

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE: WORLD TRADE CENTER  
DISASTER SITE LITIGATION

21 MC 100 (AKH)

IN RE: WORLD TRADE CENTER LOWER  
MANHATTAN DISASTER SITE LITIGATION

21 MC 102 (AKH)

IN RE: COMBINED WORLD TRADE CENTER  
AND LOWER MANHATTAN DISASTER SITE  
LITIGATION (straddler plaintiffs)

21 MC 103 (AKH)

THIS DOCUMENT APPLIES TO ALL WORLD  
TRADE CENTER DISASTER SITE LITIGATION

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TRADE CENTER LOWER MANHATTAN  
DISASTER SITE LITIGATION

IN RE: COMBINED WORLD TRADE CENTER  
AND LOWER MANHATTAN DISASTER SITE  
LITIGATION (straddler plaintiffs)

**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFFS' AND DEFENDANTS' JOINT APPLICATION FOR AN ORDER  
TO SHOW CAUSE FOR A STAY**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....ii

PRELIMINARY STATEMENT.....1

STATEMENT OF FACTS.....2

    A. FINANCIAL TERMS.....2

    B. OPT-IN INCENTIVE PAYMENT.....4

    C. CONTINGENT PAYMENTS.....4

    D. INTEREST ON THE SETTLEMENT AMOUNT.....4

    E. ALLOCATION PROCESS.....5

    F. CANCER INSURANCE POLICY.....7

    G. OPT-IN THRESHOLDS.....7

    H. RELEASES.....8

    I. CASE MANAGEMENT ORDERS.....8

ARGUMENT.....8

    A. PRINCIPLES SUPPORTING THE ENCOURAGEMENT OF SETTLEMENT  
        REQUIRE A STAY.....9

    B. A STAY WILL PRESERVE THE COURT’S AND THE PARTIES’  
        RESOURCES..... 10

CONCLUSION.....11

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Landis v. N. Am. Co.</i> , 299 U.S. 248, 254-255 (1936) .....	9
<i>Lasala v. Needham &amp; Co., Inc., et al.</i> , 399 F. Supp. 2d 421, 429 (S.D.N.Y. 2005).....	10
<i>WorldCrisa Corp. v. Armstrong</i> , 129 F. 3d 71, 76 (2d Cir.1997).....	9

Plaintiffs' Co-Liaison Counsel in the 21 MC 100 Master Docket, Worby, Groner, Edelman & Napoli, Bern LLP (the "Worby Napoli Firm"), and Sullivan Papain Block McGrath & Cannavo P.C. (the "Sullivan Papain Firm"), and counsel for Defendants the City of New York and the Contractors<sup>1</sup>, Patton Boggs LLP (the parties represented by Plaintiffs' Co-Liaison Counsel and Patton Boggs LLP will herein collectively be referred to as the "Parties"), jointly submit this memorandum of law in support of the Parties' Application for an Order to Show Cause for a Stay of all actions encompassed within the 21 MC 100, 102 and 103 Master Dockets pursuant to Federal Rule of Civil Procedure 65.

### **PRELIMINARY STATEMENT**

The terrorist attack of September 11, 2001 upon the City of New York resulted in the destruction of the World Trade Center, the loss of many, many lives, and the infliction of scars on the City, its citizens and on all Americans. Today, the healing process continues.

After many years of litigation and almost two years of negotiations, the Parties reached a Settlement Process Agreement that will resolve many, many thousands of the actions pending across the World Trade Center-related dockets. The settlement includes the following World Trade Center-related litigations: *In re World Trade Center Disaster Site Litigation*, 21 MC 100 (AKH) (the "21 MC 100 Litigation"); *In re World Trade Center Lower Manhattan Disaster Site Litigation*, 21 MC 102 (AKH) (the "21 MC 102 Litigation"); and *In Re: Combined World Trade Center and Lower Manhattan Disaster Site Litigation (straddler plaintiffs)*, 21 MC 103 (AKH) (the "21 MC 103 Litigation") (collectively, the "WTC Litigation"). As described in detail herein, the World Trade Center Litigation Settlement Process Agreement (hereinafter, the

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<sup>1</sup> The Contractors represented by Patton Boggs LLP in these actions are set forth in Exhibit A attached to the Order to Show Cause submitted herewith.

“Settlement Process Agreement”) encompasses all plaintiffs with claims against the City of New York and the Contractors.

To allow the Parties to lay the necessary foundations for implementation of the Settlement Process Agreement, and to preserve the resources of the Court and the Parties, the Parties respectfully request (by way of order to show cause as directed by the Court), an immediate stay of all actions encompassed within the 21 MC 100, 102 and 103 Master Dockets for a minimum period of ninety (90) days.

### **STATEMENT OF FACTS**

In support of this joint application for a stay, the movants set forth the following description of the main aspects of the Settlement Process Agreement.

#### **A. Financial Terms**

Plaintiffs’ Liaison Counsel, on behalf of all Plaintiffs, and the City of New York and its contractors and subcontractors who assisted with the heroic and massive rescue, recovery and debris removal operations at the World Trade Center (hereinafter, “WTC”) and at other locations in and around Lower Manhattan on and after September 11, 2001, have entered into a binding and enforceable settlement process agreement. This agreement, known as the “World Trade Center Litigation Settlement Process Agreement”, sets forth a process whereby the WTC Captive Insurance Company, Inc. (hereinafter, the “WTC Captive”) has agreed to fund on behalf of the City and its contractors and subcontractors (collectively, the “Settling Defendants”) the settlement of all cases filed by the Worby Napoli and Sullivan Papain Firms against the Settling Defendants, provided that at least ninety-five percent (95%) of all Plaintiffs who brought such cases opt into the settlement (hereinafter, the “Aggregate Opt-in Threshold”).

Under the Settlement Process Agreement, and subject to its terms and conditions, the WTC Captive will pay at least \$575,000,000 (hereinafter, the “Settlement Amount”) once various prerequisites, including the Aggregate Opt-In Threshold, are satisfied to settle all these pending cases against the Settling Defendants, including all such cases in the Court’s Master Dockets 21 MC 100, 21 MC 102 and 21 MC 103. The precise amount of the settlement will depend upon actual opt-in experience exceeding the Aggregate Opt-In Threshold as well as the satisfaction of certain contingencies that would result in additional payments to the most seriously injured settling plaintiffs, as described more fully below. Until the prerequisites are satisfied and the individual recoveries paid, the WTC Captive shall maintain the Settlement Amount in a separate account.

The Settlement Amount is allocated among the Court’s Master Dockets as follows:

- \$477,729,000 will be allocated among settling Plaintiffs in Master Docket 21 MC 100;
- \$3,471,000.00 will be allocated among settling Plaintiffs in Master Docket 21 MC 102; and
- \$12,900,000 will be allocated among settling Plaintiffs in Master Docket 21 MC 103.

In addition to these Master Docket-specific amounts, \$57,500,000 will be allocated among settling Plaintiffs in any Master Docket who qualify for a “Permanent Disability Fund,” as described more fully below. Furthermore, \$23,400,000 will fund the premium for a cancer insurance policy to be underwritten by MetLife and which shall pay, subject to its terms and conditions, additional amounts to all settling Plaintiffs who later develop a cancer covered by

that policy (hereinafter, the “Cancer Insurance Policy”). The Cancer Insurance Policy is subject to approval by the New York State Insurance Department.

**B. Opt-In Incentive Payment**

To provide additional incentive to Plaintiffs to opt into the settlement, thereby providing the Court and the Parties with the greatest extent of finality possible, the settlement funding shall be increased to reflect actual opt-in experience exceeding the Aggregate Opt-in Threshold, if achieved. Should all the Worby Napoli and Sullivan Papain Plaintiffs settle, this provision would increase the total payment by a maximum of \$57,500,000, or up to \$657,500,000 in the aggregate assuming the full Contingent Payments (as defined below) become due.

**C. Contingent Payments**

In addition to the Settlement Amount and the potential opt-in incentive payment, the WTC Captive may pay up to an additional \$25,000,000 in the future, payable in five annual installments of up to \$5,000,000 (hereinafter, “Contingent Payments”). The Contingent Payments are subject to reduction or elimination if (i) the number of new suits filed against the Settling Defendants or any of them during each year of the five-year period exceeds annual baselines or (ii) amounts paid by the WTC Captive on the Settling Defendants’ behalf to settle or satisfy any judgments during that same five year period exceed annual thresholds.

**D. Interest on the Settlement Amount**

Interest earned before the Settlement Amount is distributed to settling Plaintiffs will be used first to pay the costs and expenses of allocation of settlement funds among the settling Plaintiffs. Remaining interest, if any, shall be distributed among the settling Plaintiffs.

**E. Allocation Process**

Settlement Amount funds payable to settling Plaintiffs in each Master Docket are subject to a process whereby a neutral third party (hereinafter, the “Allocation Neutral”) retained by the parties will determine how to distribute the funds based upon each settling Plaintiff’s proof, if any, of injury and impairment (hereinafter, the “Allocation Process”). The Allocation Neutral shall be supported by a claims processing staff and a panel of at least three credentialed physicians (hereinafter, the “Medical Panel”). All settling Plaintiffs who claim an injury listed on an agreed settlement grid must submit claim forms and medical records to the Allocation Neutral, who will evaluate those submissions and determine the Plaintiffs’ respective payments subject to a claims processing protocol developed in consultation with the Medical Panel. The Medical Panel also shall advise the Allocation Neutral concerning Plaintiffs’ medical submissions, where warranted.

Settlement grid placements are dependent upon settling Plaintiffs’ ability to meet agreed medical criteria. Formulation of these criteria required collaboration by counsel and their respective medical and scientific experts. The criteria are detailed and precise and include diagnostic and impairment requirements incorporating widely-accepted medical tests. The Allocation Neutral is required to apply the criteria to determine payment amounts for each settling Plaintiff, with limited exceptions specified in the Settlement Process Agreement.

The Allocation Process includes separate tiers intended to streamline the application process for plaintiffs claiming lower-value injuries under the settlement grid, while ensuring a more comprehensive review by the Allocation Neutral and, where appropriate, the Medical Panel of submissions by Plaintiffs who claim to satisfy the criteria for larger payments. All tiers require proof that the plaintiff worked or volunteered at the WTC site or at other locations where



9/11-related debris removal or clean-up occurred. Tier 4, the highest tier, requires a detailed submission facilitating Allocation Neutral evaluation of diagnosis of injury, severity of impairment, and specific causation factors, such as the Plaintiff's age, smoking history, and dates and duration of alleged 9/11-related exposure.

Payments to Plaintiffs eligible for Tiers 1, 2 and 3 shall be at guaranteed amounts. Tier 4 payments will be based upon a point system, whereby the Allocation Neutral will assign base points to each Plaintiff according to the type and severity of his or her injuries as documented in medical and pharmaceutical records submitted to the Allocation Neutral and evaluated pursuant to the medical criteria. The Allocation Neutral will adjust a Tier 4 Plaintiff's base points to account for a host of additional factors, including claimed secondary injuries, age (younger plaintiffs receive a point increase), timing of diagnosis relative to date of alleged exposure, smoking history, timing and duration of alleged exposure, the existence of injuries pre-existing 9/11 and the degree of exacerbation, if any, of pre-existing injuries. In all tiers, a lawfully married spouse who sued shall receive payment(s) totaling 3.5% of the corresponding worker or volunteer Plaintiff's payment(s) based upon the settlement grid.

In addition to payments based upon the settlement grid, tier placements by the Allocation Neutral and adjustment factors, if applicable, as described above, a settling Plaintiff may be eligible for an award from the Permanent Disability Fund if he or she has been disabled due to his or her WTC-related rescue, recovery, debris removal or other clean-up work. Representatives, heirs or assigns of deceased Plaintiffs also may be eligible for Permanent Disability Fund awards.

Two categories of Plaintiffs may be eligible for an additional cash payment beyond their settlement grid and Permanent Disability Fund payments. Settling Plaintiffs who are found by

the Allocation Neutral to have undergone a “qualifying surgery” as a result of their injuries will receive additional payments. In addition, settling Plaintiffs who suffered an orthopedic or similar injury due to their 9/11-related work or volunteer service will be eligible for payments for those injuries.

While some payments will be made sooner, the parties anticipate that the entire Allocation Process could take as long as one year. This timeframe will be refined based upon consultations with the Allocation Neutral.

Finally, all submissions to the Allocation Neutral shall be made under penalty of perjury, and the Allocation Neutral shall conduct random and, if warranted, targeted audits of Plaintiffs’ submissions.

**F. Cancer Insurance Policy**

Plaintiffs who opt into the settlement are required to apply for the Cancer Insurance Policy and the issuer of that policy, MetLife, must accept as insureds all settling Plaintiffs except those who already suffer from a covered cancer. The policy, which is subject to regulatory approval, has a guaranteed term of fifteen years, subject to extension based upon favorable claims experience. Benefits under the policy are reduced for tobacco users.

**G. Opt-In Thresholds**

For the settlement to become final, in addition to satisfaction of the Aggregate Opt-in Threshold, settling Plaintiffs must opt into the settlement at levels that equal or exceed the following:

- 95% of Plaintiffs with pending claims against the Settling Defendants;
- 95% of Plaintiffs who claim to satisfy the criteria for larger payments under the settlement grid;

- 95% of plaintiffs who claim eligibility for the Permanent Disability Fund;
- 90% of plaintiffs who claim lower-value injuries under the settlement grid; and
- 90% of plaintiffs in each of the three Master Dockets, 21 MC 100, 21 MC 102, and 21 MC 103.

#### **H. Releases**

To participate in the settlement, each settling Plaintiff must release the City of New York, all of its contractors and subcontractors, and the WTC Captive for all past, present and future 9/11-related injury claims, known and unknown, and covenant not to sue them in the future. In addition, settling Plaintiffs must renounce expressly in a separate, notarized letter their rights to bring any personal injury claims against the Settling Defendants in the future based upon alleged “second injuries” that manifest later. Finally, settling Plaintiffs must dismiss with prejudice their lawsuits once the Aggregate Opt-In Threshold is satisfied and the settlement becomes final.

#### **I. Case Management Orders**

As a condition of settlement, the Parties will move the Court for entry of agreed Case Management Orders (“CMOs”) in each Master Docket. These CMOs impose upon future plaintiffs and current plaintiffs who opt out of the settlement certain threshold evidentiary requirements. In addition, the CMOs require counsel representing such plaintiffs to certify certain facts and specify the basis for their claims against the Settling Defendants.

### **ARGUMENT**

The history of these litigations is replete with complex case management issues resulting from the tens of thousands of claims brought by thousands of individual plaintiffs against hundreds of defendants. In each Master Docket, this Court has exercised the control and authority necessary to advance these litigations in the most efficient and effective manner

possible. The Parties respectfully request that the Court exercise such case management authority again now.

As demonstrated by the comprehensive nature of the Settlement Process Agreement (ninety-five pages with twenty-two separate sections and twenty-one exhibits),<sup>2</sup> the resolution of the claims of thousands of the plaintiffs involved in these litigations is as detailed and complex as the litigations themselves have been. Undoubtedly and unsurprisingly, the Court will need sufficient time to review the Settlement Process Agreement before proceeding. And the Parties need time to lay the appropriate foundations for the implementation of the settlement itself. It is beyond dispute that “[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255 (1936); *accord WorldCrisa Corp. v. Armstrong*, 129 F. 3d 71, 76 (2d Cir.1997) (quoting *Landis*, 299 U.S. at 254). The Parties respectfully submit that an appropriate exercise of the Court’s discretion merits the imposition of a stay of all proceedings across Master Dockets 21 MC 100, 21 MC 102 and 21 MC 103.

**A. Principles Supporting the Encouragement of Settlement Require A Stay**

Having reached agreement on a settlement, there is still much to be done. As noted, the Court needs to review the Settlement Process Agreement and have any questions addressed and answered. And before the Settlement Process Agreement can be implemented, Plaintiffs’ Counsel need to communicate with their thousands of clients and those plaintiffs need to understand the settlement and determine whether to “opt-in”. Furthermore, the necessary

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<sup>2</sup> A complete copy of the World Trade Center Litigation Settlement Process Agreement and its exhibits is attached as Exhibit A to the Affidavit of Joseph E. Hopkins, Esq. submitted herewith.

infrastructure to implement the settlement promptly and efficiently must be established by the Parties and readied for action. Given that the plaintiffs and defendants involved in the settlement are active participants in each of the Court's three Master Dockets comprising the WTC-related litigation, a stay across all three dockets is essential to allow this work to proceed.

In the special and unique circumstances where a settlement has been reached, "granting a stay furthers the long-recognized public and judicial policy in favor of the settlement of disputes." *Lasala v. Needham & Co., Inc., et al.*, 399 F. Supp. 2d 421, 429 (S.D.N.Y. 2005). It is axiomatic that supporting the settlement of actions through the imposition of a stay is a matter "firmly within a district court's discretion." *Lasala*, 399 F. Supp. at 427 (quoting *American Shipping Line, Inc. v. Massan Shipping Indus.*, 885 F. Supp. 499, 502 (S.D.N.Y. 1995)). Thus, a stay is appropriate and necessary to facilitate the settlement of these thousands of actions.

**B. A Stay Will Preserve the Court's and the Parties' Resources**

A stay will preserve the Court's and the Parties' resources. The movants comprise the vast majority of the parties involved in the 21 MC 100 Litigation. They also comprise a significant number of the parties involved in the 21 MC 102 Litigation (indeed, the Worry Napoli Firm represents over 90 percent of the Plaintiffs in the 21 MC 102 Litigation) and the 21 MC 103 Litigation.

Active and intense discovery is underway in the 21 MC 100 Litigation and is anticipated to begin shortly in the 21 MC 102 Litigation. Dispositive motion practice, pursuant to prior Case Management Orders of the Court, is underway in the 21 MC 100 Litigation – since mid-February, 2010, plaintiffs' and defendants' counsel have filed dozens of significant and substantive motions. All of these motions are scheduled to be briefed over the next two months. Finally, there are pending mid-May trial dates for twelve cases encompassed within the 21 MC

100 Litigation. Requiring the Parties to continue to complete such substantive motion practice while continuing their active participation in discovery (including expert discovery, which is not yet begun) and simultaneously trying to effectuate a settlement will unnecessarily waste the resources of the Court and the Parties. The Parties respectfully submit that those resources should be directed to completing and implementing the agreed-upon settlement.

**CONCLUSION**

For these reasons, the Parties urge the Court to enter an Order staying all actions encompassed within the 21 MC 100, 102 and 103 Master Dockets for a minimum period of ninety (90) days.

Dated: March 12, 2010

Respectfully Submitted,

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