

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Docket No.: 21 MC 100 (AKH)

IN RE: WORLD TRADE CENTER DISASTER SITE
LITIGATION

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**PLAINTIFFS' MEMORANDUM RESPONDING TO THE COURT'S
SUA SPONTE ORDER OF AUGUST 4, 2010**

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PRELIMINARY STATEMENT

Plaintiffs respectfully offer the within Memorandum requested *sua sponte* by this Court in its August 4, 2010 Order¹ addressing the question of whether the case expense of borrowing funds to finance this litigation, which are permissible under New York law, are “reasonable[] and appropriate[]”. Two expert affidavits are annexed to the Declaration of Denise A. Rubin of August 18, 2010. The first is that of Professor Anthony Sebok of Cardozo Law School and the second is proffered by Professor W. Bradley Wendel of Cornell Law School. Professor Sebok is an expert on the financing of litigation and Professor Wendel is an expert in professional responsibility and the law governing lawyers. Their affidavits² are attached as Exhibits “A” and “B”, respectively, to the Rubin Declaration. Their Affidavits establish that it is fair, reasonable and necessary for this office, as for any plaintiffs’ counsel in a litigation of this scope, to finance a case of this magnitude and include a portion of the charges for litigation financing interest as a litigation disbursement. These affidavits show that no unethical conduct by the law firm has occurred in connection with these expenses.

We also hope to clarify for this Court that the interest charge at issue here is unquestionably ethical and an appropriate expense to be charged to the clients. Indeed, it was *this Court* that set the standard of review when it issued its Order of June 25, 2010, establishing

¹ A further filing addressing this Court’s *sua sponte* order of August 17, 2010 will be served and filed separately.

² Along with the Professors’ curricula vitae and a paper (Garber) cited in Professor Sebok’s Affidavit.

the “WTC Allocation Neutral Procedure.” Moreover, this Court should understand that without the litigation financing at issue here, this litigation and the settlement reached with the City of New York and its Contractors, could not have been achieved. This firm did not front the more than thirty million dollars of litigation expense over seven (7) plus years from its own coffers. Even if the firm *had* fronted the money, however, the applicable laws, ethics rules and opinions would still have allowed the firm to charge the clients interest for the time value and use of the funds. The alternative would have been to require the clients, most of whom are uniformed civil servants or construction workers, to make a payment of the costs from their own monies. This Court surely understands that would not have been possible for men and women of modest means.

As noted *supra*, this Court has already approved and the parties have negotiated protocols for addressing the review of proper costs allocated to the plaintiffs as part of their settlement.

Point III of Court’s June 25, 2010 order, states, in relevant part:

- ...the Court has *delegated* the function of review and audit to the Allocation Neutral and will not itself review the entire Case Expense file and corresponding Statement per claimant. Allowable expenses will be those expenses that are:
- a. reasonably-related to the advancement of any plaintiff’s case;
 - b. customarily expended on behalf of plaintiffs in personal injury cases; and,
 - c. charged to plaintiffs at no greater rate than those customarily charged by outside vendors for such services.

(Emphasis added). Professor Sebok’s and Professor Wendel’s Affidavits establish beyond a shadow of a doubt that each of these standards are met here. This litigation could not have been maintained or effectively litigated, for any client, without the financing that was obtained.

Notably, as of the date of this writing, of the releases received thus far from our clients, all have accepted this expense included in their retainer agreement and have specifically signed off on

this recoupment. *See*, Exhibit “G”, Redacted Disbursement Sheet Release.³ In fact, in response to an e-mailed statement sent to the clients explaining the reasons and legal support for including the litigation financing interest charges to the clients as one of the disbursements, we received the following email message from one of our clients on the morning of August 24, 2010:

Mr Worby, Groner, Edelman and Mr Bern :

My fees are about \$2800.00-2900.00 and I think that is quite fare [sic]. Your firm obtained almost all of my documents for me over the past 9 years. For that I am grateful [sic]. Considering all the medical reports, tests, xrays, ct scans \$ 2800.00 is very reasonable.

Thank for fighting on my behalf. I know that no matter how much each one of us gets it will never be enough. We will never get back that day in September.

[Name Redacted]
NYPD Retired

As this Court is aware, these are not simple, run-of-the-mill personal injury cases, as the causation issues and legal issues like insurance coverage and claimed immunities from suit resulting in at least two appeals thus far have demonstrated. These cases required not only extensive and untraditional pleadings, motions and appeals but also the appointment (and cost) of special masters, the creation of an extensive computer database for the court’s use and extensive lobbying at the state and federal levels. In mass tort cases, there is a general custom for financing costs either through attorneys personally advancing the costs or by spreading the burden among several law firms. The latter was not possible here. No other firm was willing to take on the risk of these cases or their expense. In most large mass-tort litigations, these costs

³ In relevant part, the Client Disbursement Sheet release language includes the following:

4.1. If the firm borrowed money from any lending institution to finance the cost of the client’s case, the amounts advanced by this firm to pay the cost of prosecuting or defending a claim or action or otherwise protecting or promoting the client’s interest will bear interest at the Bank’s Rate effective on the date of each advance and never higher than the lawful rate.

... I have read this final disbursement statement which has been explained to me. I understand and approve of the charges incurred and the payment of all liens. My questions regarding disbursements have been answered to my satisfaction.

would have been borne by a plaintiffs' steering committee or several law firms functioning as lead counsel. Notwithstanding the Sullivan firm having been named as "Co-Liaison Counsel" in this matter, it is our office that has absorbed the lion's share of these massive litigation expenses and the work associated with the litigation.⁴

Indeed, even those firms that did represent clients – including Plaintiffs' Co-Liaison Counsel Sullivan Papain Block McGrath & Cannavo, P.C., either did not have the ability or refused to contribute their share of the costs. Even where firms share the costs, the custom in mass tort cases is to borrow money where necessary, at the best available interest rates and to pass along the interest charges to clients as one of the expenses of litigation. *See* Sebok Aff., ¶¶ 6-10. We obtained the financing at the best rates available in the market for litigation financing of this unique and difficult litigation and the clients are not being charged any premium on the interest or surcharge by this office. At the end of the day, what a client pays is actually much less than what was paid over all.

Finally, we will address why the borrowing of monies was necessary to bring this matter to a successful conclusion against a billion-dollar defense fund that placed no limits on defense spending.

Ultimately, without these funds and the recoupment thereof on the pending Amended Settlement Process Agreement with the City of New York and its Contractors remains in jeopardy. The repayment of this interest is made even more significant since only the plaintiffs' lawyers agreed to voluntarily reduce their fees by 8.3333%, a value of approximately \$57 million. *No other vendor or lawyer agreed to such a reduction for the plaintiffs' benefit and all,*

⁴ Indeed, most of the Papain firm's clients were solicited only after they learned a settlement was imminent. Little-to-no work was done on those cases other than the solicitation and filing of the claim. *See* Exhibit "F", Sullivan September 2009 new case solicitation letter.

including defense counsel and this Court's appointed Special Masters and vendors, received 100% remuneration for their time and expenses without one penny being waived or reduced.

ARGUMENT

POINT I.

NEW YORK STATE ETHICS RULES PERMIT THESE CHARGES TO CLIENTS' ACCOUNTS.

The New York Rules of Professional Conduct, which are applicable to attorneys in this Court under Local Rule 1.5(b)(5), require that lawyers not make an agreement for, charge, or collect an excessive fee or expense. New York Rules of Professional Conduct, Rule 1.5(a), McKinney's Cons. Laws of N.Y. (amended through April, 2010) (hereinafter "New York Rule xx"). This is similar to the rule in effect in most other jurisdictions requiring that a fee or expense be reasonable. The most important factor in assessing reasonableness is whether a fee or disbursement charged to a client is within the range customarily charged in the locality for similar services. *See* Restatement (Third) of the Law Governing Lawyers § 34, cmt. c (hereinafter "Restatement § xx").

The general practice for all lawyers, whether billing on an hourly or a contingency fee basis, is to charge to clients the actual amount of disbursements for the expenses of litigation. While adding a surcharge to these disbursements would be improper, as is billing clients for general office overhead and administrative expenses, it is well settled that a straight pass-through of disbursements is reasonable. *See* ABA Committee on Ethics and Professional Responsibility Formal Opinion 93-379 (1993). In this case, the firm is charging the plaintiffs only for interest that is attributable to loans taken out to finance this specific litigation. These loans have been personally guaranteed by the firm's partners. There is over four million dollars (\$4 million) in additional interest owed that does not pertain to reimbursable case spending, *i.e.*, those costs for office administration and overhead such as rent, salaries and leases on equipment, other

unrecoverable case spending and case disbursements on rejected cases. Those costs cannot and will not be passed through to our clients. Thus, of the total interest charges that total more than \$11 million, these client charges will only recoup approximately \$6.128 million.⁵

As Professor Wendel states in his Affidavit (Exhibit “B” to Rubin Dec.), lawyers are permitted to incur expenses in the course of representing clients and pass those charges through to clients. New York Rule 1.5(a) requires that these expenses be reasonable, but as long as they are, they can be billed to clients in addition to the attorneys’ fees. *See* Wendel Aff., Exhibit “B” at ¶¶ 6-8. In general, law firms charge clients the actual amount of disbursements for things like expert witnesses and consultants, contract attorneys hired for a particular case, out-of-town travel, long-distance telephone charges, and the like. *See* Restatement § 38, cmt. e; *see also* ABA/BNA Lawyers’ Manual on Professional Conduct ¶ 41:110 (2005 Supp.) (citing numerous state bar ethics opinions).

It is not permissible to surcharge clients for these disbursements, but *it is ethically proper to pass through the actual amount of expenses*. It is also not permissible to charge for expenditures that reflect general office overhead and administrative expenses. As discussed below, the firm has carefully segregated case-specific expenses and general overhead, and has sought to recover only the former. Regarding interest expenses, it is well established in New York (as well as nationally) that lawyers may charge a client interest on funds borrowed to finance the costs of specific litigation. *See* Wendel Aff., Exhibit “B”, at ¶ 11; New York State Bar Association Opinion 754 (2002); New York City Bar Formal Op. 1997-1 (1997); *see also* *Chittenden v. State Farm Mut. Auto. Ins. Co.*, 788 So.2d 1140, 1150 (La. 2001) (citing state bar

⁵ This represents .0086 % of the total recovered for these plaintiffs to date. Of the **9817** plaintiffs we represented on the Eligible Plaintiffs List for the Amended Settlement Process Agreement (“Amended SPA”), this is, on average, \$631.75 per person. On a pro rata basis, a Tier One claimant would pay an average of **\$78.23**; a Tier Two claimant would pay an average of **\$173.05**; a Tier Three claimant would pay an average of **\$256.39**; and a Tier Four claimant would pay an average **\$2314.51**.

ethics opinions from Florida, Maryland, Illinois and Virginia). As with all expenses, the test for permissibility is whether the amount charged is reasonable under the circumstances.

It is essential under New York law that the basis for calculating an attorney's fee be disclosed to the client at the outset of the representation. *See* Rule 1.5(b); 22 N.Y.C.R.R. § 1215.21(b). As Professor Wendel states, the firm's standard retainer agreement fully complies with these disclosure requirements. Wendel Aff., Exhibit "B" at ¶ 16. The firm's clients were apprised in advance that the firm would bill them for expenses of the litigation, on a pro rata basis and that these expenses might include interest on funds borrowed to finance the litigation. The disclosure requirements are stringent, but as long as a lawyer's disclosure is sufficient, there is no requirement that a lawyer obtain client consent to every disbursement made on the client's behalf.⁶ Wendel Aff., Exhibit "B" at ¶ 12. Thus, the firm complied with all the ethical obligations it owed to the plaintiffs in connection with these interest expenses. (In addition to Prof. Wendel's Affidavit on this point, it is worth noting that our disbursement sheets, along with the language relating to financing interest, was vetted by this Court's appointed ethics Special Master, Professor Roy Simon.)

Given that passing through interest charges is permissible *in principle*, the question is whether the amount of the charges, both the amount borrowed and the interest rate, is customary and reasonable *in this case*. As Prof. Sebok avers, law firms representing plaintiffs in complex

⁶ The Louisiana Supreme Court stressed the importance of notice to the client that the attorney may incur borrowing costs that would be paid by the client in the retainer agreement:

In the present case, it is eminently clear that Chittenden authorized Carimi in the written retainer agreement to secure a loan at his discretion to "[pay] the costs and expenses necessary to prosecute" his tort claim. Thus, it is clear that the various loans that Carimi made at the bank were made with Chittenden's authorization. Moreover, in accordance with RPC Rule 1.4 (Communication), Chittenden was fully informed through the written retainer agreement that Carimi would utilize loans needed to prosecute Chittenden's tort claim, and thus Carimi kept Chittenden properly informed of this likelihood.

Chittenden, 788 So.2d at 1148 (footnotes omitted). In this case each client was provided with exactly the same notice as endorsed by the *Chittenden* court.

tort litigation customarily borrow funds from lending institutions to pay the necessary costs of litigation. Sebok Aff., Exhibit "A" at ¶¶ 6-10. They then charge their clients the interest charged to them by the institution. Professor Sebok further avers that it is reasonable for law firms to borrow money in this manner. Sebok Aff., Exhibit "A" at ¶¶ 6-7. Professor Sebok avers that the interest rates charged by the lending institutions is reasonable. Sebok Aff., Exhibit "A" at ¶¶ 17-18; *see also* Table of Actual Interest Charges Incurred, annexed to the Rubin Declaration at Exhibit "C". Prof. Sebok's affidavit compares the rate of interest obtained on behalf of the clients in this case to the rate of return that third-party investors would demand from the clients, if non-recourse funding were available (which is unlikely). Even taking into account the uniqueness of this case, the 14% - 18% interest charged by the financial institutions is within the range approved by other courts who have reviewed the interest charged to clients as costs. See *Chittenden*, 788 So.2d 1140 (12% interest rate was reasonable) and *Fitch v. Toys "R" Us - Del., Inc.*, 876 So. 2d 185 (La. App. 2004) (18% interest rate was reasonable).

The amount borrowed is reasonable in light of the enormous litigation expenses incurred in this case. These costs include the hourly fees and expenses generated by the Special Masters; the fees for TCDI creating and maintaining a database for the Court's use; the cost of filing an individual complaint for each of the 10,000-plus plaintiffs rather than permitting multiple plaintiffs on a complaint⁷; the cost for obtaining and reproduction of each plaintiff's medical records to be produced to the defendants. Normally, a plaintiff need only supply the defendants in a litigation with a HIPAA-compliant authorization and it is the defendant's counsel who is responsible for processing that authorization, paying the health-care providers for the reproduction costs of obtaining the actual record(s). Notwithstanding the deep pockets of the

⁷ For this filing fee alone on 10,000 clients, the firm incurred charges of roughly \$3.5 million dollars.

defendants' many insurers and notwithstanding the usual custom and practice in New York personal injury, labor law and other tort litigation, this Court has required Plaintiffs' Liaison Counsel to cover all of these costs. Ultimately, however, the Court imposed these burdens *on the parties*. It should not be borne by the parties' attorneys, particularly where, as here, plaintiffs' counsel have already "voluntarily" foregone a good portion of their contractually agreed upon contingency fees.

One assumption that seems to form the basis of the Court's inquiry into the permissibility and reasonableness of the decision by the lawyers in this case to secure loans on behalf of their thousands of clients and then charge the clients the interest associated with this cost is that the "common" practice in mass torts is for a law firm to advance all funds for costs and expenses, individual or shared and then recoup the "time value" of the funds advanced in their legal fees. However, the historical truth is just the opposite. As recently as the *Agent Orange* litigation in the mid-1980's the idea that plaintiffs' lawyers could be or should be compensated for acting as "banks" was radical and controversial. See Johnson, Vincent R., *The Second Circuit Review -- 1986-1987 Term: Ethics: Ethical Limitations On Creative Financing Of Mass Tort Class Actions*. 54 BROOKLYN L. REV. 539 (1988).

In fact, although it may be hard for contemporary observers to believe, there were serious arguments presented to the Second Circuit in *Agent Orange* that the Court should prohibit law firms from joining in mass tort litigation solely in order to provide funds for costs and expenses, since to permit lawyers to act as "bankers" "would diminish participating attorneys' loyalty to their clients by reason of conferring upon some attorneys an unjustified stake in the litigation." *Ibid* at 561. In the opinion of one commentator, the reason Judge Weinstein permitted some lawyers to become their clients' "bankers" was precisely because of the novelty of the world of

mass torts: “the mass tort class action attorney has fewer avenues for passing through to clients the cost of advancing expenses. It is unlikely that the opportunity or borrowing cost can be directly transferred to the named plaintiffs via an interest provision in the retainer agreement, for presumably few individuals, each with a relatively limited stake in the class litigation, will agree to accept such liability.” *Ibid.* at 570-71 (footnotes omitted). Whether or not this was a sufficient reason is a moot point today. What is important for this case is that the borrowing provisions clearly set out in the retainer agreements in this case are not only ethically permissible and common, they reflect a conservative approach to the funding of mass torts which many serious commentators and jurists believed protect the attorney-client relationship.

Further, the clients will only be charged with 75% of the interest expense incurred on their behalf. This is because the interest, along with other case disbursements, is deducted from the client’s *gross* settlement amount, *before the deduction of attorneys’ fees*. Thus, just as the attorneys are paid 25% of the net settlement amount to the plaintiff, the attorneys also bear 25% of the reduction in that net settlement amount in the form of a consequent reduction of their attorneys’ fee. We note also that no interest is charged until the cost is actually incurred.

Even aside from the unique and unusual costs associated with the *In re: World Trade Center Disaster Site Litigation*, as Plaintiffs’ Liaison Counsel, we have incurred *massive* costs for the common benefit of all of the plaintiffs in this litigation. In the five-and-a-half year long period from January of 2004 through May 20, 2010, the firm incurred \$27,653,228.00 in case disbursements.

These disbursements include expert witness fees for research and review of file materials, medical records, scientific studies and other relevant materials (including economists, environmental experts, insurance experts, and legal ethics experts and medical experts in

multiple areas of medical practice). Other common benefit costs incurred include the printing costs for two Appeals to the United States Court of Appeals for the Second Circuit (the first opposing defendants' appeal from this Court's decision on the immunity motions for summary judgment and the second as Intervenor/Appellees on the appeal from this Court's decision on the London Insurers' obligation to pay for defense costs). We have also incurred costs for outside legal consultants in various areas of practice including ethics, constitutional law, settlement and claims administration; (as noted above) the monthly bills for Special Masters Twerski and Henderson⁸ and the bills generated by TCDI⁹ for the creation and maintenance of the Court's database system. We have also incurred fees paid to lobbyists for work done and legislation drafted and supported on the plaintiffs' behalf in the form of Jimmy Nolan's Law and the Zadroga Bill. All of these expenses inured to the direct benefit of all of the plaintiffs – in the case of Jimmy Nolan's Law, permitting hundreds of claimants who were otherwise time barred through no fault of their own to file timely claims against the City. None of these fees paid to lobbyists or to the other vendors constituted administrative or overhead costs. Indeed, contrary to the Sullivan firm's position that all fees to legal experts should be absorbed as attorneys' fees out of our 25% contingency fee, there is ample case law to support the contention that attorneys can be qualified under F.R.E. 702 and *Daubert* to testify as experts on a panoply of issues, including the propriety of contingency fee arrangements. *See, e.g., Duininck Bros., Inc. v. Howe Precast Inc.*, 2008 WL 4394668 (E.D. Texas 2008).¹⁰

⁸ To date, the total fees paid to Special Master Twerski were \$249,782.18 and to Special Master Henderson were \$248,507.64.

⁹ To date, TCDI, Inc.'s bills to Plaintiffs' Liaison Counsel totaled \$200,704.58.

¹⁰ "Stradley is clearly qualified to provide expert testimony on attorney fees. According to his résumé, Stradley has been admitted to the Texas Bar since 1984. (Mot. Ex. A.) He has been certified by the Texas Board of Legal Specialization in Personal Injury and Civil Trial Law. (*Id.*) The court finds that Stradley's "knowledge, skill, experience, training, [and] education" qualify him to provide expert testimony on the reasonableness of attorney fees." *Duininck Bros.*, 2008 WL 4394668, at p. 3.

In addition and inclusive of the overall case related disbursements and the general administrative expenses incurred by the firm (the general administrative/overhead costs and interest for financing on this portion of the debt is *not* passed along to the clients), the firm must also incur the costs of litigating every single plaintiff's case from first intake to resolution. Take, for example, a single plaintiff who was included in the initial trial group, Joseph Greco. Mr. Greco's client file was opened in or about December of 2004. As of March 9, 2010, the costs for his case *alone* came to a total of \$10,726.93. *See* Exhibit "D" to the Rubin Decl. This is *before* trial, *before* litigation-related medical examinations and *before* the retainer of experts to testify at trial.

This Court has remarked on several occasions about the fact that while plaintiffs' counsel must wait to the end of a litigation to be compensated, the defendants, by comparison, are paid by the hour and their expenses reimbursed throughout the course of the matter. While the Napoli firm incurred all of the costs noted above without a penny in income having yet been generated by these contingency-fee cases, the totals for legal fees paid by the WTC Captive Insurance Co., Inc. to their various defense counsel added up to over \$165 million by the end of third quarter 2009¹¹.

As noted *supra*, in most large mass-tort litigations, these costs would have been borne by a group of plaintiffs' law firms. Most large litigations have plaintiffs' "steering committees". Here, although there have been two firms serving as plaintiffs' Liaison Counsel in the 21 MC 100 cases, the Napoli firm has absorbed all of these massive litigation expenses. This may be a consequence of the risky nature of this litigation, which gave pause to other well-capitalized

¹¹ This number is taken from the year end financial reports of the WTC Captive Ins. Co., Inc. from 2005 through 2008 and the third quarter 2009 year-to-date figures. The reports can be produced *in camera* to this Court upon request, but will not be published for the public with this Brief. The actual costs to date are reportedly closer to \$219 million.

firms who chose to pass up the opportunity to work as co-counsel with the Napoli firm. It may be a consequence of the new environment in which plaintiff firms now operate--unlike the 1990's, where money earned in early mass torts could capitalize the tobacco litigation, there is less capital available to firms due to tort reform and defendants have been emboldened by recent political and judicial trends to redouble their efforts against the plaintiffs, thus making it almost impossible for modern firms to capitalize all of a mass tort. In this case, the Napoli firm stood alone: while the Sullivan firm has covered the costs for their clients' medical records and for deposition costs as is demonstrated by their submission of only \$222,000¹² in common benefit fees for consideration by this Court, they have not contributed to the other fees the Napoli firm has covered. For the cases in the 21 MC 102 docket, we have similarly borne the lion's share of expenses, despite the fact that we were not officially appointed as Liaison Counsel.

The table below sets forth the amounts documented by the Captive for payments to Lead Defense Counsel, Coverage Counsel and Other Defense Counsel for the time period of year end-2005 through third quarter 2009:

Time Period	Lead Defense	Coverage Counsel	Other Defense/ Pre-Existing Claims ¹³	Total (By Time Period)
Y.E. 2005	\$14,690,177.00	\$2,188,878.00	\$2,112,627.00	\$18,991,682.00
Y.E. 2006	\$17,772,812.00	\$1,430,811.00	\$1,957,266.00	\$21,160,889.00
Y.E. 2007	\$26,367,940.00	\$1,576,638.00	\$2,076,054.00	\$30,020,632.00
Y.E. 2008	\$30,757,699.00	\$760,747.00	\$26,640,691.00	\$58,159,137.00
Q3 2009 YTD	\$29,482,485.00	\$211,510.00	\$7,122,830.00	\$36,816,825.00
Total	\$119,071,113.00	\$6,168,584.00	\$39,909,468.00	\$165,149,165.00

¹² Most of this money is for copies of depositions the Napoli firm conducted, the Sullivan firm having taken the back seat on most of the Plaintiffs' Liaison's work in this litigation and "second chair" on most of the depositions.

¹³ Y.E. 2005 and 2006 list "Pre-existing Claims Counsel" instead of "Other Defense Counsel"

Of course, no plaintiff's firm could litigate against such a juggernaut, or sustain the costs for this litigation over seven years without generating income over that time, without the support of significant litigation financing and that financing generates interest costs.¹⁴

POINT II.

**IT WAS ABSOLUTELY NECESSARY TO OBTAIN
LITIGATION FINANCING AND CONSEQUENTLY, TO
INCUR INTEREST EXPENSE.**

**A. Mass Torts In Today's Litigation Environment Often
Require Outside Funding; the Question is Who Will
Provide It and For How Much?**

As this Court certainly realizes, the costs of commencing and prosecuting a mass litigation of this scope are staggering. Indeed, without the financing for this litigation that was obtained, the present settlement agreement could not have been reached because there is no way that a plaintiff's firm could single-handedly finance this litigation so as to effectively meet the funding and resources of defendants' counsel, whose attorneys fees and disbursements have been paid on a regular basis by the WTC Captive Insurance Co., Inc. from the billion-dollar FEMA grant.

Most banks require collateral equal to or greater than the loan amount, in the form of personal assets. The choice is to accept substantially less money from the bank or pledge

¹⁴ The challenge faced by the lawyers in this case is based not only on the sheer size of the defendant's war chest, it is also based on the structural advantages of corporate defendants and their attorneys, over plaintiffs' lawyers and their clients. *See* Swan, G.S., "Economics and the Litigation Funding Industry: How Much Justice Can You Afford?" 35 *New Eng. L. Rev.* 805, 805 (Summer 2001). Swan cites Stuart M. Speiser's 1980 book "Lawsuit", where Speiser notes:

Plaintiff's tort lawyers are small businessmen, subject to all of the disadvantages of that status, plus a few that are unique. There is practically no business credit available to them. There are no tax breaks, not even substantial depreciation or investment tax credits, which other small businessmen benefit from. Other businesses of our size are able to get some capital from banks, or to sell stock to the public, or to get assistance from government agencies. But no such help is available to us.

Speiser, S., *LAWSUIT* (N.Y. Horizon Press, 1980), at 560, n. 1, at 568-69.

personal assets to obtain a larger loan. Banks don't value and just won't loan against contingent assets such as attorneys' fees or inchoate verdicts.

Professor Sebok's Affidavit states that early access to capital is necessary in a case such as this, a point he supports by comparing the challenges facing our firm with the challenges facing the lawyers who conducted other major mass tort litigation over the past thirty (30) years. Sebok Aff., Exhibit "A" at ¶ 6. It is well recognized that a wealthy litigant who can outspend a poorer litigant, is generally at an advantage and may be able to obtain a favorable settlement through attrition. *See* Richmond, D., "Other People's Money: The Ethics of Litigation Funding" 56 MERLR 649 (2005), *citing In re: K.A.H.*, 967 P.2d 91, 93 (Alaska 1998). Indeed, as the *In re: K.A.H.* Court noted that "[d]efendants, aware of the economic pressure burdening unaided plaintiffs, have every economic incentive to prolong the litigation with frivolous motions and discovery." *In re: K.A.H.* 967 P.2d at 93-94. Richmond notes that "while contingent fees address attorney compensation issues, they do not aid a plaintiff's attorney when it comes to funding litigation expenses" 56 Mercer L. Rev. at 649-650. The loans obtained on behalf of the clients in this case fund litigation expenses in a way that contingent fees do not.

Professor Sebok also avers that the alternative to pursuing direct loans on behalf of the clients in this case would have been for the individual plaintiffs to front the costs for the litigation. Given the extraordinary costs involved, the only practical means available to the clients to secure capital would have been to seek investment in their litigation by third parties, a practice known in New York as "non-recourse funding." Sebok Aff., Exhibit "A" at ¶ 7. As Prof. Sebok explains, this would have been impossible in this case. Sebok Aff., Exhibit "A" at ¶¶ 12-16. Therefore, without these loans and the consequent interest, as noted with regard to

class action litigation, plaintiffs in these mass tort actions would effectively be foreclosed from seeking redress through the court system.

Professor Sebok also explains that the rates charged to the clients were better than those customarily charged by outside vendors for such services. The loans represent competitive rates of interest in the specialized field of litigation financing where interest rates can easily exceed 36% *per annum*. Sebok Aff., Exhibit “A” at ¶¶ 17-18. In addition, it should be noted that the loans obtained by the Napoli firm to finance these litigations have been *personally guaranteed* by the partners of the firm, so that if the litigation were to be unsuccessful, the partners would have been personally responsible not only for the expenses incurred and borrowed, but for the interest charges accrued on those loans. This was due in large part to the unique nature of the claims, underlying facts and injuries and the acknowledged difficulties in proving the causal connection between the facts alleged and the injuries. Traditionally banks will not finance these matters.

B. The Extreme Risk of These Cases, Based On New And Evolving Medical Evidence, Meant That Even The Usual Sources Of Financing, *i.e.*, Banks, Would Not Lend on This “Collateral”.

Prior to the September 11, 2001 attacks and the collapse of the Twin Towers, there had been no incident where a large group of people were exposed simultaneously to such a broad range of contaminants and particulate matter. Illnesses that were previously assumed to take many years to manifest from the time of exposure were being seen after relatively short exposures and minimal incubation. While prior evidence and study experience taught that firefighters suffering adverse effects on lung volume gradually recovered lung volume over time, a recent study in the New England Journal of Medicine demonstrated just the opposite in the WTC population; in these patients, lung volume has continued to decrease and their conditions to

worsen over the seven years since exposure in the wake of 9/11. *See, e.g.,* Aldrich, T., *et al.*, “*Lung Function In Rescue Workers At The World Trade Center After 7 Years,*” NEW ENGLAND JOURNAL OF MEDICINE, 362:14, April 8, 2010, pp. 1263-1271, (“Aldrich”).

Accordingly, more than just legal acumen, skill and dedication were required of Plaintiffs’ Counsel for the successful litigation of these claims against the City of New York, its Contractors and their well-funded, highly skilled and organized defense team consisting of a dedicated in-house unit at the City’s Law Department as well as outside counsel at Patton Boggs, LLP and many other highly respected insurance defense firms. In addition to the legal talent brought to the table by the Napoli firm and certainly of paramount importance, was the ability to obtain sufficient litigation financing to allow them to stand toe-to-toe with such well-funded adversaries. Thus, financing of these litigation matters demanded borrowing from lenders other than traditional banks due to the extreme risk involved in this litigation.

POINT III.

CONTRACT TERMS BETWEEN ATTORNEY AND CLIENT THAT ARE FAIR AND REASONABLE SHOULD BE UPHELD BY THE COURT.

The Courts have long recognized the importance of attorneys’ contingency fee contracts in providing access to the courts for persons of limited financial means. Addressing the relative value of the attorney’s risk in such contracts, the Second Circuit wrote:

a contingency agreement is the freely negotiated expression both of a claimant's willingness to pay more than a particular hourly rate to secure effective representation and of an attorney's willingness to take the case despite the risk of nonpayment. Therefore, we *ought normally to give the same deference to these agreements* as we would to any contract embodying the intent of the parties.
[internal citations omitted].

Wells v. Sullivan (“*Wells II*”), 907 F.2d 367, 371 (2d Cir. 1990) (emphasis added), *citing*

Rodriguez v. Bowen, 865 F.2d 739, 746 (6th Cir. 1989); *Wells v. Sullivan* (“*Wells I*”), 855 F.2d

37, 45 (2d Cir. 1988); and *McGuire v. Sullivan*, 873 F.2d 974, 981 (7th Cir. 1989). Indeed, it has been held that:

courts should be reluctant to disturb contingent fee arrangements freely entered into by knowledgeable and competent parties. *Dunn v. H.K.Porter Co., Inc.*, 602 F.2d at 1111-12. Further, a prompt and efficient attorney who achieves a fair settlement without litigation serves both his client and the interests of justice. *It should therefore be the unusual circumstance that a court refuses to enforce a contractual contingent attorney's fee arrangement because of events arising after the contract's negotiation.*

McKenzie Const., Inc. v. Maynard, 758 F.2d 97, 101-102 (3d Cir. 1985). The First Circuit has held that “[r]easonable fees have been defined as ‘those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.’” *Ramos Colon v. Secretary of Health and Human Services*, 850 F.2d 24, 26 (1st Cir. 1988) quoting *Blum v. Stenson*, 465 U.S. 886, 895 n. 11 (1984) (a § 1988 case). The same can be said for reasonable costs and expenses.

Rewriting the contract clauses struck between attorney and client relating to the lawyer’s ability to recoup interest costs incurred for the client’s benefit will have a strong chilling effect discouraging other attorneys from undertaking litigation for worthy clients in the future. The proposed reduction of Plaintiffs’ Liaison Counsel’s fees and impairment of their right to pass necessary charges along to the clients in these matters sends a strong message to other attorneys practicing in the Plaintiffs’ Bar that careful consideration must be given to avoiding not just mass tort litigation, but indeed, all costly litigation in the future. As noted *supra*, the very scope and costs of funding plaintiffs litigation varies not only with the size of the case, but with the resources available to both the attorney and the client. Borrowing is the great leveler. Sometimes the attorney can fund a case out of her own capital, but that possibility is becoming less and less certain while tort litigation becomes more expensive and tort reform makes it more

risky. This leaves only two choices—either the client “sells” part of the claim to a non-recourse funder, or the attorney helps the client borrow and passes the costs on to the client. If the latter choice is no longer upheld by the courts—if the courts re-write the contracts designed to enable that choice after the fact—then only the former choice will be left to clients, and that will reduce the amount of litigation brought on behalf of worthy plaintiffs as much as any tort reform statute.

Indeed, limiting the contingency fees and the reimbursement of necessary litigation costs like interest that plaintiffs’ attorneys can obtain in personal injury litigation beyond the “reasonable” limits already set in New York is precisely the tool that so-called “tort reformers” have historically used to minimize plaintiffs’ ability to obtain access to justice. A prime example of this effect is the significant decline of medical malpractice litigation in the face of many states’ limiting the permissible attorneys’ contingency fees for those cases. *See, e.g., Roa v. Lodi Medical Group, Inc.* 37 Cal.3d 920, 934 (1985) (discussion of prejudicial effect of limitations in contingency fees for medical malpractice plaintiffs in Chief Justice Bird’s dissenting opinion).¹⁵ *See also* Casey L. Dwyer, *An Empirical Examination Of The Equal Protection Challenge To Contingency Fee Restrictions In Medical Malpractice Reform Statutes*, 56 Duke L.J. 611, 641 (2006).

It is especially troubling that this Court is proposing to *further* rewrite the contract between the attorneys and the clients in this case, after applying the judicial pressure that resulted in the voluntary reduction of attorneys’ fees *and also* in the face of the fact that this Court has not suggested that Defendants’ Liaison Counsel should have been paid at a reduced rate for *their* work. There is a glaring inconsistency in the contention that only the Plaintiffs’ Counsel should

¹⁵ “Since section 6146 [limiting plaintiffs’ contingency fees for medical malpractice litigation] affects only medical malpractice cases, attorneys may avoid these problems by refusing to represent medical malpractice victims. Only those lawyers not sufficiently competent or well-established to attract unrestricted business have any financial incentive to represent a severely injured medical malpractice victim.” *Roa v. Lodi Medical Group, Inc.*, 37 Cal.3d at 935 (dissent).

bear the burden of reduced fees – and then only *after* the obligation to represent the client has been accepted, the work has been done and the time, work and funds have already been invested for seven years of litigation and discovery. Such a consistent approach as this Court has thus far demonstrated in cutting plaintiffs’ counsel’s fees in prior 9/11 litigation, without ever limiting the amount of money the City or large Corporate entities can pay for their defense is dangerously one-sided; it places plaintiffs at a great disadvantage when litigating against well funded defendants like the City and its contractors in these actions. Such an approach is wholly unjust and promises to create a strong incentive among the plaintiffs’ bar against representing plaintiffs who cannot pay an hourly billing fee and litigation costs in the future.

Without attorneys willing to represent clients of moderate and low financial means, particularly in civil matters where a right to counsel is not guaranteed, our legal system cannot hope to provide its citizens with equal access to the courts for protection of their rights. The availability of good legal representation for a contingency fee arrangement is necessary for the protection of many public interests and the enforcement of public values and laws. Indeed, this Court recognized that fact in its decision in *Klein*, a securities derivative matter, writing:

The criticisms of counsel for being motivated by the fees they might earn, rather than the good they might do, are misplaced. *[internal citations omitted]*. The critics have no sound data of public injury, or burden to corporations for whose benefit such actions are brought and recoveries are obtained, or improper imposition on insiders whose transactions attract lawsuits. The arguments of “over enforcement and opportunism by attorneys,” allegedly creating “a negative image of the legal profession in the mind of the public,” *[cit. omitted]*, reflects the rhetoric of critics, not sound judgment based on empirical studies.

Klein, 2004 WL 596109, 10. Clearly, *the law should be applied in this case* and in interpreting these contracts, not the rhetoric of critics and pundits.

POINT IV.

**THE TAX IMPLICATIONS OF CLIENT DISBURSEMENTS
MILITATE STRONGLY IN FAVOR OF BORROWING FOR
LITIGATION FINANCING.**

The tax implications of financing litigation also militate in favor of loans and interest such as that at issue here. Based on current tax law, a contingency lawyer is not allowed to deduct case disbursements until the resolution of that specific case.

In 1994, the national office of the Internal Revenue Service issued its “Technical Advice Memorandum” (“T.A.M.”) 9432002 (1994 WL 420348, (March 30, 1994)) addressing a law firm that was a cash-basis professional corporation engaged in a personal injury practice. *See, e.g.,* Rettig, C., “Deductibility Of Client Costs by a Law Firm,” THE TAX REPORTER, July 1995¹⁶. The law firm at issue had entered into “net fee contracts” with its clients whereby it made payments to third parties on behalf of the clients for such disbursements as court filing fees, expert witness fees and charges for outside photocopying and printing. The charges were to be offset from any recovery in the client’s matter. *Id.* As the Rettig article notes, T.A.M. 9432002 advised that out-of-pocket expenses incurred by the law firm on behalf of its client pursuant to such a “net fee contract” were not deductible as ordinary and necessary business expenses on the theory that the reimbursable expenses should be treated as advances in the nature of a loan. *Id.*, *citing* T.A.M. 9432002, 1994 WL 420348, (March 30, 1994).

This means that if the firm were to take the money it earns and use those dollars to pay for case disbursements, the firm would have significantly less buying power due to the fact that these disbursements are not *currently* tax deductible. In other words, assuming the attorney is in the 50% tax bracket, for every \$1.00 of fee income, he would only have \$0.50 to use for case

¹⁶ <http://www.taxlitigator.com/articles/161348.htm>

disbursements. By borrowing the funds for these disbursements instead, even though the attorney bears all the risk if the case fails, he has option of deferring the interest cost until the case ends, borrowing only what is needed and thus maximizing the amount that can be spent on the clients' cases. The attorney can avoid incurring a tax liability on costs in the year the costs are incurred, since those costs will not be reimbursed until the resolution of the litigation.

POINT V.

CHANGES IN THE NEGOTIATED AND SO-ORDERED SETTLEMENT PROTOCOL MAY HAVE SIGNIFICANT NEGATIVE EFFECTS ON THE PARTIES' ABILITY TO TIMELY COMPLETE THEIR OBLIGATIONS UNDER THE AMENDED SETTLEMENT PROCESS AGREEMENT.

Depending on the outcome of the hearing scheduled for August 27, 2010 and this Court's rulings arising from that hearing and the instant briefing, this Court's inquiry about the financing and interest issues may require significant changes to this office's Settlement Protocol.

Depending on the ruling and the nature of any changes this Court may order, the settling parties may be required to resend all packages and releases with new letters updating the information that had previously been provided to the clients in our client information letters. This will require extending the opt-in threshold date by *at least* 60 additional days (indeed, given the incredible amount of work that has been done in getting the settlement packages out to our clients over the past three months, it is likely that 60 days would not be sufficient time for a re-tooling of these matters). These packages have been printed, collated and mailed by our office staff over the past month and we have already received back well over five thousand executed releases. We expect that number to double by September 1, 2010. Additionally, of *all* the executed packets received, *all* have accepted and signed off on this interest expense, as they did prospectively at the time they entered their retainer agreements.

POINT VI.

**THE MANNER IN WHICH A PLAINTIFF'S FIRM
FINANCES ITS CASES IS ESSENTIALLY A TRADE
SECRET PROVIDING A BUSINESS ADVANTAGE TO
COMPETITORS AND A LITIGATION ADVANTAGE TO
DEFENSE COUNSEL.**

The manner in which a plaintiff's litigation firm obtains financing for its cases is, in essence, a trade secret that is generally information protected by a firm from disclosure to its competitors. The full disclosure of these details at a public hearing will provide other plaintiff firms a competitive advantage over us in future litigations. Similarly, the defendant firms that we litigate against will gain an advantage by knowing how we finance our cases. If this argument and concern sounds familiar it is because this Court granted a protective order to the defendants' insurance carriers against the public dissemination of information about their insurance structures and "towers" during the discovery in these matters on the same concerns and facts set forth in Mr. Tyrrell's argument at a conference on May 5, 2008. *See* Transcript, Conference of May 5, 2008, Exhibit "E" to the Rubin Declaration, at pp. 20-22. During that argument, Mr. Tyrrell explained the implications of disclosure of such sensitive trade secret type information and how that disclosure would create a competitive disadvantage to the carriers involved in the litigation in competing for future business. Accordingly, we will file this type of information, pursuant to this Court's suggestion, for *in camera* review only.

Another consideration is that this Settlement, and each part of the deal, including the voluntary reduction in our attorneys' fees, was reached upon certain assumptions including the assumption that we would be able to recoup the enormous expense of the litigation financing. A change in any of those assumptions, including that issue now raised by this Court sua sponte, may require reconsideration of the entire agreement, and certainly all future agreements.

POINT VII.

**IN THE ABSENCE OF IMPROPRIETY OR A “CASE OR
CONTROVERSY” ARISING FROM THE PLAINTIFFS’
CONTINGENT FEE CONTRACTS, THIS COURT HAS NO
JURISDICTION TO ALTER THE ATTORNEYS’
CONTRACTED-FOR CONTINGENCY FEES.**

Federal district courts may only decide those questions arising in a “case” or “controversy.”¹⁷ This constitutional principal limits federal courts to the exercise of “the power... to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.”¹⁸ As there is no “case or controversy” concerning Plaintiffs’ contingency fee contracts, this Court lacks jurisdiction over the subject matter of those fee contracts. Before this Court’s mention of the attorneys’ fees issue on March 12, 2010 (and in a prior agenda for a conference in the fall of 2009) no one had challenged the validity or reasonableness of the Plaintiffs’ Counsel’s contingent fee contracts – publicly or privately.

In *Brown v. Watkins Motor Lines, Inc.*, 596 F.2d 129, 130 (5th Cir. 1979), the Fifth Circuit reversed a district court’s decision “to adopt as the court’s ward a minor represented by a duly qualified guardian, fix the compensation of the guardian’s attorney, and direct his payment out of a tort judgment previously rendered by the court.” The Fifth Circuit wrote: “The case or controversy in the federal forum ended with payment of the judgment into the registry of the court.” *Brown*, 596 F.2d at 132. In *Brown*, no party challenged the contingent fee agreement; instead, the District Court acted on its own to force the parties to accept “a remedy that they did not seek.” *Id.*¹⁹

¹⁷ U.S. CONST. art. III, § 2

¹⁸ *Brown v. Watkins Motor Lines, Inc.*, 596 F.2d 129, 131 (5th Cir. 1979) (quoting *Muskrat v. United States*, 219 U.S. 346 (1911)).

¹⁹ Fifth Circuit cases distinguish *Brown* in those limited circumstances where district courts traditionally intervene, as in cases involving “wards” of the court: minors and seamen. See *Karim v. Finch Shipping Co.*, 374 F.3d 302, 304 (5th Cir. 2004); *Hoffert v. Gen. Motors Corp.*, 656 F.2d 161, 162 (5th Cir. 1981); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1109 (7th Cir. 1982). Yet, this case lacks those individuals typically afforded special

Judge Posner, writing for the panel in the Seventh Circuit, reached a similar conclusion in *U.S. v. Vague*, 697 F.2d 805 (7th Cir. 1983). In that case, the district judge on his own initiative ordered a defendant's lawyer to return part of his fee because the judge considered it excessive. The Seventh Circuit reversed. Finding that the district judge had improperly assumed a prosecutor's role, the *Vague* Court wrote *that federal courts may decide only those controversies presented by the parties in litigation*. *Vague*, 697 F.2d at 807 (emphasis added). "No doubt a great deal goes on in the world which ought not to go on. If courts had general investigatory powers, they might discover some of these things and possibly right them." *Id.* (internal citation and quotation marks omitted). Nonetheless, absent contempt of court committed before the court, the judge lacked the power to initiate an investigation into the attorney's fees charged by the defendant's lawyer:

A judge cannot be made to approve an unethical transaction, but the district judge in this case was not asked to do any such thing; he was just asked to decide Steven Vague's punishment for a crime. To reach the fee question the judge had to start a separate proceeding.

Id., at 808.

The "case or controversy" at issue in the matters at bar does not extend to the pre-litigation contingent fee contracts between plaintiffs and their attorneys.²⁰ No client complained of the contingency fees they had agreed to pay before this Court's statements at the March 12 and March 19, 2010 conferences and none complained about the fact that the firm was passing the interest costs along as part of the disbursements – as we plainly advised our clients would be the case in our retainer agreements.

protection; the fee contracts at issue here involved adults. As the *Rosquist* Court held, "[a]n agreement between two freely consenting, competent adults will most often be controlling." *Rosquist*, 692 F.2d at 1111.

²⁰ *Cf. Rosquist*, 692 F.2d at 1110 (discussing *Brown* and noting that only the release of funds to the plaintiff remained in *Brown*).

Prior to the voluntary²¹ reduction in attorneys' fees that was negotiated as part of the Amended Settlement Process Agreement presented to this Court on June 10, 2010, this Court had determined to change the rate of the fee contracts absent any expressed dissatisfaction or challenge to their validity by anyone. Hence, plaintiffs' contingent fee contracts presented no justiciable "case or controversy." *See Brown*, 596 F.2d at 131-32 ("If no party before a court makes or suggests any contest, but rather all litigants desire precisely the same result, there can be no case or controversy within the meaning of Article III.") (*citing Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47 (1971)). "Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them, and confines them to resolving real and substantial controversies admitting of specific relief through a decree of a conclusive character...." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)(internal citations and quotations omitted). "[I]t is not enough that a dispute was very much alive when suit was filed.... The parties must continue to have a personal stake in the outcome of the lawsuit." *Id.* at 477-78 (internal quotations and citations omitted); *see also Murphy v. Equifax Check Services, Inc.* 35 F.Supp.2d 200, 202 (D.Conn., 1999). Accordingly, this Court is without jurisdiction to modify the portion of the plaintiffs' fee contracts that provide for the interest charges at issue in this hearing where the parties to those valid contracts have not submitted any controversy arising therefrom to this Court for consideration.

²¹ Of course "voluntary" is a relative term here, where the fees were reduced under this Court's threat to cut them even further as it did in prior World Trade Center matters, in which this Court stated that the state law regarding reasonable contingency fees was of no moment and set attorneys' fees to 15 percent, allowing 20% for only one firm that demonstrated extraordinary work. *See, e.g., In re: September 11 Litigation*, 567 F. Supp.2d 611, 616-618 (SDNY 2008).

A. The Court Lacks Authority To *Sua Sponte* Change The Terms Of Plaintiffs' Privately-Negotiated Fee Contracts.

This Court has repeatedly acknowledged the extraordinary efforts the Napoli firm and its individual attorneys have made in this matter on numerous occasions:

...I want everyone to know how hard [plaintiffs' counsel] have worked. They took these cases when there was no one to take these cases. They've invested a huge amount of time and energy and capital, now over a period of seven to eight years, in moving these cases. I can't tell you how much work that has involved, nor how much capital that has involved, nor how many sacrifices they made in giving up other opportunities to represent clients. This case has been exhausting. It's required 24 hours of work sometimes by multiple people in their law firms. It's doubtful to me that there was enough manpower left in these law firms to do anything else of any sizeable proportions. No one brings these cases for nothing. Sure, there is an expectation of recovery and the potential of a fee, but there's also the potential for a loss and a recovery of nothing. Now a contingent fee lawyer can take those risks in the ordinary run of cases because the lawyer has many such cases and some will succeed and some will fail. But when you have a mass tort case of like this, with the numbers of clients It's an all-or-nothing affair.

In re: World Trade Center Disaster Site Litigation, 21 MC 100 (AKH), Fairness Hearing Transcript, June 23, 2010 Fairness Hearing, at pp. 112-113.

Notwithstanding that fact, this Court asserted *sue sponte* that due to the fact that this case is “special” because it arises from the 9/11 attacks, the Plaintiffs’ attorneys’ fees should be reduced. In that regard this Court raises a very important point, *i.e.*, the unique nature of this litigation and the claims that lie at its heart. It is precisely that unique nature of the *In re: World Trade Center Disaster Site Litigations* that made financing for these matters so much more difficult to obtain and only then from litigation financing sources that charge a markedly higher rate of interest than a simple bank loan.

It is not a court’s function to rewrite private, binding fee contracts. If the work done was performed professionally – as this Court has repeatedly asserted was the case -- and the plaintiffs

have had a successful outcome whether through settlement or verdict, this Court should not be re-writing private contracts between attorneys and their clients. Nor should this Court now be re-tooling the negotiated procedures in place by way of this Court's own order to address approval of -- and assure the propriety and fairness of -- costs charged to the plaintiffs.

In proposing that plaintiffs' counsel's contingency fees should be cut prior to the Amended SPA, this Court cited three sources of authority for the proposed reduction in attorneys' fees. Respectfully, none supports that authority, as discussed below, either with regard to the contingency fees in general or, in this specific instance, with regard to recouping the interest paid for the litigation financing that made this litigation possible for our clients.

1. The Cases At Bar Are Not A Class Action And Rule 23 Does Not Apply Either Expressly Or By Analogy.

In the earlier-settled WTC matters where this Court ordered the plaintiffs' counsel's fees cut, this Court characterized the cases as a quasi-class action giving the Court equitable authority to review contingent fee contracts. Notably, however, from the first appearances before this Court, counsel has heard this Court emphasize the fact that these matters would *not* be treated nor tried as a class action or multiple litigation. Indeed, plaintiffs' counsel were forced to incur millions of dollars of additional filing fee costs for individual complaints when this Court disallowed the filing of complaints with multiple plaintiffs and ordered previously-served multiple-plaintiff actions to be divided into individual cases. This matter is not a class action. Neither has it been – nor can it be – certified as a class action for settlement purposes. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Class action rules do not become applicable simply because a large number of cases settle. Individual differences remain, not only as to the

characteristics of each individual claim, but also as to the relationship between each plaintiff and his or her attorney.²²

Rule 23(e) *requires* that the court approve any settlement of a class action. By contrast, no comparable provision is found in the Air Transportation Safety and System Stabilization Act of 2001 (ATSSSA) 49 USC § 40101 (“ATSSSA”), the statute that consolidated these matters before this Court. Had Congress intended to include a provision empowering this Court to supervise attorneys’ private fee contracts in the matters before this Court pursuant to the ATSSSA, it would have done so. Without express authority by rule or statute and without complaint from any party to these fee contracts, this Court is without authority to rewrite them.

Additionally, the policy bases for court review of attorney’s fees in class action settlements do not exist in the matters at bar. In a class action, court review “protect[s] the nonparty members of the class from unjust or unfair settlements affecting their rights as well as ... minimize[s] conflicts that may arise between the attorney and the class, between the named plaintiffs and the absentees, and between various subclasses.” *In re: High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 228 (5th Cir. 2008) (*quoting Strong v. BellSouth Telecomm., Inc.*, 137 F.3d 844, 849 (5th Cir. 1998)). Unlike a class action, there are no “nonparty” or “absentee” plaintiffs in these matters. Each plaintiff is personally represented by the attorney of his choice pursuant to a valid contract between attorney and client.

2. The Court’s Inherent Powers Are Limited By Statute And Do Not Include The Power To *Sua Sponte* Set Aside Valid Fee Agreements.

A federal court’s inherent powers consist of those necessary to the exercise of the judicial power. *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764 (1980). Constitutionally, they derive

²² “These are 10,800 individual cases. ... There are different kinds of diseases with causation problems, ... There are so many different factors.” *See* 21 MC 100 Conference Transcript, May 29, 2008 at p. 36 (emphasis added).

from Article III, § 1, which vests “the judicial power” in the Supreme Court and in such other federal courts as Congress establishes. Courts lack the power to extend inherent authority beyond powers necessary to their judicial function. Only Congress, under the “Necessary and Proper” Clause in Article I, may authorize additional “beneficial” powers by statute, taking into account policy considerations. As prominent constitutional scholar, Professor Robert Pushaw, explains:

However, federal judges and executive officials cannot, on their own, assert incidental powers that they believe will be merely *beneficial* and appropriate in fulfilling their constitutional functions. Rather, the [Necessary and Proper] Clause gives Congress sole authority to make such policy determinations, either directly or by delegation.

Pushaw, Robert J., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 833-34 (2001) (footnotes omitted and emphasis added).

The United States Court of Appeals for the Fifth Circuit implicitly aligned itself with this view in *F.D.I.C. v. Maxxam, Inc.*, 523 F.3d 566 (5th Cir. 2008). In *Maxxam*, the District Court invoked Rule 11 and inherent authority to sanction the FDIC for improperly requesting that the Office of Thrift Supervision pursue frivolous administrative proceedings against an individual. The District Court awarded the entire costs of the administrative proceedings (over \$56 million) as sanctions against the FDIC.

After rejecting Rule 11’s applicability as justification for the sanction, the Fifth Circuit examined the concept of inherent authority. The Fifth Circuit stressed that a federal court’s inherent powers consist of those *necessary* for the courts to manage their affairs and extend only to litigation before the court or, in the case of a sanction, to disobedience of the sanctioning court’s orders. Finding that the Office of Thrift Supervision’s administrative proceedings were (1) not before the District Court and (2) did not threaten the District Court’s authority, the Fifth Circuit reversed the sanction. “Inherent powers are the exception, not the rule, and their assertion

requires special justification in each case.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 64 (1991) (Kennedy, J., dissenting). In *Chambers*, the Supreme Court authorized a District Court’s exercise of inherent power to impose attorney’s fees as a sanction for bad faith conduct occurring in the proceeding before the court. This Court’s order of August 4, 2010 and the implied likelihood of a further order cutting the Plaintiffs’ Attorneys’ ability to recover their interest costs go beyond the limits of inherent power set out in *Chambers*.

Because of their potency, courts must exercise inherent powers with restraint and discretion. *Id.*, at 44. The Fifth Circuit has stated: “To the extent that inherent power is seen as a product of necessity, it contains its own limits. It is not a broad reservoir of power, ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function.” *NASCO, Inc. v. Calcasieu Tele. & Radio, Inc.*, 894 F.2d 696, 702 (5th Cir. 1990), *aff’d sub nom. Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

There is no basis to invoke an inherent power to change Plaintiffs’ Counsel’s fee contracts or the already negotiated and approved protocols for cost approval when that invocation is unnecessary to the functioning of the Court. In the words of Professor Pushaw, this Court seeks to exercise a “beneficial” power as a matter of perceived policy interests, not an “indispensable” power necessary to the Court’s very functioning. A court cannot exercise merely “beneficial” powers without express Congressional authority. Additionally, the fee contracts are not before the Court,²³ nor does the anticipated performance of the fee contracts threaten the Court’s authority. Thus, the prerequisites for invoking inherent power are absent here.

²³ See discussion *supra* regarding lack of subject matter jurisdiction.

Nor do the 5th Circuit's decision in *Karim v. Finch Shipping, Inc.*, 374 F.3d 302, 304 (5th Cir. 2004) or the 7th Circuit's decision in *Rosquist* support the exercise of inherent authority in this instance. In *Karim* the Fifth Circuit cited the District Court's duty when sitting in admiralty to protect seamen who are traditional wards of the Court. *Id.* *Rosquist* involved children, a guardian *ad litem*, and a minor's settlement requiring court approval. The Seventh Circuit explained in *Rosquist*: "We do not, of course, imply that the court should *sua sponte* review every attorney's fee contract. An agreement between two freely consenting, competent adults will most often be controlling." *Rosquist*, 692 F.2d at 1111.

The *In re: WTC* plaintiffs are not seamen, children, or others who lack legal capacity. There is no evidence that any of the WTC plaintiffs, young or elderly, healthy or ill, lacked legal capacity to enter a fee contract with their respective counsel. Indeed, if a plaintiff lacked capacity to contract with counsel, he or she would similarly lack capacity to accept the proposed settlement. Courts have not placed the elderly, the unhealthy, or the seriously injured in the same category as wards of the court or legal incompetents. If they did, it is difficult to imagine any serious personal injury case in which the Court would not then be duty-bound to oversee the affairs of every plaintiff.

Of course, this Court has the same duty as any court to exercise ethical supervision over the parties. *In re: Zyprexa Products Liability Litigation*, 424 F.Supp.2d 488, 492 (E.D.N.Y., 2006), citing *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 530 (1824). *But as the expert affidavits offered on this motion have demonstrated, no unethical conduct exists here and none has been alleged.* No ground exists for asserting unreasonableness because of the nature of the underlying facts that resulted in this litigation. Nothing between the injured parties and their attorney is any different than the same relationship between attorney and client in any personal injury litigation.

The Court must gauge the retainer agreements' reasonableness (and the question of whether the costs assessed are reasonable and appropriate) by weighing each particular case's potential benefits and risks *at the time* that the parties negotiated the fee contract.²⁴

B. A Re-Drafting of Plaintiffs' Fee Contracts and the Cost Protocols in the Settlement Agreement Would Deprive Plaintiffs' Counsel of Property Without Due Process of Law.

As noted *supra*, no party or attorney raised any complaint by motion or otherwise to the Court regarding any aspect of plaintiffs' private contingent fee contracts, much less of the interest charges for litigation financing. Plaintiffs' counsel only learned of this Court's intention to examine those interest charges in the plaintiffs' disbursement statements during a discussion at the Town Hall meeting on August 3, 2010 and in the Order issued the next day (August 4, 2010). Prior to those two events, we had no warning that this Court had any plan to alter the contingency fee contracts or the portion of those contracts providing for recoupment of interest costs.

An attorney's right to fees under a contingent fee contract is a recognized property right. Plaintiffs' Counsel respectfully submits that because their contingent fee contracts constituted property, counsel is entitled to the procedural minima of due process before this Court renders any order cutting or otherwise limiting their fees: effective notice and an opportunity to be heard.

Of course, Plaintiffs' Liaison Counsel would have been very interested to learn that this Court was considering further material alterations to the terms of their contingent fee contracts before they voluntarily cut their attorneys' fees by 8.3333% in connection with the Amended Settlement Agreement.

²⁴ A.B.A. Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-389, p. 12 (1994) ("It is important to keep in mind that the reasonableness as well as the appropriateness of a fee arrangement necessarily must be judged at the time it is entered into.").

The possibility that this Court would undermine the contingency fee agreements and the negotiated cost protocols falls more heavily on Plaintiffs' Liaison Counsel than on any other plaintiffs' attorney in this litigation. It is Liaison Counsel, primarily the Napoli firm, who have vigorously worked up these cases, as opposed to those attorneys who simply signed retainer agreements with claimants and referred them to the Napoli firm, or those attorneys who signed individual cases and have been content to sit on the sidelines, offering no assistance in research, briefing or depositions and simply waiting for a settlement or plaintiffs' verdict to collect their fees.

Several unproven factual assumptions appear to underlie this Court's investigation of the client disbursements for interest expense. The "reasonableness" of attorney's fees and their fee agreements is at least in part (if not wholly) a factual issue. *Forbush v. J.C. Penney Co.*, 98 F.3d 817, 822 (5th Cir. 1996) ("The determination of a fair attorney fee award is not a 'purely legal issue.'").

In order to support modification of the privately-negotiated fee contracts, and in reaching the conclusion that the existing contracted attorney's fees and cost protocols in this matter are unreasonable, this Court has hinted in commentary that the original retainer fee contracts did not sufficiently take into account "economies of scale" due to the massive size of this litigation; or that individual plaintiffs lacked real choices in the legal marketplace and thus had to accept the terms of the Plaintiffs' counsel's fee contract or go without counsel. Neither supposition is correct. Each individual plaintiff's medical and employment records had to be obtained, catalogued, reviewed and analyzed by medical paralegals and counsel; each deposition had to be prepared for by review of mountains of documentation; each development in court required

massive mailings to apprise each of thousands of plaintiffs of the status of the litigation and how every development affected their claim.

More to the point, Defendants' Liaison Counsel are the beneficiaries of any possible economies of scale in that they enjoy the benefits of claim aggregation automatically. When similar evidence applies to multiple claims, as is the case in the matters at bar, the defense can use that evidence to defend all of their defendants. This is similarly true for all of the legal briefing, answers to complaints, motions to dismiss, examinations of plaintiffs and experts and treating physicians. Thus, given the more than \$219 million in attorneys' fees incurred by the City's and Contractors' counsel here²⁵, this Court must assume that \$219 million is the actual cost of dealing with the common and unique aspects of these litigations. To offset this enormous spending by the Captive and the London Insurers on behalf of their insureds, the only way the plaintiffs could hope to stand on a relatively flat playing field was through a reasonable contingency fee agreement and through outside financing that required interest costs be paid.

Our clients, as required by the New York Rules Of Court, were fully informed regarding the fee contracts' terms, *including the fact that interest charges would be part of the disbursements charged to them*, and each client freely entered into the fee contract. As well, each client is asked to sign off on those disbursements at the end of the case (or as here, with the settlement). *See* Exhibit "G", where the release language on the Disbursement Statement release expressly addresses such interest payments as those questioned in this Court's August 4, 2010 Order. A contingent fee contract represents the freely-negotiated result of a client's willingness to pay a percentage of his potential recovery for effective representation and an attorney's willingness to accept the case with a real risk of failure and the loss of the amount of time and

²⁵ The numbers in the table appearing *supra* were only current as of third quarter 2009; those fees have continued to mount since that time.

money invested. The Court should consider these factors before taking any action to restrict the plaintiffs' attorneys' ability to recoup the interest expense for the litigation financing obtained.

In both *In re: Guidant* and *In re: Zyprexa*, the courts allowed attorneys whose contingent fees were affected to challenge the cap and obtain an upward variance by demonstrating their efforts on behalf of their clients. In *In re: Guidant*, the review that Judge Frank undertook of the attorney's submissions resulted in his raising the original cap of 20% to a maximum of 37.18% potentially available to *all* attorneys.²⁶ He also concluded that, "[i]n the majority of cases in this MDL, the Court believes that contingency fee contracts have worked just as they should." The evidence presented by the attorneys gave Judge Frank a fuller picture and on this more complete record, he changed his view of the percentage that would be fair and reasonable.

In re: Guidant II demonstrates that the purported "economies of scale" in a mass tort litigation do not tell the full story of an individual attorney's efforts. Many attorneys may be content to collect clients and then "free-ride" while others do the heavy lifting.²⁷ But the Napoli firm "were required to complete a great deal of work on behalf of their clients, some work that was inherent in [multiple litigation]"²⁸ and some work that could not be attributed specifically to the nature of the WTC litigations.

²⁶ *In re: Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 3896006 (D. Minn. Aug. 21, 2008). Judge Frank devised a formula that resulted in plaintiffs paying no more on a percentage basis for attorney fees (contingency plus common benefit attorney fees) than: (1) the percentage contracted for in their contingency/retainer agreement; (2) 37.18%; or (3) the state-imposed limit, whichever of these three was less.

²⁷ A prime example of which is apparent when comparing the work done in this matter by the Napoli office as compared to the Papain firm. Not only did the Papain firm get a free ride through the discovery process (even where Sullivan attorneys conducted depositions, they sought their discovery documents for preparation from the Napoli files and database) and most of the depositions and briefing, but almost half of its case inventory was solicited within the last eight months when they knew a settlement with the City was imminent.

²⁸ *In re: Guidant*, 2008 WL 3896006 at 5.

CONCLUSION

Plaintiffs' counsel could not have conducted this litigation without outside financing to meet the gargantuan costs of litigating more than 11,000 separate cases characterized by detailed medical and scientific evidence and hard-fought litigation of every statutory issue. There is simply no basis to challenge Plaintiffs' Liaison Counsel's ethical and reasonable ability to recoup the interest costs as provided for in their contingency fee (retainer) agreements.

Dated: New York, New York
August 24, 2010

Respectfully Submitted,

WORBY GRONER EDELMAN & NAPOLI BERN LLP
Attorneys for Plaintiffs

A handwritten signature in black ink, appearing to read "Denise A. Rubin". The signature is fluid and cursive, with a horizontal line underneath it.

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ATTORNEY'S DECLARATION/AFFIRMATION OF SERVICE

Denise A. Rubin, an Attorney duly licensed to practice before the Courts of the State of New York, hereby affirms/declares the following under penalty of perjury:

I am associated with the law firm Worby Groner Edelman & Napoli Bern, LLP and as such represent the plaintiffs in the within action. On August 24, 2010, I duly served a true copy of the within **PLAINTIFFS' MEMORANDUM RESPONDING TO THE COURT'S SUA SPONTE ORDER OF AUGUST 4, 2010** on the persons listed below by e-mail.

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