiffs' injuries were not caused by any of the Defendants' attempts to comply with civil defense laws or orders.

Like other immunities, the SDEA provision focuses on "the specific act or omission out of which the injury is claimed to have arisen" and not on the activities upon which the defendant "is engaged generally." *Miller v. State*, 62 N.Y.2d 506, 513 (1984) (discussing state common law governmental immunity) (citation omitted).[34] The question is whether the specific act or omission resulting in the plaintiff's injury can reasonably be seen as an attempt to comply with a civil defense law or order. As one court put it in the context of an injury arising from an air raid drill, "to obtain the immunity of the statute, 'either the condition or the instrumentality causing

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[34] *See also Japan Airlines Co. v. Port Auth.*, 178 F.3d 103, 111 (2d Cir. 1999) (same); *Berkovitz v. United States*, 486 U.S. 531, 540 (1988) (under discretionary function immunity to Federal Tort Claims suit, court must examine the plaintiff's "specific allegations of agency wrongdoing"); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001) (federal government contractor defense available if "the government has directed a contractor to do *the very thing that is the subject of the claim*") (emphasis added).

the injury must be occasioned by or used in air-raids or drills.'" *Field*, 62 N.Y.S.2d at 719 (quoting trial court opinion).

Accordingly, the cases affording immunity under the SDEA's predecessor uniformly found that the specific requirements of a civil defense law or order had a close causal connection with the plaintiff's injury. *See*, *e.g.*, *Field*, 62 N.Y.S.2d at 721 (blackout led to plaintiff's failure to see gap in roof through which he fell); *Gaglio*, 143 F.2d at 906 (plaintiff fell off train platform in dim lighting required by blackout regulations); *Smith*, 57 F. Supp. at 53-54 (air raid warden driving to station in compliance with civil defense rules hit soldiers who were, pursuant to orders, walking on wrong side of the road).

In this case, however, the nexus between any civil defense law or order and the injuries Plaintiffs have suffered is so remote as to be fanciful. Defendants do not claim that any civil defense law or order directed them to deny Plaintiffs access to functioning, properly fitted respiratory equipment or required them to suspend enforcement of respirator usage or other safety rules. To the contrary, both the executive orders and the *salus populi* maxim extend authority only insofar as it is necessary to protect the public welfare. While the vagueness of that command might justify a great many actions, it

cannot justify the specific conduct giving rise to Plaintiffs' injuries here. To the contrary, Defendants decided early on that the public welfare required strict compliance with worker safety requirement at the site and that compliance would not interfere with operations at the site. For that reason, even if the Mayor or the Governor *had* ordered Defendants to ignore worker safety requirements, that order would have been unlawful under the very civil defense statutes authorizing the orders. *See* Disaster Act § 24(1)(g)(ii) (prohibiting suspension of law "which does not safeguard the health and welfare of the public and which is not reasonably necessary to the disaster effort").

The State has no conceivable interest in encouraging officials or contractors to disregard the very measures the government puts in place to govern the emergency response, or in protecting them from liability for the consequences of those violations. That is why the SDEA imposes criminal sanctions for violations of the terms of such emergency orders. SDEA § 9181(5). It makes absolutely no sense to provide immunity from civil liability for conduct subject to criminal sanction. The core purpose of the SDEA was to facilitate an emergency response governed by rules and orders deliberately calculated to protect the public from both the aftermath of an

attack, and from the potential dangers of the response. Encouraging officials and contractors to ignore the specific plans and orders in favor of their own view of the "public welfare" is directly inimical to that project.

### *3. There Are Material Disputes Over The Question Of Defendants' "Good Faith"*

Defendants' reckless conduct in violation of the emergency orders governing work at the World Trade Center site also prevents them from establishing the "good faith" element of the SDEA defense.

Contrary to Defendant's inexplicable insistence otherwise, Br. 48, the courts have long and uniformly held that the existence of good faith under the SDEA and its predecessor "[o]bviously . . . [is] a question of fact for the jury." *Jones v. Gray*, 45 N.Y.S.2d 519, 523 (App. Div. 1943); *see also Smith*, 57 F. Supp. at 55 ("Of course, the existence of good faith is an issue for the jury to decide."); *Jankowski*, 52 A.D.2d at 772 (under New Jersey equivalent, the "question of good faith was for the jury").[35] As noted above, the Complaint explicitly alleges that the injury-producing conduct in this

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[35] In *Smith v. Town of Orangetwon*, this Court did not hold that "'good faith' was an essentially legal question," Br. 48, but rather concluded that on the facts of that case, a jury finding of no good faith would be unsupported by the evidence. *See* 150 F.2d at 787. The same was true in *Gaglio*. *See* 143 F.2d at 907.

case was *not* in good faith. *See supra* n.25. That allegation is not subject to dispute in a motion on the pleadings. *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir. 1988). Moreover, even considering the broader discovery evidence, the district court found that there were material factual disputes as to Defendants' good faith. SPA 59-61. That conclusion is not surprising: "Summary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles." *Leberman v. John Blair & Co.*, 880 F.2d 1555, 1559-60 (2d Cir. 1989) (citation omitted). At any rate, the district court's conclusion that there are material issues of fact relating to Defendants' good faith is not subject to review in this interlocutory appeal. *See Johnson v. Jones*, 515 U.S. 304, 316-17 (1995).

That should end the matter, but even if it did not, Defendants' objections to the district court's good faith ruling are unfounded. Here, Plaintiffs have alleged, and demonstrated through summary judgment evidence, that:

> (1) Defendants were aware of the great danger posed to the workers by toxins pervading Ground Zero;
>
> (2) They recognized the necessity of informing workers of those dangers and vigorously enforcing respirator and other safety requirements;

(3) Defendants concluded, from the very beginning of the operations, that compliance with these safety rules was feasible even under the extreme conditions that initially existed at the site and, in fact, mandated that the Contractors observe and enforce the safety rules;

(4) Defendants failed to implement those safety plans and rules on the ground;

(5) For example, although OSHA claimed to have purchased tens of thousands of respirators, many workers never received them;

(6) When workers did receive respirators, the devices were not tested to ensure a tight fit, frequently rendering the devices useless;

(7) Workers were misled about the danger of working without a respirator, being led to believe that the air was generally safe to breathe;

(8) As a result of misinformation, malfitting equipment, and bad examples by Defendants' agents, a great many workers did not wear respirators while working among the toxins;

(9) Although required by state and federal law, as well as the health and safety rules developed for the site, Defendants grossly failed to enforce respirator usage requirements, leading to observed rates of usage falling below 30%;

(10) Defendants were repeatedly made aware of the safety problems at the site, through their own observations as well as by reports from contractor, city and federal inspectors. Yet, they did little or nothing to correct the situation; and

> (11) Defendants knew or should have known that the result of their conduct would be the massive infliction of injury, illness and death that has befallen Plaintiffs in the years since.

*See* Statement Section I, *supra*.

Defendants dispute none of this at the present stage in the litigation. Instead, they insist that all of it is irrelevant to their claimed good faith. Br. 46. All good faith requires, they assert, is that the Defendants be engaged in a "genuine or *bona fide* civil defense effort" as opposed to conduct "taken with a motive unrelated to responding to the attack." *Id*. Accordingly, they argue, so long as they were attempting to remove debris from the site of the collapses, their conduct must be deemed to have been in "good faith," regardless of how reckless or patently illegal their methods were. "In other words, good faith under the SDEA turns on *why* a defendant acts, not *how* he acts." *Id*. This assertion strains credulity and the English language.

"Good faith" commonly, indeed necessarily, comprehends both the motive and the manner of one's action. For example, a security guard ordered to keep the public away from the disaster site would not be engaging in a "good faith" attempt to comply with that order if he simply shot without warning every pedestrian approaching the site. To be sure, shooting the pedestrians would accomplish the goal of keeping the public away from the

site. But there are good faith and bad faith means of accomplishing that end and the difference can be as important as the end result itself.

Moreover, Defendants' interpretation of "good faith" renders the term superfluous in the context of the SDEA immunity provision. That provision already requires that the Defendants be "complying with or attempting to comply with" a civil defense law or order. SDEA § 9193(1). Someone who acting with a "motive unrelated to responding to the attack," Br. 46, is not "attempting to comply with" the law within the ordinary usage of those words. He is attempting to do something else. The additional requirement of "good faith" must add something beyond simply excluding fake attempts.

Thus, the New York courts have previously rejected Defendants' interpretation under the SDEA's predecessor provision. In *Jones v. Gray*, 45 N.Y.S.2d at 520, an air raid warden crashed into another vehicle while driving to his station at the onset of a blackout drill. There was no question that civil defense regulations required the defendant to report to his station, or that he was traveling to his post when the accident occurred. *Id*. at 520-21[36] Making the same argument advanced in this case, the defendant in

[36] Defendants' suggestion that the defendant was not making a "bona fide" effort to get to his station, Br. 50, is plainly unsupported by the text of

*Jones* argued that his "good faith and honest intention must be conclusively presumed as a matter of law from the single fact alone that at the time of the collision, he was proceeding in the general direction of his air raid post." *Id*. at 523. The court rejected that claim out of hand. *Id*. Instead, the court took into account the reckless manner in which the defendant was driving. *Id*. at 246. And as in this case, that reckless conduct was in direct violation of the specific civil defense regulations governing *how* he was carry out his civil defense obligations. *See id*. (defense orders required "restricting his speed to fifteen miles an hour during a blackout" and having "some lights on to 'warn approaching vehicles of the presence of another vehicle'"). The court held that it was open to the jury to conclude that the defendant was not acting in good faith in light of all the circumstances. *Id*.; *see also Gaglio*, 143 F.2d at 907 (explaining that in *Gray*, it was "evident from the facts recited in the opinion that the air-raid warden was conducting himself *so recklessly* that there was sufficient evidence to support the jury's finding that he was not acting in good faith") (emphasis added).

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the opinion. *See* 456 N.Y.S.2d at 522-23 (stating only that defendant delayed commencing to his post in order to invite others to accompany him, and that when the accident occurred he was "proceeding in the general direction of his air raid post").

The Supreme Court of New Jersey gave that State's SDEA equivalent the same construction in *Jankowski*. As in *Jones,* a civil defense official hit another car while driving recklessly to his station, running a red light at an excessive rate of speed. 52 A.D.2d at 772. There was no question of his general motive: "His one thought, according to his testimony, was to get to his destination before the red air signal should be sounded." *Id*. But that was insufficient to establish his good faith: "The mental picture of a man driving at 35 miles an hour through busy city streets in sheer disregard of prohibitory signals and traffic conditions naturally suggests the inquiry whether *that method of proceeding* toward the accomplishment of a lawful objective was consistent with good faith." *Id*. at 773 (emphasis added). Of importance again was the fact that the civil defense orders themselves placed limitations on the means of compliance: the court observed that the defendant's superior officer "testified that the order to attend as quickly as possible carried with it the implication 'as quickly as was possible consistent with safety.'" *Id*. Directly rejecting the proposition put forward by Defendants in this case, the court held that the "statute was not, we think,

intended to give carte blanche to recklessness or to wholly unnecessary disregard for life, limb and property." *Id*.[37]

This Court's decision in *Smith v. Town of Orangetown*, is not to the contrary. In that case, a police officer was under orders to report to police headquarters immediately upon the sounding of a blackout alarm. 150 F.2d at 783. On his way, he crested a hill and ran into a group of soldiers marching on the wrong side of the road. *Id*. The jury found in the defendant's favor. On appeal, this Court rejected the plaintiffs' argument that "recklessness and wanton speed are incompatible with good faith." *Id*. at 785. "[T]his is not necessarily so," this Court explained, "for at most they would only be evidence in some situations that there was no honest attempt to comply with orders." *Id*. Whether the alleged recklessness in the case at bar supported a finding of bad faith, the Court held, was for the jury to

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[37] Similarly, in *Scully v. Herbert*, 84 N.Y.S.2d 805 (App. Div. 1948), it was undisputed that the defendant police was generally attempting to comply with his obligation to turn off stop lights in preparation for an air raid drill when he struck another vehicle. *See id*. at 382-83. But that was not enough to establish immunity. Instead the court found it "necessary to examine the wording" of the regulations that governed the air raid drill, *id*. at 384, because a "warden might act in good faith from the moment he receives an alert message, but his acts do not receive immunity until they are performed within the realm of immunity granted by the rules and regulations." *Id*. at 386.

decide. *Id*. (noting that the jury had the evidence of recklessness before it "and could give it such weight as it deemed proper"). The Court further noted that "[n]o charge was given or requested that reckless speed was not evidence bearing on good faith." *Id*. In so ruling, this Court embraced the decision in *Jones v. Gray*, which, this Court repeated, held that "the question of good faith was for the jury" and was not to be conclusively presumed simply because the defendant was acting to comply with his order to report to his station. *Id*.

Defendants point out that in *Smith v. Town of Orangetown*, this Court held open that even reckless conduct may be in "good faith." Br. 49. That may be true. One can imagine, for example, an officer driving with reckless speed in order to perform a critical task important to the protection of a great many more people than are risked by his dangerous driving. But Defendants make no claim here that their reckless disregard for worker safety was the result of a good faith decision to risk worker lives in order to achieve a higher objective. Instead, they decided precisely the opposite – that compliance with these safety obligations was consistent with their other "civil defense" obligations, great and small.

Defendants nonetheless assert that allowing consideration of the manner in which a civil defense goal is accomplished effectively "merge[s] the concepts of good faith and negligence." Br. 51. That is incorrect. Negligence is not enough, in itself, to negate good faith. But Plaintiffs have not alleged mere negligence. Instead, they have alleged and provided substantial evidence to prove that Defendants knowingly and recklessly exposed Plaintiffs to substantial risk of injury in violation, not only of their common law duty of due care, but also in violation of specific statutory and regulatory requirements that were adopted by the City and the Contractor Defendants themselves for the operation of the debris clearance project. One need not confuse negligence for bad faith in order to recognize that at a certain point, the degree of a defendant's reckless disregard for the safety of others and wanton violation of safety rules intended to protect against that danger in the course of an emergency, makes it impossible for the defendant to claim that it was acting in good faith.

#### *4. Defendants Have Not Shown That All Of Plaintiffs' Injuries Occurred During The Course Of A "Civil Defense" Emergency*

The District Court was also correct to hold that Defendants could not show on the pleadings, or undisputed summary judgment evidence, that

every injury sustained by the Plaintiffs occurred during the "civil defense" stage of operations at the WTC site.

In conferring immunity for attempts to comply with orders issued "pursuant to" the SDEA and laws "relating to civil defense," the New York Legislature plainly intended to impose a temporal limitation on the duration of the immunity it had provided. Defendants nonetheless insist that the Act confers immunity long after normalcy returned to the site, applying until "recovery and rehabilitation of the state" and the "restoration of commercial and financial activities" has been accomplished. Br. 38 (citation and quotation marks omitted); *see also* PA Br. 2-3 (immunity "continued until the rent in the national fabric was repaired"). Under that view, every ordinary construction injury will be subject to SDEA immunity until the site is completely rebuilt, more than a decade at the attack.

"There exists no statutory design or discernable legislative intendment which supports such a sweeping application of the Act's immunity provision." *Fitzgibbon v. County of Nassau*, 541 N.Y.S.2d 845 (App Div. 1989). Taking into account the State's long-established rule of narrow construction of SDEA immunity, as well as the purposes of the statute, the court in *Fitzgibbon* concluded that although the SDEA authorizes the

creation of an auxiliary police force and provides immunity during the force's drills, the Act did not contemplate immunity for "the routine and regularly scheduled patrolling presently at issue here." *Id*. at 847-49. To the contrary, "in providing for immunity the framers undoubtedly anticipated that the various civil defense functions contemplated by the Act would be undertaken *during the rush of an emergency* – or in drills calculated to prepare for emergencies." *Id*. at 849 (emphasis added). To hold otherwise, the court recognized, would extend immunity to activities having little resemblance to the civil defense functions contemplated by the statute. *Id*.

Limiting immunity to conduct during the rush of the emergency is consistent with the SDEA's statutory definition of "civil defense." While the definition is broad in some respects, it is also repeatedly qualified with words to make clear the time-limited scope of the Act. Civil defense includes actions to deal with not every condition created by the attack, or even every "emergency condition," but instead, only the "immediate emergency conditions." SDEA § 9103(5). The definition also covers "*emergency* welfare measures," "restoration of *essential* community services," and "*immediately essential* emergency repair[s]." *Id*. (emphasis added). And, most importantly for this case, it covers not all debris

clearance but only "*essential* debris clearance." *Id.* (emphasis added). These are words of limitation, words that, as *Fitzgibbon* rightly recognized, contemplate action "undertaken during the rush of an emergency."[38] 541 N.Y.S.2d at 849. These are words that contemplate that at some point the recovery from an attack shall cease to be a civil defense matter.

For that reason, a New York court rejected the Port Authority's assertion that "all WTC site clean-up work constituted 'essential debris clearance'" under the SDEA. *Daly v. Port Auth.*, 793 N.Y.S.2d 712 (App.

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[38] While the statutory definition also contains some more general language describing "civil defense" activities as well, those broader terms should not be read to render superfluous the specific limitations imposed on the definition with respect to debris clearance. The statute plainly does not contemplate that every aspect of the definition shall apply every time the word is used in the statute. While the broad language used in the definition is plainly on-point with respect to the scope of the Civil Defense Commission's authority, *see* SDEA § 9121, it just as plainly was not intended to expand the immunity or other provisions beyond reason. For example, Section 9137 of the SDEA provides that members of civil defense from other states and Canada "performing civil defense services . . . pursuant to any law, any rule, regulation or order duly promulgated or issued pursuant this act . . . shall possess the same powers . . . they would ordinarily possess if performing their duties in the jurisdiction in which normally employed or rendering services." It is difficult to believe that the legislature intended to allow Canadian civil defense workers to exercise the full extent of their legal authority under Canadian law against citizens of New York long until the towers are rebuilt.

Div. 2005). "Had the Legislature intended to include all debris clearance, it would not have added the limited adjective 'essential.'" *Id.* at 719. Relying on *Fitzgibbon*, the court therefore concluded that "'[e]ssential debris clearance' within the meaning of SDEA § 9103(5) is that which is integral to the civil defense purpose, which must be performed on an urgent basis." *Id.*

In *Daly*, the state court held that the SDEA applied "[d]uring the search for survivors" but not after. 793 N.Y.S.2d at 719.[39] Defendants argue in this Court that the period should extend to include various other activities, such as fighting fires, recovering unexploded ordinance, or searching for victims' remains.[40] Br. 44-45.[41] But Defendants did not ask the district

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[39] Defendants falsely assert that Plaintiffs have conceded that Defendants are entitled to immunity during that time period. Br. 35. Instead, all Plaintiffs have conceded is that many of the activities undertaken in the immediate aftermath of the attack may qualify as "civil defense" activities taken during the rush of an emergency. Plaintiffs have not conceded that the activities during that period meet the other necessary requirements for immunity.

[40] Defendants assert that "the search for human remains continued until the final day of the operations of the WTC Site," Br. 44, but nothing in the Complaint or the cited pages of the district court's opinion states when the search for human remains concluded.

[41] Defendants' reliance on the definition of "emergency" in New York General Municipal Law § 209-b to define the scope of the SDEA immunity provision, *see* Br. 44, is misplaced. The SDEA provision does not use the word "emergency," but rather "civil defense." Defendants cannot sensibly

court to dismiss the claims of particular individuals performing specific tasks during designated periods. Instead, they made an all-or-nothing argument, asserting blanket immunity against the claims of both firefighters and truck drivers, those working on the pile and those working at the landfill, those who were injured on the first day of the response or the last day of the debris clearance.[42] The district court properly ruled on what they asked for, declining to say, at this early stage in the case, where that line should be drawn absent further factual development. SPA 60-61.

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claim that in enacting the statutory definition in an entirely different part of the code, the Legislature intended to alter the scope of the SDEA's immunity provision.

[42] Accordingly, Defendants' complaint that the district court did not separate out certain contractors whose involvement in the project ended early is particularly specious. *See* Br. 45-46 n.76. Having failed to ask for such relief in the district court, they cannot demand it from this Court now. Moreover, any such request could not have been made in a motion for judgment on the pleadings as the Complaint does not say when particular defendants started or ended their work at the site.

Defendants complain that treating Plaintiffs as individuals, rather than as an undifferentiated mass, would unfairly subject them to the burdens of litigation that the immunity provision was intended to avoid. Br. 40-41. But the legislature plainly contemplated subjecting defendants to such costs when it limited the immunity in the way that it did. Accordingly, every reported case concerning the immunity provision of the SDEA's predecessor went to trial rather than being resolved by preliminary motions. *See Jones*, 45 N.Y.S.2d at 521; *Page Airways*, 23 N.Y.2d at 506; *Smith*, 150 F.2d at 784; *see also Jankowski*, 52 A.2d at 771; *Gaglio*, 143 F.2d at 905; *Scully*, 84 N.Y.S.2d at 806; *Field*, N.Y.S.2d at 717-18.

Finally, if this Court accepts Defendants' view that the SDEA provides an open-ended immunity that may last a decade or more until the site is rebuilt, the Court must be especially vigilant in giving the other requirements of the immunity provision a reasonable scope. It would be one thing to extend for years an immunity for complying with specific orders by high-level officials or public bodies that have determined in advance that the risk to workers' safety is worth taking in light of a greater public good. It is quite another to say that a one-time command to "do what is necessary" will for years afterwards delegate to private companies and low level employees the discretion to violate basic safety rules whenever they see fit.

* * *

Denying Defendants immunity at this juncture will not leave them exposed to unwarranted liability regardless of the exigent circumstances of the case. Judge Hellerstein has made clear his view that Defendants are entitled to a substantial degree of protection under the SDEA and federal law, albeit not the blanket immunity Defendants have sought in the initial round of motions. Moreover, he has held open that further, more tailored motions may yet be considered before trial. At the same time, even if immunity were denied entirely, this does not mean that the law will cast a

blind eye to the extraordinary circumstances of this case. As Justice Stallman recognized, it is yet open to defendants to argue that the worker safety rules and statutes they violated were rendered inapplicable because of the exigent circumstances. *Daly*, 793 N.Y.S.2d at 721 & n.12. Moreover, many legal standards have a built-in capacity to take into account the emergency nature of a situation in determining liability. *See, e.g.*, *Jones*, 33 N.Y.2d at 280 ("chaotic conditions" during prison riot do not entitled defendants to immunity, but are taken into account in determining whether plaintiff proved her tort claim). Finally, at all events, Congress has acted to ensure that the financial burden of any judgment is born principally by the federal taxpayers and insurance companies, and not by these defendants.

### D. Disaster Act

Defendants also failed to demonstrate that they are entitled to immunity under the Disaster Act at this stage in the case.

#### *1. The Disaster Act Immunity Provision Applies Only To A "Political Subdivision," Thereby Excluding The Private Contractors And Port Authority*

By its express terms the Disaster Act provides for immunity only to a "political subdivision," which plainly excludes private contractors and the Port Authority. Disaster Act § 25(5); *Daly*, 793 N.Y.S.2d at 720; *see also*

*Fox v. Cheminova, Inc.*, 387 F. Supp. 2d 160, 170 (E.D.N.Y. 2005). Even if it did not, the provision extends immunity only for "carrying out the provisions of *this Section*," Disaster Act § 25(5) (emphasis added), and there is nothing in Section 25 for a private corporation to "carry out." *See* Disaster Act § 25(1) (authorizing the "chief executive of any political subdivision" to use the "resources of his political subdivision" to respond to emergencies, and to request assistance from his county and other political subdivisions); *id.* § 20(2)(f) (definition "chief executive" to include only executives of counties, cities, villages and towns).[43]

Defendants ask this Court to judicially revise the statute's language "[t]o implement the Legislature's purpose and to encourage a collaborative effort between public and private actors in responding to a disaster." Br. 63. "The problem, of course, is that legislators – not judges – are charged with making policy," as Defendants themselves have reminded the Court. Br. 60. The policy choice to limit immunity to political subdivisions was plainly intentional. The Act contains a comprehensive set of immunity provisions,

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[43] While the Port Authority may be a quasi-governmental entity, it is not a political "subdivision" within the meaning of the Disaster Act and has no "chief executive" within the Act's definition. *See Daly*, 793 N.Y.S.2d at 720.

spelling out in detail exactly who is entitled to immunity and under what circumstances.[44] And as Defendants explain, the Legislature was aware that "a joint effort, public and private, is needed to mobilize resources" for a disaster response. Br. 62 (quoting Disaster Act § 20). Yet it chose not to extend immunity to private entities under Section 25(5) or under any of the other immunity provisions. There is nothing inconsistent or illogical in that choice. As discussed above, the law has long protected private contractors principally by allowing them to include the cost of liability insurance in their contract, or to seek indemnity from the government. That has been the practice with respect to the federal response to emergency disasters for decades, *see infra*, and there is no basis to think that New York believed a different approach was required.

At any rate, "this court is not at liberty, because it thinks the provisions [of a statute] inconsistent or illogical, to rewrite them in order to bring them into harmony with its views as to the underlying [legislative] purpose." *Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 472 (1934).

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[44] *See* Disaster Act §§ 26(3), 29-b(1), 29-b(2).

### 2. *Plaintiffs' Injuries Do Not Arise From Defendants' Exercise Of Any Discretionary Function Or Duty In Carrying Out Section 25 Of The Disaster Act*

In any case, the Disaster Act immunity provision protects only against claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." Disaster Act § 25(5). As one New York court has already held, this provision does not provide blanket immunity to the Defendants in this case. See *Daly*, 793 N.Y.S.2d at 721.

#### *i. Disaster Act Immunity Is Time Limited*

Perhaps even more clearly than the SDEA, the Disaster Act extends immunity only for actions taking during the rush of an emergency. The statute extends immunity only to discretionary actions "in carrying out the provisions of this section." Disaster Act § 25(5). "[T]his section," in turn, authorizes local officials to take actions "as may be necessary or appropriate to cope with *the disaster* or any *emergency* resulting therefrom." *Id.* § 25(1) (emphasis added). The term "disaster" is defined as the "occurrence or imminent threat of wide spread or severe damage, injury, or loss of life or property resulting from any natural or man-made causes." *Id.* § 20(2)(a). Even more so than the phrase "civil defense," the words "disaster" and "emergency" connote a sense of exigency. And, significantly, the statute

provides for post-disaster recovery operations in a separate section of the Act to which the immunity provision does not apply. *See id*. § 28-a. For all the reasons discussed with respect to the SDEA, the state Legislature plainly did not intend the effectively suspend the ordinary mechanisms for protecting workers and the public when the emergency has subsided.

*ii. Defendants' Failures Do Not Fall Within The Definition Of "Discretionary Function"*

The Disaster Act provides protection only for the "exercise or performance or the failure to exercise or perform a discretionary function or duty." *Id* § 25(5). This same limitation is imposed under the federal Stafford Act and New York common law immunity for the exercise of certain discretionary governmental functions. 42 U.S.C. § 5148; *Tango v. Tulevech*, 61 N.Y.2d 34, 40 (1983). Accordingly, because no one has seriously suggested the different definitions of "discretionary function" apply under these different immunity regimes, Plaintiffs will discuss this recurring issue here, in the context of the Disaster Act.

The Disaster Act "does not automatically exempt a political subdivision from liability for every act that its employees or agents perform in the course of a large project, solely because the subdivision has discretion

over how it organizes and executes that project." *Daly*, 793 N.Y.S.2d at 721. Instead, as was true under the SDEA, the question is whether the specific injury-producing conduct was an exercise of a discretionary function. *Id.* Accordingly, the question is whether Defendants were exercising a discretionary function when they failed to implement the safety regime requirement by state and federal law and the emergency orders governing the cleanup. They were not, for three reasons.

***First***, none of Plaintiffs' injuries were the result of protected acts of discretion. *See Daly*, 793 N.Y.S.2d at 721. The term "discretionary function or duty" is a term of art that had a well-developed meaning in the law at the time the Disaster Act was enacted.[45] Discretionary acts "involve the exercise of reasoned judgment which could typically produce different *acceptable* results whereas a ministerial act envisions direct adherence to a *governing rule or standard* with a compulsory result." *Tango*, 61 N.Y.2d at 40

[45] When the New York legislature passed the statute in 1978, the concept already had a well-developed meaning under the 1940s-era Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(a), the terms of which had been carried over to the disaster-specific Stafford Act in 1972, *see* 42 U.S.C. § 5148. When a legislature uses terms that have a developed meaning in the law, it is presumed to have intended to incorporate that existing meaning into the statute. *See, e.g.*, *Town of Cheektowaga v. Niagra Frontier Transp. Auth.*, 442 N.Y.S.2d 322, 325 (App. Div. 1981); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995).

(emphasis added). *See also, e.g., Owen v. City of Independence*, 445 U.S. 622, 648 n.31 (1980) (same distinction drawn under FTCA). Accordingly, "discretion is indicated if the powers are 'to be executed or withheld according to [a governmental agent's] own view of that is necessary and proper,'" *Tango*, 61 N.Y.2d at 40 (citation omitted), but is unavailable when the "the challenged actions . . . were instead *controlled by mandatory statutes or regulations*," *United States v. Gaubert*, 499 U.S. 315, 328 (1991) (emphasis added). For as the Supreme Court has explained in the context of the FCTA,

> [t]he discretionary function exception will not apply when a *federal statute, regulation, or policy* specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect.

*Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (emphasis added).[46] *See also Daly*, 793 N.Y.S.2d at 721 (same under Disaster Act, as "[n]either

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[46] Defendants make a one-paragraph attempt to argue that the Disaster Act specifically immunizes violations of mandatory legal duties. Br. 58. This argument relies on a tortured reading of the text of the provision – the word "discretionary" quite plainly modifies both "functions" and "duties" – and ignores that the phrase "discretionary function or duty" had a well-

the City nor any other entity has discretion to violate an applicable statute"); *Davis v. New York.*, 691 N.Y.S.2d 668, 672 (App. Div. 1999) (same under common law: "government conduct does not involve an element of judgment or choice if there is a statute, regulation or policy that requires an employee to follow a specific course of action") (citing *Gaubert*, 499 U.S. at 322); *Dureiko v. United States*, 209 F.3d 1345, 1353 (Fed. Cir. 2000) (same under Stafford Act).[47]

In this case, Plaintiffs have alleged that their injuries are the result of Defendants' violation of specific, mandatory legal duties under statutes that "envision[] direct adherence to a governing rule or standard with a compulsory result." *Tango*, 61 N.Y.2d at 40. *See, e.g.*, Complaint ¶¶ 253,

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developed meaning in the law at the time the Disaster Act was enacted. *See supra*, p. 93 & n. 45.

[47] *See also, e.g., Pietra v. New York*, 510 N.Y.S.2d 334, 336 (App. Div. 1986) (no immunity where officers had no discretion to "conduct[] an unlawful search"), *aff'd*, 530 N.Y.S.2d 510 (1988); *Smullen v. City of N.Y.*, 28 N.Y.2d 66, 70-71 (1971) (no immunity where city inspector had no discretion to permit work to continue in violation of Industrial Code); *Garrett v. Holiday Inns, Inc.*, 58 N.Y.2d 253, 263 (1983) (no immunity where official issued certificate of occupancy in face of "blatant and dangerous code violations"); *Arteaga v. New York*, 72 N.Y.2d 212, 220-21 (1988) (although prison officials' quasi-judicial functions immunized, inmates can sue for "unlawful actions of employees taken . . . in violation of the governing rules and regulations," like beatings or punishment without due process).

260, 263, 267. These are precisely the kind of violations of non-discretionary duties that fall outside the scope of the discretionary function doctrine. *See, e.g.*, *Phillips v. United States*, 956 F.2d 1071, 1076-77 (11th Cir. 1992) (Army Corps of Engineers failure to "obey the Corps's Safety Manual's directives" "did not involve a permissible exercise of policy judgment" under the discretionary function exception to the FTCA); *Routh v. United States*, 941 F.2d 853, 855 (9th Cir. 1991) (federal official had no discretion to disregard safety requirements written into contract); *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1026 (9th Cir. 1989) ("[D]iscretion may be removed if the government incorporates specific safety standards in a contract which imposes duties on the government's agent.").

Moreover, Plaintiffs also allege that the Defendants are liable under laws imposing vicarious liability upon property owners, like the Port Authority, and general contractors, like the City and the Prime Contractors, for the safety violations of the subcontractors in this case. *See* Complaint ¶¶ 257-63 (alleging violation of New York Labor Law § 241(6)); SPA 93 (explaining that the "duty imposed under Section 241(6) may not be delegated"); *Sferraza v. Port Auth.*, 777 N.Y.S.2d 645 (App. Div. 2004)

(same). Liability in such cases arises because of the defendants' status, not because of the exercise of any discretionary governmental function. The Port Authority, for example, engaged in no discretion in simply *owning* the World Trade Center site.

Defendants complain that if violation of a mandatory legal duty vitiates immunity, there is nothing left of the immunity provision to protect. Br. 61 & n.82. Discretionary function immunity does, in fact, provide substantial protection in the great many situations in which the law does not, with sufficient precision, direct an official's conduct. Defendants themselves collect numerous examples. *See* Br. 64-65. But such is not the case here. Unsurprisingly, worker safety law provides detailed requirements for companies sending their employees into highly toxic and dangerous environments. *See generally* 29 C.F.R. pt. 1910 (OSHA standards); 12 N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.7 (2007) (N.Y. Industrial Code). Nor can Defendants complain that the work rules at the site lacked specificity. Moreover, even where the rules provided some degree of flexibility and discretion, that discretion is not unlimited. For example, even if Defendants could claim a degree of discretion in choosing which specific respirator to deploy, they plainly had no discretion to simply not provide any

respiratory protection at all. *See* N.Y. Industrial Code § 23-1.8(b)(1) ("Where this Part (rule) requires a respirator to be provided, the employer *shall* furnish . . . an approved respirator.") (emphasis added). Nor did Defendants have any discretion as to whether to conduct fit-testing. *See* 29 C.F.R. § 1910.134(f) (requiring that "before an employee may be required to use any respirator . . . the employee *must* be fit tested") (emphasis added). And even if they had some discretion about the ways in which to monitor air quality, that discretion did not extend so far as to allow them to provide simply false information that they knew or reasonably should have known would mislead the workers into not wearing their respirators. *See, e.g.*, *McCrink v. City of N.Y.*, 296 N.Y. 99, 105 (1947) (although termination of police officer "calls for the exercise of [] discretion," the "field in which that discretion may be exercised . . . is limited" and does not include the discretion to retain an officer where danger to others is reasonably to be perceived); *In re Alva S.S. Co.*, 405 F.2d 962, 969 (2d Cir. 1969) ("The discretion of a governmental official is subject to the duty to abate a 'known risk' if 'danger to others is reasonably to be perceived.'") (quoting *McCrink*, 296 N.Y. at 106).[48]

[48] Again, it bears noting that Defendants did not ask the district court

***Second***, even if Defendants had discretion to decide that compliance with mandatory safety laws should be sacrificed in the pursuit of a greater public good, they exercised no such discretion in this case. Instead, they exercised what discretion they may have had to determine that compliance with these safety rules was feasible, desirable, and of the utmost importance to the public welfare. Plaintiffs' injuries arise not from that discretionary judgment, but rather from Defendants' ministerial failure to implement the decision they had made in their best judgment.

Such failures are routinely excluded from the scope of discretionary function immunity. Discretionary function immunity applies only if "the judgment is of the kind that the discretionary function exception was designed to shield." *Berkovitz*, 486 U.S. at 537. Accordingly, protection is afforded only "governmental actions and decisions based on considerations of public policy." *Id.*; *see also Davis*, 691 N.Y.S.2d at 671 (state common law immunity applies to "the type of policy-rooted decision making that governmental immunity is designed to safeguard"). It does not however,

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to weed through the specific counts of the complaint or review specific allegations in light of the Disaster Act's immunity provision. They instead made a strategic all-or-nothing decision, asking only that the entire Complaint be dismissed with respect to every single Plaintiff. The district court rightly rejected that undifferentiated request.

extend to the failure to implement that policy decision, even if that failure involved some degree of judgment. *See* 486 U.S. at 538 n.3 (discussing *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), holding that while Coast Guard's decision which lighthouses to maintain is a "discretionary function," failure to implement that policy decision is not)).

New York Courts apply the same rule. For example, in *Kelly v. New York*, 395 N.Y.S.2d 311 (App. Div. 1977), *aff'd*, 45 N.Y.2d 973 (1978), the court rejected a claim of immunity for excessive force used in the re-taking of Attica prison after the famous riot there. While the Court acknowledged that the planning of the government assault on the prison may have involved protected discretion, *id*. at 329-30, the complaint alleged "negligence in the practical execution of the plan rather than the making of it." *Id*. at 330. While there surely was some causal connection between the planning and the injury – there would have been no injury if there had been no attempt to retake the prison by force – that relationship was insufficient to confer immunity on the "decisions made on the operational level" that involved no policy judgment. *Id.* at 331 (citation omitted); *see also Eiseman v. New York*, 70 N.Y.2d 175, 184 (1987) (immunity afforded to "policy determinations" of a discretionary nature); *Haddock v. New York City*, 75

N.Y.2d 478, 484-85 (1990) (discretionary function immunity applies to "expert judgment in policy matters" but not to unthinking violations of the rules established by those policy judgments).

***Third***, at the very least, the district court was right to determine that the existence of discretionary function immunity required a closer analysis of the facts than could be provided on the pleadings or the undisputed summary judgment evidence. SPA 64, 66-67.

> Since most actions of governmental officials involve some exercise of discretion, whether a particular action should be immune . . . is often a close question and depends not so much on the importance of the position held by the public official or its title as on an analysis of its function, and 'the scope of discretion and responsibilities of the office *and all the circumstances* as they reasonably appeared at the time of the action on which liability is sought to be based.'

*Santangelo v. New York*, 474 N.Y.S.2d 995, 999 (App. Div. 1984) (emphasis added). Consideration of such claims of immunity, therefore "requires a proper, and fully developed, factual record." SPA 67.

## III. State Common Law Immunity

### A. Defendants Are Not Entitled To Discretionary Function Immunity

Defendants' claim to state common law discretionary function immunity fails for the same reason as their claim to discretionary function

immunity under the Disaster Act – Plaintiffs' injuries do not arise from the exercise of any protected discretion. Moreover, as described in the Sullivan Plaintiffs' brief, New York common law does not provide immunity to government contractors' negligent or otherwise unlawful performance of their contracts. *See, e.g.*, *Royal Ins. Co. of Am. v. Ru-Val Elec. Corp.*, 918 F. Supp. 647, 659-60 (E.D.N.Y. 1996) (Weinstein, J.); *Turner v. Degnon M'Lean Contracting Co.*, 90 N.Y.S. 948, 950 (App. Div. 1906), *aff'd*, 184 N.Y. 525 (1906). Nor does that immunity extend to proprietary activities such as overseeing a public works project, thereby excluding immunity for the City and Port Authority. *See, e.g.*, *In re World Trade Ctr. Bombing Litig.*, 776 N.Y.S.2d 713, 731-34 (App. Div. 2004); *Riss v. City of N.Y.*, 22 N.Y.2d 579, 581 (Ct. Cl. 1968); *Oeters v. City of N.Y.*, 270 N.Y. 364 (1936).

### B. The Port Authority Does Not Enjoy "Governmental Function" Immunity

Unable to persuade either the district court or its co-defendants, the Port Authority nonetheless maintains in this Court that it is globally immune from suit simply because its conduct involved a "governmental function," even if the other requirements for discretionary function immunity are not met. PA Br. 33-46.

The claim fails because the State of New York long ago abolished "governmental function" immunity by statute. *See* Ct. Cl. Act § 8; N.Y. Unconsol. Law § 7106 ("Although the port authority is engaged in the performance of *governmental functions*, the two states consent to liability on the part of the port authority in such suits.") (emphasis added). Accordingly, the courts have repeatedly rejected the Port Authority's governmental function immunity argument. *See In re World Trade Ctr. Bombing Litig.*, 776 N.Y.S.2d at 728; *Rittenhouse v. A. Star Container Serv.*, Nos. 86-5876, 87-5830, 1988 WL 112898, at *2 (S.D.N.Y. Oct. 17, 1988); *see also, e.g.*, *Jones v. New York*, 33 N.Y.2d 275, 280 (1973) (Claims Act extinguished immunity arising from governmental nature of defendant's activities); *Holmes v. Erie County*, 42 N.Y.S.2d 243, 244-46 (App. Div. 1943) (same).

The governmental nature of an activity is, instead, taken into account in determining the existence of a tort law *duty*, a merits question beyond the scope of this interlocutory appeal. In this regard, when a defendant undertakes governmental functions that have no private analogue, its actions ordinarily are not subject to a tort suit, not because of sovereign immunity, but because of a lack of a tort law duty. *See In re World Trade Ctr. Bombing*

*Litig.*, 776 N.Y.S.2d at 460-61; *see also, e.g.*, *Lauer v. City of N.Y.*, 95 N.Y.2d 95, 99-100 (2000).

While this defense as to purely governmental functions may be loosely referred to as a kind of "tort immunity," *Balsam v. Delma Eng'g Corp.*, 90 N.Y.2d 966, 967 (1997), it is not an aspect of retained sovereign immunity or a true immunity from suit.[49] For example, it does not apply outside the context of common law torts to a statutory claim, where the legislature itself has determined the scope of a governmental entity's duty to the victim. *See Pelaez v. Seide*, 2 N.Y.3d 186, 200-01 (2004); *Riss*, 22 N.Y.2d at 582.

In any case, this merits defense has no merit. As noted above, the Port Authority's conduct in this case did not involve any purely governmental conduct. *See supra*, p. 102. Indeed, a principal basis of the Port Authority's liability in this case arises solely because of its ownership of the worksite. *Id*. Ownership of commercial property is plainly a proprietary function. *See In re World Trade Ctr. Bombing Litig.*, 776 N.Y.S.2d at 731; *see also Hess v.*

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[49] To be sure, some courts have in passing loosely referred to this lack of a tort law duty as an "immunity" from tort liability or, less often, a partial retention of sovereign immunity. *See, e.g.*, PA Br. 34 (citing, *e.g.*, *Dunckley v. State*, 519 N.Y.S.2d 323, 326-27 (Ct. Cl. 1987)). But nothing turned on the label used in these cases.

*Port Auth. Trans-Hudson Corp*., 513 U.S. 30, 45 n.17 (1994) (noting that "facilities, such as the World Trade Center . . . are not typically operated by either States or municipalities").

Moreover, even if the Port Authority's liability arose solely from its governmental functions, it still would be subject to tort liability. While the government generally owes no tort duty for the exercise of its governmental functions, there is an exception when "a special relationship exists between the governmental entity and the injured party." *Japan Airlines Co. v. Port Auth.*, 178 F.3d 103, 111 (2d Cir. 1999) (citing *Kircher v. City of Jameston*, 74 N.Y.2d 251, 255-56 (1989)). The elements of a "special relationship" are as follows:

> (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.

*Cuffy v. City of N.Y.*, 69 N.Y.2d 255, 260 (1987).

As Judge Hellerstein found, A10336-37, this case falls easily within that description of a "special duty": (1) The City and the Port Authority, through promises and actions, made clear to the workers that they would

take responsibility for determining the measures needed to protect those working selflessly on the ground and to ensure that these measures were put into place, *see* City Br. 16-20; (2) Defendants knew of the extraordinary harm that could befall Plaintiffs in the absence of sufficient protection, *id*. at 16; (3) Defendants were obviously in direct contact with Plaintiffs, *id*. at 18-20; and (4) Plaintiffs justifiably relied upon defendants to keep their word, *cf. Japan Airlines*, 178 F.3d at 112; *Henderson v. City of N.Y.*, 576 N.Y.S.2d 562, 564-65 (App. Div. 1991).

In addition, a special relationship arises then a governmental entity "violates a statutory duty enacted for the benefit of a particular class of persons" or when it "assumes positive direction and control in the face of a known, blatant and dangerous safety violation." *Pelaez*, 2 N.Y. at 199-200. Both apply here. *See, e.g.*, Complaint ¶¶ 40-41 (Defendants controlled Ground Zero worksite); *id*. ¶¶ 264-71 (alleging violations of N.Y. Gen. Mun. L. §§ 205-a, 205-e).

## IV. Federal Statutory And Common Law Immunity

The district court also properly denied Defendants' motions for summary judgment under the Stafford Act or so-called "derivative federal

immunity" under *Yearsely v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), and *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

### A. This Court Lacks Jurisdiction To Resolve Defendants' Federal Immunity Claim

As demonstrated in Plaintiffs' Motion to Dismiss, this Court lacks jurisdiction to resolve the federal immunity defenses in an interlocutory appeal. *See* Motion to Dismiss 37-47. We make one additional point here.

Defendants assert that they enjoy the same immunity as would be enjoyed by federal agencies, an immunity which, they assert, is an immunity from suit subject to interlocutory review. Opposition to Motion to Dismiss 20. This argument fails not only because Defendants are *not* entitled to share in the federal government's sovereign immunity, but also because even if they were, that immunity does not provide an immunity from suit subject to interlocutory review. To the contrary, the courts of appeals have uniformly held that the United States' sovereign immunity is *not* an immunity from suit reviewable under the collateral order doctrine. *See Houston County Hosp. v. Blue Cross & Blue Shield*, 481 F.3d 265, 276-80

(5th Cir. 2007);[50] *Alaska v. United States*, 64 F.3d 1352, 1355 (9th Cir. 1995); *Pullman Constr. Indus., Inc. v. United States*, 23 F.3d 1166, 1169 (7th Cir. 1994). As Judge Easterbrook explained in *Pullman Construction*, while the Eleventh Amendment and the Foreign Sovereign Immunities Act provide "an explicit statutory or constitutional guarantee that trial will not occur," 23 F.3d at 1169, Congress, "on behalf of the United States, has surrendered any comparable right not to be a litigant in its own courts," *id*., by pervasively allowing suit against itself and its agencies, generally subject only to certain limitations with respect to the scope of relief available, *id*. at 1168.

While the Government disagreed in *Pullman Construction*, the court fairly observed:

> If this is all so clear, one wonders why, in the entire existence of the United States, the federal government has never before taken an interlocutory appeal to assert sovereign immunity. Our case appears to be the first. Before today the United States has occasionally sought and received permission to take an interlocutory appeal on this question under 28 U.S.C. § 1292(b)(2), a puzzling step if the federal government could appeal of right.

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[50] Notably, the private insurer in *Houston Community Hospital* made essentially the same claim to derivative federal immunity as the Port Authority makes in its brief here. *Compare* PA Br. 47-53 *with* 481 F.3d at 269-76.

23 F.3d at 1168.

The same observation is appropriate here: Defendants have not pointed to any case in the history of the nation permitting an interlocutory appeal as of right from the denial of immunity under the Stafford Act, the parallel "discretionary function" exception to the FTCA, or any common law "derivative immunity" claim under *Yearsley* or *Boyle*. Nor could Plaintiffs find any. There is no cause for this Court to be the first and to create a circuit split with the Fifth, Seventh and Ninth Circuits.

### B. Defendants Are Not Immune Under The Stafford Act

While Defendants continue to assert immunity "pursuant to the Stafford Act," Br. 73-74, they have abandoned any attempt to show that they qualify for it under the language of the statute. The title – "Nonliability of Federal Government" – forecasts what the text of the provision makes clear:

> The *Federal Government* shall not be liable for any claim based upon the exercise or performance of or the failure to exercise of perform a discretionary function or duty on the part of *a Federal agency* or any *employee of the Federal Government* in carrying out the provisions of this chapter.

42 U.S.C. § 5148 (emphasis added). Defendants are not the "Federal Government," a "Federal agency" or the "employee[s] of the Federal Government."

Defendants insist that this must have been an oversight, given how important private participation is to federal disaster relief efforts. Br. 81-82. They thus urge this Court to rewrite the provision to conform with its purported purposes. *Id*. But this Court has no more authority to rewrite a federal statute than it does to rewrite the Disaster Act. Moreover, as in the case of the Disaster Act, Congress's limitation on the immunity it extended was plainly intentional. The Stafford Act expressly contemplates cooperation between federal agencies and state and local governments, particularly with respect to debris removal. *See* 42 U.S.C. §§ 5149, 5173. The statute likewise expressly authorizes the use of federal disaster funds to contract with private parties for debris clearance. 42 U.S.C. § 5150. At the same time, however, the statute clearly does *not* contemplate that federal involvement in debris clearance will extinguish the tort law rights of citizens injured during the process. The statute prohibits the President from making grants for debris clearance on private property until "the affected State or local government . . . shall first agree to indemnify the Federal Government

against any claim arising from such removal." *Id*. § 5173(b). No such indemnity would be necessary if federal participation itself extinguished the prospect of liability for all involved in the debris removal process.

Rather than provide immunity to its disaster assistance partners, the Stafford Act provides funds to allow those partners to purchase liability insurance. *See* 42 U.S.C. § 5173(b); A 5680. As described above, that is precisely what happened in this case. FEMA agreed from the outset to provide funds to cover the cost of liability insurance for debris removal at Ground Zero. A 10206. When Defendants were unable to obtain that insurance on the private market, FEMA provided $1 billion to establish the Captive Insurance fund from which any judgment in this case will be paid. Doing so provides protection to *all* of the emergency responders, including not only the government and private contractors, but also the men and women who risk their lives and their health doing the actual recovery work on the ground. There is no basis to think that Congress cared deeply about the tort liability of corporations and local governments, but not a wit about

the ordinary citizens injured or killed by reckless conduct during a disaster response.[51]

It is thus predictable that Defendants are unable to cite to a single case in the 30-year history of this statute in which Stafford Act immunity has been applied to a local government or private contractor.

Finally, even if the Stafford Act extended to Defendants, it would do them no good. The Stafford Act provides precisely the same "discretionary function" immunity afforded under the Disaster Act. And, as discussed above, Defendants do not qualify for discretionary function immunity, whatever its source.

### C. Defendants Are Not Entitled To "Derivative" Federal Immunity

In an attempt to evade the plain limitations of the Stafford Act's language, Defendants assert to be entitled to "derivative federal immunity," the contours of which have nothing to do with the language of the statute. That attempt fails for many reasons.

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[51] Congress's determination *not* to immunize its disaster assistance partners is further demonstrated by its refusal, in the wake of Hurricane Katrina, to amend the Stafford Act to immunize the work of disaster response contractors. *See supra*, p. 67.

### *1.* Yearsley *And Its Progeny Do Not Apply To Defendants Acting Under The "Leadership" Of A Federal Agency*

Defendants assert that under *Yearsely* and *Boyle*, "a private entity may share in the government's immunity where it is (1) working under the direction of the government; and (2) the actions complained of are generally within the scope of the government's directives." Br. 74-75. Defendants misstate the law and do not qualify for immunity even under the standard they assert.

In *Yearsley*, the defendants caused erosion to the plaintiff's land by running steamship paddles to keep water moving through an adjacent channel. The work was done "pursuant to a contract with the United States Government, and under the direction of the Secretary of War and the supervision of the Chief of Engineers of the United States." 309 U.S. at 19. There was no suggestion that the work was negligently conducted, or that the erosion was caused by anything other than the defendant's compliance with the Government's specific instructions on how to conduct the operation. The Supreme Court held that, under such circumstances, "there is be liability on the part of the contractor for executing [the Government's] will." *Id.* at 21.

Whatever the precise scope or basis of *Yearsley* at the time, the Supreme Court established the modern government contractor defense in its exhaustive opinion in *Boyle*. The plaintiff in *Boyle* was killed due to the allegedly negligent design of a military helicopter escape hatch. After reviewing *Yearsley*, this Court held that federal pre-emption principles required displacement of state tort duties where there was a "significant conflict" between state law and federal interests. 487 U.S. at 507. The Court made clear that such conflict does not arise simply because a state imposes tort liability upon a defendant for work done pursuant to a government contract. *Id*. at 509. For example, the Court explained, there is no conflict when a contractor is held liable for conduct that itself violated its contract with the Government. *Id*. at 508-09 (citing *Miree v. DeKalb Co.*, 433 U.S. 25 (1977)). Nor did federal law supply a defense when state law provided duties that supplemented, rather than conflicted with, the obligations imposed by the federal contract. 487 U.S. at 509. Instead, the Court held, federal law pre-empts state tort liability only where the contractor can show that (1) "the United States approved reasonably precise specifications" for the feature leading to the plaintiff's injuries; (2) "the equipment conformed to those specifications"; and (3) "the supplier warned

the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id*. at 512.

Defendants are not entitled to immunity under this line of cases, for several reasons.

***First***, a necessary element of the *Yearsley/Boyle* defense is a government contract. Defendants cite no precedent applying the government contractor defense in the absence of a contract, much less on the basis of anything as amorphous a federal "leadership" of an activity. And for good reason: there are innumerable ways in which federal officials may influence private behavior, ranging from direct regulation, to threats of enforcement action, to warnings, to strong suggestions, to off-hand advice given over the telephone. Heretofore, federal law has drawn an administrable and sensible bright line: federal pre-emption requires a federal contract or other equally concrete mode of compulsion, like a regulation or a statute.[52] Such was the case in every decision Defendants

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[52] The Port Authority points to another line of cases treated certain private defendants as federal agents when they perform a traditional governmental function pursuant to an express delegation. PA Br. 46-53. In those cases, the delegation is ordinary reflected in a contract or in the terms of a federal statute or regulation. *See, e.g.*, *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 72 (2d Cir. 1998) (discussing immunity for Medicare

cite in support of their claim of immunity. *See* City Br. 74; *Boyle*, 487 U.S. at 502; *Yearsley*, 309 U.S. at 19; *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400, 406 (D.S.C. 1994); *Dolphen Gardens v. United States*, 243 F.Supp. 824, 825 (D. Conn. 1965).

The requirement of a contract ensures both that the defendants' action was, in fact, *compelled* by the federal government and that the federal decision was undertaken at a level of formality and authority sufficient to invoke a federal interest great enough to justify displacement of state law. As this Court has recognized, "[s]tripped to its essentials," the government contractor defense is "to claim, 'The Government made me do it.'" *In re Joint E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.2d 626, 632 (2d Cir. 1990). In the absence of the compulsion of a government contract there is no conflict between state law and federal interests sufficient to invoke pre-emption. *See id*. at 630 (defense "mandates that the federal duties be *imposed* on the contractor"). Thus, the Supreme Court has explained that the defense is only available when "the government has *directed a contractor* to do the very

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fiscal intermediaries acting "within the scope of their authority under the Medicare Act").

thing that is the subject of the claim." *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001) (emphasis added).

To allow a defense based on mere "leadership" would lead to intractable line-drawing problems. In this case, for example, while the district court casually referred to federal agencies as having "leadership" roles in some areas, that label conceals an extremely complex reality on the ground that changed over time. *See* Statement Section II(B), *supra*. Deciding what particular relationship constitutes "leadership" of a sort sufficient to warrant immunity would be no easy task.

More importantly, accepting Defendants' novel and expansive view of federal immunity would create a substantial incursion into state sovereignty. New York has carefully balanced the need to encourage cooperative disaster responses against the need to protect the public, allowing only the Governor to suspend application of state law and providing civil immunity in only certain limited circumstances. Under Defendants' view, however, all of those decisions can be cast aside by any federal official who recommends a course of action in conflict with state law (even, it seems, if the federal official had no such intention or was unaware of the requirements of state

law). Surely Congress did not intend the Stafford Act to operate such a massive displacement of state prerogatives.

Moreover, permitting broad immunity for those who follow federal "leadership" would, in fact, risk deterring federal assistance efforts. Federal officials would undoubtedly be reluctant to take action that might later be taken to displace a defendant's responsibility for complying with important state and federal safety rules.

***Second,*** even if a contract were not a prerequisite for the government contractor defense, the degree of control and compulsion in this case does not nearly approach that sufficient to warrant displacement of state law.

In this case, Defendants cannot assert that the federal government "directed" them to do "the very thing that is the subject of the claim." *Malesko*, 534 U.S. at 74 n.6. The federal government did not make Defendants to do *anything at all*. Nothing in the Stafford Act authorizes federal officials to take control of a disaster site or to issue orders to anyone. To the contrary, the Act envisions voluntary cooperation between the federal government and state and local officials. *See, e.g.*, 42 U.S.C. § 5143(b)(3) (President may appoint federal coordinating officer who may "*coordinate* the administration of relief, including activities of the State and local

governments . . . which *agree* to operate under his advice or direction") (emphasis added). Indeed, the federal government may not even participate in debris removal operations unless the local government agrees to cooperate and to indemnify the federal government. *Id*. § 5173(b). In this case, the district court found that the record "presents a picture of cooperation and collaboration, with federal agencies providing assistance . . . . and expressly declining to assume an enforcement role, deferring instead to the City agencies and the Primary Contractors." SPA 80. Accordingly, OSHA "work[ed] in an advisory capacity, providing assistance only as needed and requested by the City." *Id*. at 77. It "expressly declined to assume an enforcement role," and instead, reported violations to Defendants for remediation. *Id*. at 78; *see also* A 3671 (WTC Partnership Agreement). Likewise, the EPA "expressly acknowledged that it lacked the authority to enforce worker health and safety policies for non-EPA employees." SPA 79. And while the Army Corps of Engineers coordinated the work at the Fresh Kills landfill, it did so not by the force if its own coercive authority but because the City *asked* it to provide that service. *Id*. at 76. And, in any case, "the City continued to exercise an independent degree of supervisory control

over operations," including the creation of the health and safety plan applicable to the site. *Id*.

This is precisely the same pattern of joint state, local and federal operations that have characterized disaster responses for decades. It is telling that despite this long history, Defendants can point to exactly zero cases ever extending federal immunity to non-federal participants in a disaster response.

***Third,*** even if Defendants would be immune for following a federal official's *advice*, the defense would still fail in this case, for Plaintiff's injuries arise precisely because Defendants' failed to follow "the direction of the government," Br. 75, which was to fully comply with all applicable health and safety laws and regulations. *See supra*, p. 6; *Miree*, 433 U.S. at 30 (no federal immunity against third party beneficiary suit seeking compensation for conduct that violated directives in federal contract). Defendants do not claim that the federal agencies advised them, or gave them license, to violate any federal or state safety laws. Moreover, even if federal agencies had advised Defendants to violate state and federal law, that advice would have been entirely unauthorized and outside of the scope of the agency's own discretionary function immunity under the Stafford Act.

*See supra*, pp. 93-98. Defendants cannot rightly claim to have "derivative immunity" for conduct that enjoys no federal immunity in the first place.

### *2. Federal Law Does Not Immunize Defendants Who Delegate Non-Delegable Duties To Federal Officials*

Defendants also claim that they should be immune for the federal government's failures in the areas where federal agencies volunteered to take over duties that Defendants otherwise would have had to perform for themselves. For example, they do not claim that OSHA directed them to withhold respirators or training from the workers; instead, they say that OSHA volunteered be in charge of distributing respirators and, therefore, Defendants should not be liable for OSHA's inadequate performance of that assignment.

This claim bears little resemblance to the federal contractor immunity doctrine Defendants invoke. The federal immunity argument is that "the federal government *made* me do it,"[53] not that "the federal government *helped* me do it" or "the federal government *did it for me*." Federal immunity applies when the defendant can claim to be, in some sense, the federal government's agent; not when a federal official acts as an agent for

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[53] *In re Joint E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.2d at 632.

the defendant. *See, e.g.*, *Densberger v. United Techs. Corp.*, 297 F.3d 66, 75 (2d Cir. 2002) ("The affirmative defense applies only if the government exercised significant *control over* the relevant *actions of the contractor*.") (emphasis added).

Defendants' claim that they should not be liable for failures they themselves did not commit goes to the merits of Plaintiffs' state law claims, not to any entitlement to federal immunity. In this case, state law placed a *non-delegable* duty upon Defendants to ensure that workers on the site were provided adequate safety, in accordance with state and federal safety rules and regulations. *See* SPA 93. There is no question that Defendants would be liable if they had delegated that responsibility to a subcontractor, or to the Red Cross, and the duty had been left unfilled. There is no reason for federal law to displace the state's decision to make that duty non-delegable simply because the duty has been delegated to a federal official or agency. Nothing in federal law required the City to accept the federal agencies' offers of assistance. Nor did anything prevent Defendants from monitoring the performance of federal personnel and, in the event of deficient performance, stepping in to supplement the federal effort, taking over, or requesting improved performance from the federal agency.

The federal government has no interest in relieving these defendants of their obligation to engage in that oversight, much less a sufficient interest to warrant pre-emption. And this Court has no cause to invent a previously unheard-of immunity to supplement or displace the immunity Congress has already chosen to extend under the Stafford Act when the federal government cooperates in responding to disasters.

### *3. In Any Event, The Degree Of Federal Involvement Is A Matter Of Dispute In The Summary Judgment Record*

Regardless of the precise level of federal involvement needed to invoke federal immunity, the district court was plainly correct in concluding that "the record is not sufficiently clear to enable the court to demark the boundary between federally instructed discretionary decisions, and those made by the various Defendants." SPA 80. That determination is not subject to dispute in this interlocutory appeal and is, in any case, manifestly correct. *See* SPA 75-79; *supra*, p. 16-21; *Johnson v. Jones*, 515 U.S. at 316-17.

### D. The Port Authority Is Not Entitled To Immunity For Engaging In Purportedly Delegated Federal Governmental Functions

The Port Authority makes the fanciful claim (not joined by any of the other defendants) that it is entitled to immunity as an actual federal officer because it was exercising delegated federal functions. *See* PA Br. 47-53. To substantiate this claim of federal delegation, the Port Authority points to two facts: (1) it took part in the disaster response which was the subject of a federal disaster response plan; and (2) the President purportedly promised to pay the cost of debris removal, which the Port Authority interprets to include the cost of any tort liability arising from Defendants' tortious performance. PA Br. 52-53. As the district court rightly concluded, whatever the proper scope of the federal officer immunity doctrine, the Port Authority's conduct falls far outside its outer perimeter. SPA 82. *Cf. Watson v. Philip Morris Cos.*, 127 S. Ct. 2301, 2308-10 (2007) (rejecting similarly far-fetched claim of delegation).

The Port Authority can point to nothing even suggesting that it was officially delegated any actual authority or duties by the federal government. To be sure, the Stafford Act authorizes federal agencies to cooperate with local governments and private entities in disaster responses. But that

cooperation does not federalize the response or convert everyone acting under the broad aegis of a federal disaster plan a federal officer. Nor does everyone responding to a disaster undertake a delegated federal power. To the contrary, the statute makes clear that disaster response, and debris clearance in particular, is the obligation of state and local governments, with federal agencies participating only upon the request and consent of the state and local entities. *See* 42 U.S.C. §§ 5143(b)(3), 5149(a), 5170, 5173(b).

Nor does immunity flow from the alleged the fact that the President promised to pay the Port Authority's liability costs.[54] While a statutory or

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[54] This factual claim is not supported in the record and is highly implausible, particularly in light of the fact that Congress enacted special legislation to provide for liability insurance for this case and did not include the Port Authority (whose liability was already capped to the amount of its insurance under ATSSSA § 408(a)(1)). Even if the President promised to pay for the cost of the clean up, there is no basis to conclude from that generalized promise an agreement to indemnify participants for liability incurred as a result of their own wrongful conduct.

Moreover, the Port Authority's citation to 44 C.F.R. § 206.223(e), *see* Br. 53, is completely inapt. That provision says that FEMA will not pay for "damages caused by [an applicant's] own negligence" but "*may*" extend to damage caused by "negligence by another party" (emphasis added). The provision plainly addresses the cost of repairing *physical* damage, not paying legal damages awards; only says that FEMA has the authority, not the obligation, to pay for such "damages"; and has no bearing here, whether the Port Authority has been sued for its own negligence, not "negligence by another party."

regulatory indemnity provision is one indicia of delegation of a federal function, *see Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 72 (2d Cir. 1998), such a promise is wholly insufficient to confer immunity. To the contrary, there would be no purpose of promising indemnification if, by doing so, the prospect of liability was thereby extinguished.

Finally, and at any rate, even if the Port Authority were entitled to federal officer immunity, that immunity extends only to the officer's discretionary functions, *see Pani*, 152 F.3d at 72, and defendants have pointed to nothing that provided them discretion to violate state and federal safety laws.

## CONCLUSION

For the reasons stated herein, the judgment should be affirmed.

Respectfully submitted,

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Dated: July 23, 2007

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(B), I hereby certify that this brief is printed in proportionally spaced, 14-point Times New Roman font. As measured by Microsoft Word, the brief contains 27,135 words, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief is within the expanded word limited allowed by this Court's order of May 14, 2007, allowing parties to file brief of up to 28,0000 words.

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Dated: July 23, 2007.

## PROOF OF SERVICE

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