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RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

1. Admit.
2. Admit.
3. Admit.
4. Admit.
5. Admit.
6. Admit.
7. Admit.
8. Admit.
9. Admit.
10. Admit.
11. Admit.
12. Admit.
13. Admit.
14. Admit.
15. Admit.
16. Admit.
17. Admit.
18. Admit.
19. Plaintiff cannot admit or deny as this statement is conclusory and not a statement of fact.

PLAINTIFF'S STATEMENT OF MATERIAL FACTS

1. This matter arises out of a construction site accident, wherein plaintiff Jadson Cunha was injured when he fell from an extension ladder at a K. Hovnanian residential construction jobsite in Mendham, New Jersey. (*Exhibit A, Report of Vincent Gallagher, at 2*).

2. At the time of the incident, Mr. Cunha worked for Real Construction, a subcontractor of Quality Framing Management ("Quality"). Quality was the general contractor on the K. Hovnanian new residential construction project at on the Mendam, New Jersey project. (*Exhibit J, Deposition of James Burke, at 20*).

3. Both K. Hovnanian and Quality have filed Answers to plaintiff's second amended complaint in this matter, and yet neither Answer raises the IRCA as an affirmative defense. (*Exhibit B, K. Hovanian's Answer to Seconded Amended* Complaint)(*Exhibit C, Quality's Answer to Second Amended Complaint*).

4. Specifically, Mr. Cunha was injured when he:

> Was at the top of the ladder approximately the third rung from the top. As part of the installation process, he was measuring to determine the size of plywood sheething that he would have to cut and then install. He testified that he would have to lean from the ladder 15 inches on either side. At the time of this incident, he was looking to his left. The ladder moved to the right. He attempted to grab a block or tow by four that was not securely fastened to upright two by four studs. When the ladder moved, he reached with his left hand to grab that block was unable to prevent his fall.

(*Exhibit A, Report of Vincent Gallagher, at 2*).

5. As a result of the fall from the ladder, Mr. Cuhna sustained a comminuted intraarticular left calcaneal fracture which required an open reduction and internal fixation. (*Exhibit D, Report of Todd M. Lipschultz, M.D.*).

6. Moreover, the injury Mr. Cunha sustained has resulted in a workers' compensation lien

amounting to $139,660.04. (*Exhibit H, Workers Compensation Lien*).

5. According to OSHA safety expert, Vincent Gallagher, "[f]ourteen percent of all construction worker fatalities are the result of falls from ladders. Most deaths from falls off of ladders occur at heights below ten feet. (*Exhibit A, Report of Vincent Gallagher, at 20*).

6. As such, OSHA has adopted and applied various standards to ensure that ladders are use safely on jobsites. (*Exhibit A, Report of Vincent Gallagher, at 18-23*).

7. Specifically, it is not permissible to permit or require workers on a job site to use ladders as work platforms. (*Exhibit A, Report of Vincent Gallagher, at 2*6).

8. Despite the clear OSHA standards for the safe use of ladders, defendants K. Hovnanian and Quality blatantly violated OSHA by requiring or permitting workers to work from ladders while performing the following tasks:

> 1. Climb ladders with plywood sheathing on their head.
> 2. Take the plywood from their head and place it against he two by four studs on the outside wall.
> 3. Hold the plywood sheathing against the two by four studs with one hand and use a nail gun with their other hand to secure it.
> 4. Make measurements to determine the next size plywood section to cut.

(*Exhibit A, Report of Vincent Gallagher, at 2*6)(*Exhibit I, Deposition of Randy Simat, at* 51, 60, *74, 75*)(*Exhibit J, Deposition of James Burke. at 51-54*).

9. According to Mr. Gallagher, defendants K. Hovnanian and Quality have a history of disregarding safety guidelines on the jobsite, particularly when it comes to the safe use (or misuse) of ladders:

> It appears to me from deposition testimony and the facts in this case that there was a deliberate decision made by Hovnanian and Quality to permit workers of Real Construction to install plywood sheathing on the side of these buildings while using

> ladders. That decision was made long before work began at this site. That was the customary practice of these two companies for many years. They had to have known that there were costs associated with using the equipment to perform the work safely. They consciously decided to put greater priority on money rather than human lives. Plywood sheathing was installed as high as 30 feet at this job site. Falls from 20 to 30 feet are likely to result in catastrophic injury or death. Statistics bear out the reality that Hispanic workers in the construction industry have been suffering a disproportionate amount of fatal and serious injuries from falls from elevation in the last ten years. That death rate is the result of builders permitting their workers to work without OSHA required fall protection.

(*Exhibit A, Report of Vincent Gallagher, at 29-30*).

10. Moreover, Vincent Gallagher commented on the relationship between poor job site safety practices and the exploitation of cheap immigrant workers:

> Historically, workers like Jadson Cunha are given the lowest paying and the most dangerous jobs. That was before the passage of minimum wage laws, child labor laws, and other labor laws including OSHA. The difference today is that we have laws in place to protect workers like Jadson Cunha. The price has been paid. Workers and their families testified before Congress of their losses and the need to pass a law to protect workers. We as a society have agreed to protect all of our workers. Mr. Cunha, however, was not provided with the protection intended by Congress. Mr. Cunha's exposure to this fall hazard was no accident. It resulted from plans by Hovnanian and Quality not to require the use of a safe platform on a forklift truck, a cherry picker, scissors lift or other personnel lift. The only reasonable explanation is that they were trying to save money.

(*Exhibit A, Report of Vincent Gallagher, at 30*).

LEGAL DISCUSSION

A. Affirmative Defense Waiver Issue

Defendants assert that plaintiff's claims for economic and non-economic damages should be dismissed because such recovery would allegedly be violative of the Immigration Reform Control Act ("IRCA"), 8 *U.S.C.* § 1324(a)(1). However, neither defendant K. Hovanian nor defendant Quality Framing Management ("Quality") asserted the IRCA as an affirmative defense at any point during this litigation. As such, defendants have waived their right to assert the IRCA as an affirmative defense because it was never raised in their Answers. (*Exhibit B, K. Hovanian's Answer to Seconded Amended* Complaint)(*Exhibit C, Quality's Answer to Second Amended Complaint*). It is well settled that an affirmative defense that is not pleaded or otherwise timely raised is deemed to have been waived. *See R*. 4:5-4 *and Official Comment*. Additionally, even when an affirmative defense is pleaded, the same does not insure its preservation. An affirmative defense may be deemed waived if not again raised during a protracted and complex discovery period or if defendant's litigation conduct is inconsistent with reliance on the defense. *Id.*

It is undisputed that both K. Hovanian and Quality failed to raise the IRCA as an affirmative defense pursuant to *R*. 4:5-4. In fact, defendant waited nearly until the close fo discovery before raising this defense. Plaintiffs made these claims clear in the complaint and initial discovery responses. However, upon learning of plaintiff's immigration status, rather than amended their respective Answers to assert this affirmative defense, defendants for the first time assert it in a motion for summary judgment. Accordingly, defendant was properly deemed to have waived an affirmative defense under the IRCA.

Of course the mandatory requirement of pleading affirmative defenses be relaxed because the enforcement would be inconsistent with substantial justice or public policy. *Ahammed v. Longandro*, 394 N.J. Super. 179, 191 (App. Div. 2007)(relaxing the pleading requirements of *R*. 4:5-4 where plaintiff's counsel's statements regarding the applicability of the workers' compensation bar lulled defense counsel into failing to raise same as a defense until time of trial). However in *Ahammed*, the mandatory requirement for pleading an affirmative defense was relaxed in light of equity considerations, not public policy. In this instance, the use of the IRCA that defendants advocate, as set forth at lengh *supra*., is in direct contravention with both equity considerations as well as the public policy the IRCA was established to serve.

Accordingly, neither considerations of public policy, nor equity support relaxation of the mandatory pleading requirements *R*. 4:5-4 and therefore, defendants should be properly precluded from raising the defenses under the IRCA. In any event, these defense lack substantive merit as well.

B. Immigration Status Is Not a Bar to Recovering Economic Damages

Defendants' motion for summary judgment dismiss plaintiff's lost wage claim should be denied because neither the case law nor public policy permits defendant to use plaintiff's immigration status as a shield to escape accountability for its own actions of both employing immigrant labor on its construction projects and failing to follow the federal OSHA regulations.[1] In this instance K. Hovnanian's and Quality's alleged negligence left Mr. Cunha permanently and

[1] While Cunha was not a W2 employee of either K. Hovnanian or Quality, for purposes of OSHA and workplace safety, K. Hovnanian and Quality are deemed to be one of his "employers." 29 CFR §1926.32 ("Employer" is defined as "contractor or subcontractor"); *See also* 29 *C.F.R.* §1926.16 ("By contracting for full performance of a contract subject to section 107 of the Act, the prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work."); *Alloway v. Bradlees*, 157 N.J. 221, 237-38 (1999)

severely injured. (*Exhibit D, Report of Todd M. Lipschultz, M.D.*)(*Exhibit H, Workers Compensation Lien*).

Of course, at the outset it remains that as a result of this incident, plaintiff has a workers' compensation lien totaling $139,660.04. This lien includes payments made to Mr. Cunha for temporary disability commensurate with a percentage of the wages he lost as a result of his fall. Of course, Mr. Cunha will have to reimburse the workers' compensation carrier at the close of this case should he receive a damages award, regardless of whether or not he is permitted to advance a lost wage claim. Among numerous other reasons, it would be quite unfair to prohibit Cunha from recovering any lost wages at trial while the workers compensation carrier would be entitled to recover from any award the amount it paid Cunha for same. (*Exhibit H, Workers Compensation Lien*).

Accordingly, controlling New Jersey case law unequivocally permits immigrants—regardless of their status—to pursue economic damages, including lost wages in personal injury actions. Yet in its moving papers below defendant disregarded controlling precedent and instead relied upon a tortured reading of *Crespo v. Evergo Corp.*, 366 N.J. Super. 391, 394 (App. Div. 2004) in arguing for a distorted expansion of the "quite narrow" issue presented in that decision. Defendants' arguments lack support in precedent and policy and are counter to controlling law.

In addition to attempting to read *Crespo* as prohibiting plaintiff's ability to pursue a lost wage claim, defendants further attempt to fit a square peg into a round hole by asserting that *Crespo* somehow prohibits plaintiff's ability to pursue a claim for non-economic damages. However, it has long been foreclosed that an undocumented immigrant's ability to recover lost wages and non-economic damages is not contingent on his immigration status. This issue was addressed by the

Appellate Division in a 1979 decision involving a claim for lost income by an undocumented immigrant injured in an auto accident, *Montoya v. Gateway Insurance Co.,* 168 N.J. Super. 100, 103 (App. Div.), *cert. denied,* 81 N.J. 402 (1979). In ruling that plaintiff *Montoya* was entitled to pursue his claim for income loss, the Appellate Division was succinct and directly stated that immigrants have the right of access to our nation's courts and recover all damages, including economic damages, as the result of another's negligence:

> There is no question but that an illegal alien is eligible at common law to use in our courts for personal injury sustained and to recover as an element of his damage loss of earnings caused by the tortfeasor's negligence.

Id. at 108. The Appellate Division rejected the argument that Montoya's immigration status barred his recovery, providing a comprehensive explanation illustrating the underlying rationale:

> The public policy of discouraging illegal immigration will not be subverted by according such aliens access to our courts. It cannot be supposed that anyone enters this country for the purpose of initiating litigation. ***Indeed, forbidding aliens access to the courts may have precisely the reverse effect. Potential employers may well be encouraged to employ such aliens if they become aware of the alien's inability to lodge claims against them for wages or on account of injuries sustained.*** Insurance companies may well be encouraged to insure them in anticipation of being able to renege with impunity after a covered loss has occurred.

Id. at 104 (emphasis added). While defendants causally acknowledges an immigrant's right of access New Jersey Courts and protection by New Jersey labor laws, defendants make a paltry attempt to distinguish the *Montoya* line of cases, simply because plaintiff's negligence claim in *Montoya* arose out of an auto accident. *Id.* Of course, it can hardly be accurate that the Appellate Division sought to distinguish an undocumented workers access to the court based on whether the common law negligence claims arose out of an auto accident verses as slip and fall, verses a construction accident -as is the case here. As discussed in *Montoya*, the longstanding line of cases that holds "all persons"- citizens and non-citizens– alike are entitled to bring economic damage and

other common law personal injury claims are premised on the Fifth and Fourteenth Amendments to the United States Constitution, both of which use the word "person," not "citizen," to describe who is protected. Further support was provided by Congress in 42 U.S.C.A. §1981. *Montoya*, 168 N.J.Super. at 104.

Defendants argue that since plaintiff is not legally employable in the United States, that therefore he should not be able to make a claim for lost income. This same base argument was made in *Montoya*, "With respect to plaintiff's claim for [lost income], defendants contend that plaintiff's illegal status renders his employment illegal." Accordingly, it was urged in *Montoya* that he should not be allowed to make his income loss claim. *Montoya*, 168 N.J.Super. at 104. In rejecting this argument, the Court made a distinction between work which itself would be unlawful (like bookmaking or selling narcotics) and lawful employment (such as working construction) that happens to be engaged in by an individual "under a [legal] disability to do it." Since the work itself Montoya was in was not illegal, he was rightfully deemed in "an occupational status," and thus entitled to make his lost income claim. *Id.* at 106-108. The same is the case here as Cunha was engaged in a legal field of work, construction, at the time of the accident.

While the specific scenario in *Montoya* dealt with a claim for lost income benefits under a first party auto insurance policy, the reasoning of the Court and basis for its decision equally applies here. The rationale for the Court's decision was the long standing line of cases, grounded in state and federal constitutional law, that "an illegal alien is eligible at common law to sue...<u>for personal injury</u> and to recover as an element of damages <u>lost earnings</u> caused by the tortfeasor's negligence. *Id.* at 108 (emphasis added), *see also Caballero v. Martinez*, 186 N.J. 548, 552 (2006) (undocumented immigrant injured in automobile accident entitled to income continuation benefits,

no-fault medical benefits, and personal injury damages under the Unsatisfied Claim and Judgment Fund). In the end the Court concluded that since *Montoya* could recover lost wages in a common law action despite his status as an illegal alien, it would make no sense to deny him that same right in an income continuation benefits claim in a PIP context since such is meant as a substitute for that common law claim. *Id.* at 108.

The principles and concepts about an undocumented worker's right to be compensated for lost income in a personal injury case set forth in *Montoya* was reaffirmed in *Mendoza v. Monmouth Recycling Corp*., 288 N.J. Super. 240 (App. Div. 1996). In *Mendoza* the Appellate Division held that a person's immigration status is not a bar to recovering workers' compensation benefits, including future lost wages. *See also Fernandez-Lopez v. Jose Cervino, Inc.*, 288 N.J. Super. 14 (App. Div. 1996) (finding that petitioner's illegal status did not bar recovery under Worker's Compensation Act when he was injured on the job); *Balbuena v. IDR Realty LLC.,* 6 N.Y.3d 338 (2006) (can recover for lost wages, reasoning that precluding such a claim would have the ill effect of lessening the incentive for employer's to comply with the law by providing a safe working environment); *Klapa v. O&Y Liberty Plaza Co.,* 168 Misc.2d 911 (Sup.Ct. 1996); *Hagl v. Jacob Stern & Sons, Inc.*, 396 F.Supp. 779 (E.D.P.A. 1975) (same).

The *Mendoza* court began its analysis by reciting that:

> "a well established body of law holds that illegal aliens have rights of access to the courts and are eligible to sue therein to enforce contracts and redress civil wrongs such as negligently inflicted personal injuries."

Mendoza v. Monmouth Recycling Corp., 288 N.J. Super. 240, 248 (App. Div. 1996), *citing, Montoya*, 168 N.J.Super. at 103-104 In reaffirming the principle set forth in *Montoya*, the *Mendoza* court proclaimed, "We fully subscribe to that position." *Id.* Although in the workers compensation

context, like *Montoya*, the *Mendoza* reasoning equally applies to the instant matter. The Court explained:

> As we have pointed out, workers' compensation rests upon both contract and tort principles-the contract right in effect substitutes for the tort right an employee would otherwise have. It would not only be illogical but it would also serve no discernible public purpose to accord illegal aliens the right to bring affirmative claims in tort for personal injury but to deny them the right to pursue the substitutionary remedy for personal injuries sustained in the workplace...In short, we are in full accord with the holding in *Montoya* which recognized that in respect of illegal aliens, the *sui generis* nature of unemployment compensation and the considerations uniquely relevant to its administration are not transferrable to or in any way applicable to the alien's right to prosecute personal injury claims. <u>And workers' compensation is, in the end, a personal-injury remedy</u>.

Mendoza, 288 N.J. Super. at 248 (emphasis added). Thus the Appellate Division in *Mendoza* again rejected the same unlearned argument advanced by defendant K. Hovnanian and defendant Quality here; that since Cunha can not work in this country legally, he therefore he should not be able to make a future lost earning claim. *Mendoza* reaffirmed the same principle from 20 years earlier in *Montoya;* that since the undocumented immigrant would be entitled to obtain economic loss compensation in an ordinary common law personal injury context, it would simply make no sense to deny that same relief in a workers compensation case because in the end, "workers' compensation is ... a personal-injury remedy." *Id.*

<u>C. *Crespo* Was a Statutory Right to Work Case Where a Pre-requisite to Eligibility for its Remedial Benefits Was Legal Employability; *Crespo* Was Not a Personal Injury Case and Defendants' Reliance upon it Is Misplaced</u>

K. Hovanian and Quality hinge their bankrupt argument almost exclusively on a tortured reading of *Crespo v. Evergo Corp.* As the *Crespo* court made clear, "[a]s presented in the context of plaintiff's [right to work] claims, the issue before us is quite narrow." *Crespo v. Evergo Corp.*,

366 N.J. Super. 391, 394 (App. Div. 2004). *Crespo* was a right to work case brought under the Law Against Discrimination ("LAD"), not a personal injury case. In *Crespo* plaintiff Rosa Crespo obtained employment at the defendant's warehouse by presenting a false social security card. She worked there for about 17 months until maternity leave. Some months later she asked to return but by that time had been replaced. There was also an allegation about a comment that workers with babies are not reliable. Crespo later filed a lawsuit charging she had a right to return to work and the failure to rehire her because she had a baby was discriminatory. *Id*. at 393-94.

The Law Division barred her economic claims (back pay, front pay and lost benefits) but allowed her to pursue non-economic damages (emotional distress, punitive damages and counsel fees). The Appellate Division granted interlocutory appeal on defendant's motion contesting the order allowing non-economic damages. The Appellate Division however dismissed the entire case (which was solely brought under the LAD) because a prerequisite to eligibility for the remedial benefits under the LAD statute was legal employability. Specifically, the Court noted that although the LAD provides that all persons shall be free from discrimination:

> "it also provides that it shall not be unlawful under the LAD for an employer to 'restrict employment to citizens of the United States where such restriction is required by federal law...." *N.J.S.A.* 10:5-12(a).

Crespo, 366 N.J.Super. at 396. Thus since there was an explicit limitation in the LAD statute barring claims by those not legally entitled to employment, and since there was no dispute Crespo had used a false social security card and was not legally employable, she could not make out a prima facia LAD claim and thus the entire case which was exclusively brought under that statute was dismissed. In short, *Crespo* was in its essence a statutory right to work employment case, not a personal injury case. And since *Crespo* had no legal right to work, and since such legal right is a necessary

prerequisite to the LAD claim, the claim was not sustainable and was dismissed. *Crespo, 366 N.J. Super at 396-402.*

Crespo did not overturn, nor did it depart from the *Montoya-Mendoza* line of cases. As the Court specifically made clear, "the issue before us is quite narrow." *Crespo* at 394. In fact, in further focusing the narrow scope of the issue, and in further distinguishing itself from common law personal injury cases, the Court again reaffirmed the *Montoya-Mendoza* rule which defendants mistakenly seek to dispense with here:

> New Jersey's "well established body of law holds that illegal aliens have rights of access to the courts and are eligible to sue therein to enforce contracts and redress civil wrongs such as negligently inflicted personal injuries. " *Montoya v. Gateway Ins. Co.,* 168 N.J.Super. 100, 104, (App.Div.), *cert. denied,* 81 N.J. 402 (1979).

Crespo at 394. And the Court continued by distinguishing the statutory right to work employment case that was *Crespo*:

> In contrast, where the governing workplace statutory scheme makes legal employment a prerequisite to its remedial benefits, a worker's illegal alien status will bar relief thereunder [because] There is no constitutional right to work illegally.

Crespo at 399-400. In fact, the Court went on to make clear that Crespo's claim rose solely from the defendant's failure to terminate her, a termination that was mandated by federal law. There was no claim in the case of discrimination or other wrongful conduct arising from the time that she was actually employed. *Id.* at 401-402.

Crespo relied on the holding *Bastas v. Bd. of Review in the Dep't of Labor & Indus*., in finding that an undocumented worker was not entitled to bring a claim for future lost wages. 155 N.J. Super. 312, 315 (App. Div. 1978)(denial of unemployment compensation to an undocumented immigrant). In both *Crespo* and *Bastas*, the Appellate Division predicated its decisions on the

specific statutory language which limited the remedy of lost income to those legally employable. *Id*., *compare to Caballero v. Martinez*, 186 N.J. 548, 560-562 (2006) (undocumented immigrant entitled to income and medical benefits from UCJF where statute did not limit recovery illegal immigrants).

Neither *Montoya* nor *Mendoza* has been impacted by the holding in *Crespo*. The same should hold true for Cunha's claims here. Plaintiff's claims for non-economic damages as well as prospective lost wages are not predicated upon a statutory remedy. Rather, plaintiff's claim is grounded in personal injury caused by general contractor, K. Hovnanian's and sub contractor Quality's alleged negligence. *Crespo* is inapplicable to this common law matter.

D. Similarly, ***Hoffman*** Sought a Statutory Remedy That Included Legal Employability as a Pre-requisite to Eligibility for its Remedial Benefits; ***Hoffman*** like ***Crespo*** Was Not a Personal Injury Case and Defendants' Reliance upon it Is Misplaced

Defendants similarly, and improperly, rely upon the United States Supreme Court decision in *Hoffman Plastic Compounds v. National Labor Relations Board*, 535 U.S. 137 (2002) , for support of their applications. In that case Hoffman hired a gentleman by the name of Castro to work in a production facility. Hoffman fired Castro, along with several other workers, because he was involved with a labor organizing campaign at the facility. Upon application from one of Castro's co-workers the National Labor Relations Board found the firings violated the National Labor Relations Act and ordered Hoffman to reinstate the fired workers, including Castro, with back pay. *Id.* at 140-42. An Administrative Law Judge learned that Castro was in fact an undocumented alien and found he could not be reinstated or awarded back pay. The NLRB overturned the ALJ as to Castro finding the award of backpay would further the protections afforded under the NLRA to all workers, undocumented and documented. However, the Supreme Court reversed the NLRB and

concluded that undocumented aliens cannot pursue an award for unfair labor practices under the NLRA in light of the strong and countervailing policies behind IRCA. *Id.* at 149-52.

Thus, similar to the decision in *Crespo*, in *Hoffman* the holding is narrowly focused to prohibit an undocumented worker from securing remedy under the National Labor Relations Act - a statutory workplace statute like the LAD. More specifically, the fact that Castro had submitted false documents, a criminal act under IRCA, in order to secure employment was fatal to his claims. *Id.* at 149. This fact was the lynchpin in the Court's decision. Once Castro violated IRCA by submitting false documents, an unfair labor practice under the NLRA, Castro could no longer benefit from the protections of the NLRA. Thus, Castro was taken out of the protective ambit of the NLRA, just as Crespo was removed from the protective scheme of the LAD, because Castro engaged in his own unfair labor practice in submitting false documents. These scenarios are wildly distinguishable from the Cunha matter and are particularly narrow. In fact, the appellate division in *Crespo* highlighted the limited holding of *Hoffman* stating "[t]o be sure, *Hoffman* has not been expanded beyond its specific focus." *Crespo*, 366 N.J. Super. at 398. In short, in *Hoffman*, the United States Supreme Court found an undocumented worker could not recover economic losses under the federal National Labor Relations Act and in *Crespo*, New Jersey's Appellate Division found an undocumented worker could not recover economic losses under the Law Against Discrimination. Both holdings were limited to an analyses under specific statutory frameworks, frameworks particularly related to the employment context.

It seems that defendants implicitly, if not overtly, argue that since the passage of IRCA and the decision in *Hoffman*, there is an across-the-board prohibition against any undocumented alien recovering for economic losses. That proposition is flatly wrong. In fact, in *Crespo* our Appellate

Division highlighted that even following the passage of IRCA and the rendering of the *Hoffman* decision undocumented workers remain lawfully positioned to pursue claims under other statutory schemes. For instance, following *Hoffman*, the Federal District Court for the Southern District of New York upheld an undocumented worker 's claims under the federal Fair Labor Standards Act for work already performed. *Zeng Liu v. Donna Karan Int'l Inc.*, 207 F.Supp.2d 191, 192-93 (S.D.N.Y. 2002). The Federal District Court for the Northern District of California found that an illegal alien who was arrested and detained for fourteen months immediately following settlement of an FLSA suit against his employer could proceed with an FLSA retaliation claim against that employer. *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F.Supp. 2d 1056, 1061-62 (N.D. Cal.2002). Also, the California courts found that a workplace sexual harassment plaintiff was not precluded from emotional distress claims arising from harassment during employment, though she was barred, pursuant to IRCA, from a wrongful discharge damage claim. *Murillo v. Rite Stuff Foods, Inc.,* 65 Cal. App.4th 833 (1998).

E. Federal Immigration Policies Are Furthered by Permitting Plaintiff to Present His Claim for Future Lost Income and Non-Economic Damages to a Jury

Given the abundance of case law affording immigrants access to the courts and economic damages, K. Hovnanian and Quality offer a fallback xenophobic, double standard argument of passion which New Jersey courts have repeatedly and pointedly rejected. The simple fact is K. Hovnanian by and through their subcontractor Quality, took advantage of abundant and cheap immigrant labor, yet now seeks to avoid having to pay damages arising out of the poor working conditions resulting from its admitted failure to follow federal safety laws. According to OSHA safety expert, Vincent Gallagher, defendants K. Hovnanian and Quality have a pattern and practice of violating OSHA, especially when it comes to the use (or misuse) of ladders. As such, Mr. Gallagher opined:

> It appears to me from deposition testimony and the facts in this case that there was a deliberate decision made by Hovnanian and Quality to permit workers of Real Construction to install plywood sheathing on the side of these buildings while using ladders. That decision was made long before work began at this site. That was the customary practice of these two companies for many years. They had to have known that there were costs associated with using the equipment to perform the work safely. They consciously decided to put greater priority on money rather than human lives. Plywood sheathing was installed as high as 30 feet at this job site. Falls from 20 to 30 feet are likely to result in catastrophic injury or death. Statistics bear out the reality that Hispanic workers in the construction industry have been suffering a disproportionate amount of fatal and serious injuries from falls from elevation in the last ten years. That death rate is the result of builders permitting their workers to work without OSHA required fall protection.
>
> Historically, workers like Jadson Cunha are given the lowest paying and the most dangerous jobs.

(*Exhibit A, Report of Vincent Gallagher, at 29-30*). This is not consistent with New Jersey case law and the public policy upon which it rests. It also contravenes the mandates and spirit of the Immigration Reform and Control Act of 1986 ("IRCA").

As an initial matter, the Supreme Court of New Jersey in *Caballero*, *supra*, recently expressed its belief that it is unwise for New Jersey courts to unnecessarily interpret federal immigration law. In holding that an undocumented immigrant could recover lost wages from the Unsatisfied Claim and Judgment Fund, the unanimous Court explained:

> We begin by observing that we do not consider federal immigration law and policy in making our determination because, if we were to consider those sources, we would assume (or possibly usurp) the very function of the Federal Immigration and Naturalization Service. The adjudication of potentially complex questions of federal immigration law and policy is better left to that Federal Agency.

Caballero, 186 N.J. at 557. Accordingly, the Court should not consider federal immigration policy in this matter. But if it does the Court should conclude, consist with prior decisions, that denying defendants' motion furthers the IRCA and its underlying policies.

The IRCA specifically focuses on employers and employer conduct as the means to control immigration; it does not target immigrant-employees. When New Jersey courts have discussed the IRCA they have found that allowing employers to escape liability from workplace personal injury liability based on an employee's immigration status creates an even stronger incentive for employers to continue to hire undocumented workers.

In *Piscitelli v. Classic Residence*, 2009 WL 1811072 (N.J. App. Div. 2009), the Appellate Division cited the legislative history of the IRCA and explained that the statute's purpose was to limit unlawful immigration by imposing sanctions on employers that hire undocumented immigrants:

> Congress stated that "[t]he bill establishes penalties for employers who unknowingly hire undocumented aliens, thereby ending the magnet that lures them to this country." Congress was seeking to close 'the back door' on illegal immigration, through employer sanctions. Congress noted that "[e]mployment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. <u>Employers will be deterred by the penalties</u>

> in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.

Piscitelli, 2009 WL at *8 (quoting H.R. Rep. No. 99-682(I) (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5650 (emphasis added). The legislative history reveals that Congress expressly determined that imposing sanctions on employers rather than immigrants was more effective and ethical:

> Now, as in the past, the Committee remains convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens.

H.R. Rep. No. 99-682(I) (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5650.

Mendoza recognized the purpose and intent of the IRCA by explaining that workplace safety and the policies underlying the IRCA are furthered by holding employers accountable when they jeopardize employees' safety:

> We also regard the desideratum of workplace safety enhanced by according workers' compensation benefits to an illegal alien since an employer's immunity from payment of compensation to that class of employees might well provide a disincentive to assuring workplace safety. Moreover, such an immunity from accountability might well have the further undesirable effect of encouraging employers to hire illegal aliens in contravention of the provisions and policies of the Immigration Reform and Control Act.

Mendoza, 288 N.J. Super. at 248. In *Serrano v. Underground Utilities, Corp.*, 407 N.J. Super. 253 (App. Div. 2009), the Appellate Division again discussed the public policy considerations underlying the IRCA. Particularly, *Serrano* found that including undocumented immigrants among the workers covered by the Fair Labor Standards Act is more likely than not to further the goals of the IRCA:

> [A]llowing [undocumented workers] to sue non-compliant employers under the FLSA may advance the [IRCA's] policy objectives. In particular, such litigation reduces incentives for employers to hire illegal workers to displace legal employees who would be entitled to be compensated at the pay levels mandated by the FLSA.

Serrano, 407 N.J. Super. at 271. Therefore, K. Hovnanian's and Quality's arguments that denying plaintiff access to future lost wage benefits in a personal injury case is consistent with the IRCA is erroneous.

In fact, the only important IRCA policy consideration is reducing any incentive an employer may have in employing someone who is not lawfully permitted to work in the United States. Congress stated that "[t]he principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions." H.R. Rep. No. 99-682(I) (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5650. Defendants' position allows an employer to exploit this cheap labor pool without the risk of liability if the employer's negligence causes injury. K. Hovnanian's and Quality's positions seek to incentivize and encourage the continued hiring of illegal aliens and thus directly contravenes the policies of IRCA.

Moreover, depriving Mr. Cunha of his livelihood is unfair and contravenes precedent as set forth *supra* and swims against the tide of cases addressing this issue across the country. *Balbuena v. IDR Realty LLC*, 6 N.Y. 3d 338, 359 (2006) (holding that an undocumented immigrant can recover economic damages, including lost wages, under a common law negligence claim reasoning that precluding such a claim would have the ill effect of lessening the incentive for employer's to comply with the law by providing a safe working environment); *Tyson Foods, Inc. v. Guzman*, 116 S.W. 3d 233, (Tx. App. 2003) (holding that an undocumented immigrant can recover economic damages, including lost wages, under a state common law negligence claim); *Zavala v. Wal-Mart Stores, Inc.*, 393 F.Supp. 3d 295, 322–23 (D.N.J. 2005) (holding that an undocumented immigrant can recover back pay under the FLSA because that statute provides a broad definition of "employee" that does not exclude undocumented immigrants, and because allowing undocumented immigrants to recover

under the FLSA reduces employer incentives to hire undocumented workers); *Rosa v. Partners in Progress, Inc.*, 152 N.H. 6, (2005) (relying on *Mendoza* to hold that an undocumented immigrant can recover lost wages because the immigrant's "injury has nothing to do with his citizenship or immigration status") (citing *Mendoza v. Monmouth Recycling Corp.*, 288 N.J. Super. 240, 247 (App. Div. 1996)); *Hernandez v. Ishikawajima Harima Heavy Ind., Ltd.*, 848 F.2d 498 (5th Cir. 1988) (holding that undocumented immigrant can recover lost wages because the defendant failed to provide any evidence that the immigrant-plaintiff "was about to be deported or would surely be deported"); *Madeira v. Affordable Housing Found., Inc.*, 315 F.Supp. 2d 504, 507–08 (S.D.N.Y. 2004) (held that undocumented immigrant could recover lost wages in light of the "incontrovertible fact" that "undocumented aliens do obtain work in the United States"); *Klapa v. O&Y Liberty Plaza Co.,* 168 Misc.2d 911 (Sup.Ct. 1996) (illegal immigrant entitled to make future lost wage claim in personal injury suit); *Hagl v. Jacob Stern & Sons, Inc.*, 396 F.Supp. 779 (E.D.P.A. 1975) (same).

F. The Court Should Reject K. Hovanian's and Quality's Attempt to Carry the Jobsite Exploitation of the Immigrant Worker into the Courtroom

Defendants' presentation boils down to a factual argument that there is no workplace safety exploitation because defendants' contracts with Mr. Cunha's employer, Real Construction, required the employer to provide safe working conditions[2], and even if defendants are responsible for Mr.

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[2] Clearly this statement fails to take into account that OSHA and New Jersey law rest on the bedrock principle that safety begins at the top, to wit, the general contractor has a non-delegable duty to maintain a safe workplace that includes "ensur[ing] 'prospective and continuing compliance' with the legislatively imposed non-delegable obligation to all employees on the job site, without regard to contractual or employer obligations." *Alloway v. Bradlees Inc.,* 157 N.J. 221, 237-38 (1999), *citing, Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App. Div. 1994). As a matter of public policy and federal law, the general contractor is the single repository of responsibility for the safety of all subcontractor employees working under it. As such, the general contractor bears responsibility for all OSHA violations on its projects. *Meder v. Resorts International*, 240 N.J.Super. 470, 473-77 (App. Div. 1989), *cert. den.* 121 N.J. 608;

Cunha's injury, his claims should be entirely stricken because of his status as an undocumented immigrant from Latin America. The argument that K. Hovanian and Quality advance would permit these companies to continuously violate federal safety law in the conduct of its business and simultaneously exploit cheap immigrant labor in order to get the jobs completed. In fact, Mr. Gallagher's reports makes reference to the exploitation of cheap immigrant labor:

> Historically, workers like Jadson Cunha are given the lowest paying and the most dangerous jobs. That was before the passage of minimum wage laws, child labor laws, and other labor laws including OSHA. The difference today is that we have laws in place to protect workers like Jadson Cunha. The price has been paid. Workers and their families testified before Congress of their losses and the need to pass a law to protect workers. We as a society have agreed to protect all of our workers. Mr. Cunha, however, was not provided with the protection intended by Congress. Mr. Cunha's exposure to this fall hazard was no accident. It resulted from plans by Hovnanian and Quality not to require the use of a safe platform on a forklift truck, a cherry picker, scissors lift or other personnel lift. The only reasonable explanation is that they were trying to save money.

(*Exhibit A, Report of Vincent Gallagher, at 20*). Perhaps it is defendants' view of immigrant workers which explains its dismissive view of the disproportionate perils they face in the type of work Cunha was doing at the time of the accident.

In the United States, about a million workers have been killed on-the-job since the 1920's. The United States Bureau of Labor Statistics estimated annual workplace fatalities at 30,039 in the early 1920's. 75,000 railroad workers died in the quarter century before World War I alone. The construction industry was just as dangerous, if not more so. The International Association of Bridge and Structural Steel Workers (Iron Workers), for example, lost a full one percent of its membership to workplace accidents in fiscal year 1911-12. A leading skyscraper construction firm admitted at

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Kane, 278 N.J.Super. at 142-43; *Dawson v. Bunker Hill Plaza Assocs.,* 289 N.J.Super. 309, 320-21 (App.Div.1996).

the end of the 1920's that one worker died for every 33 hours of employed time during the previous decade. The United States led the world in casualty rates. Coal worker fatality rates were triple those in the United Kingdom, to cite one example.[3]

High fatality and injury rates continued beyond the early twentieth century. Into the 1990's, the Iron Workers continued to report losing about 100 members a year to workplace accidents.[4] Responding to National Safety Council statistics suggesting that 14,000 Americans are killed and 2.5 million permanently injured in the workplace every year[5], the United States Congress passed the Occupational Safety and Health Act of 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 *U.S.C.A.* § 651(b) At the time of OSHA's passage, the country was losing more men and women to workplace accidents than to the war in Vietnam.[6] Today, according to OSHA's own numbers, 6,000 American workers per year die from workplace accidents, 6 million American workers per year suffer injuries due to such accidents, and 50,000 American workers per year die from illnesses related to occupational hazards.

Death and disability due to unsafe or unhealthy workplaces remain America's hidden epidemic. In 1994, there were 6.8 million job-related injuries and illnesses in the private sector alone, an average of more than 18,000 injuries and/or illnesses each and every day of the year. U.S.

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[3] Linder, Marc. *Fatal Subtraction: Statistical MIAs on the Industrial Battlefield.* 20 J. Legis. 99 (1994).

[4] Linder, 20 J. Legis. 99.

[5] Linder, 20 J. Legis. 99. See Also *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosectuions for Industrial Accidents.* 101 Harv. L. Rev. 535 (1987).

[6] Linder, 20 J. Legis. 99.

Department of Labor, Bureau of Labor Statistics, *Annual Survey of Occupational Injuries and Illnesses*, 1994. The cost of these injuries and illnesses has been estimated at $120 billion for 1994 alone. *National Safety Council, Accident Facts*, (1995 Edition). Researchers at Mt. Sinai Medical School have estimated that 50,000 to 70,000 workers die each year as a result of major occupationally acquired diseases like cancer, lung disease and coronary heart disease. Landrigan PJ, Baker DB, "The recognition and control of occupational disease," *Journal of the American Medical Association* 1991;266:676-80. In 1998, the number of confirmed deaths due to occupational injuries in the U.S. was 6,026, approximately one-tenth the estimated number of deaths due to occupational illnesses. U.S. Department of Labor, Bureau of Labor Statistics, "National Census of Fatal Occupational Injuries," 1998, U.S. Department of Labor, August 4, 1999.

OSHA was implemented with these systemic inadequacies in mind. OSHA was enacted to provide prevention; however, as discussed earlier, a high incidence of occupational injury and illness persist. When construction site leaders fail to follow OSHA safety standards, the imposition of liability through tort law is meant to discourage irresponsible conduct, compensate the injured and create incentives to minimize risks of harm. *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 448 (1993); *People Express Airlines, Inc. v. Consolidated Rail Corporation,* 100 N.J. 246, 266 (1985); *Weinberg v. Dinger*, 106 N.J. 469, 494 (1987); *see also Prosser and Keeton on Torts* § 4 (5th Ed.1984) (noting that "prophylactic" factor of preventing future harm is a primary consideration in tort law). Tort law provides the bite to work in conjunction with OSHA's bark. It provides real economic incentive for firms to invest in safety for their workers, rather than turn a profit on the potential for injury.

Indeed, OSHA was passed to prevent the very type of catastrophic workplace accident Cunha suffered here. And in fact, ladder falls from residential construction are considered the "granddaddy" of all workplace hazards. While defendants will likely suggest that only common sense is needed to avoid these accidents, the OSHA legislation and its implementing regulations include extensive ladder safety standards and regulations which include various measures of training, prevention, supervision and inspections- all aimed at avoiding these accidents– regulations systematically ignored by K. Hovnanian and Quality. *See* 29 C.F.R. §1926.1050 - 1060. As set forth in the facts section above, the principal of Quality, James Burke, and the individual designated as the most knowledgeable in safety at the company, readily admitted he permits workers to use ladders as work platforms. (*Exhibit J, Deposition of James Burke. at 51-54*). This was confirmed by Randy Simat, of K. Hovanian. (*Exhibit I, Deposition of Randy Simat, at* 51, 60, *74, 75*). K. Hovnanian and Quality take advantage of low wage, hardworking immigrant workers like Cunha, and do business as though OSHA does not exist.

Moreover, exploitation of immigrant workers is hardly a thing of the past. Only last summer the following headline appeared in *USA Today*, "Hispanic worker deaths up 76%, [while] U.S. job fatalities fall in same span."[7] The disturbing reality is that it is disproportionately dangerous to be an Hispanic worker in America today. "[R]ecent statistics reveal an ethnic fatality trend evidenced by an alarming increase in Hispanic worker deaths."[8] The federal government recently reported that 937 Hispanic workers died from job-related injuries in 2007, representing a 76% increase from

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[7] Rick Jervis, *Hispanic Worker Deaths Up 76% Since 1992*, USA Today, July 20, 2009. (*Exhibit E*)

[8] Mark LeWinter, *Dying for a Paycheck: Body Count Rises as Workers Fall*, N.J. Law J., Oct. 28, 2008. (*Exhibit F*)

1992.[9] Most striking, however, is that the nationwide total decreased during the same period; Hispanics died in record numbers as the American workplace became safer.

A recent article from the New Jersey Law Journal also discusses the epidemic defendants' position would only exacerbate:

> A casual drive past a residential construction site in New Jersey on any given day will reveal that the framers and roofers are working at elevations where they are exposed to significant risk of catastrophic injury or death. The problem, however, is not limited to New Jersey; it is industry wide. The National Association of Homebuilders (NAHB) recently completed the most comprehensive analysis of fatalities in the residential homebuilding industry. Falls from elevation continue to be the leading cause of fatalities and the highest proportion of those killed worked for small contractors with less than 10 employers.
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> . . . .
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> While injury on residential work-sites certainly occurs across all demographics, recent statistics reveal an ethnic fatality trend evidenced by an alarming increase in Hispanic worker deaths. The NAHB concluded that 28 percent of all fall fatalities were Hispanic workers and 29 percent were foreign born. Between 2003–2006, 34 percent of all Hispanic worker deaths occurred in residential construction—an increase of 370 percent over prior periods. These statistics do not include the number of workers that suffer career-ending or catastrophic spinal or brain injuries as a result of falls.[10]

Defendants' position encourages the growing dangers faced by Hispanic workers. *See*, *e.g.*, *Montoya v. Gateway Insurance Co.,* 168 N.J. Super. 100, 104 (App. Div. 1979) ("The public policy of discouraging illegal immigration will not be subverted by according such aliens access to our courts. ... Indeed, forbidding aliens access to the courts may have precisely the reverse effect. Potential employers may well be encouraged to employ such aliens if they become aware of the alien's inability to lodge claims against them for wages or on account of injuries sustained."); *Mendoza v. Monmouth Recycling*, 288 N.J. Super. 240, 248 (App.Div. 1996) (permitting undocumented

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[9] Rick Jervis, *Hispanic Worker Deaths Up 76% Since 1992*, USA Today, July 20, 2009.

[10] LeWinter, *supra* note 2. (emphasis added)

immigrant from maintaining wage loss claim enhances workplace safety by encouraging responsible conduct); *Balbuena v. IDR Realty LLC.,* 6 N.Y.3d 338 (2006) (precluding claim for lost wages would have the ill effect of lessening the incentive for employer's to comply with the law by providing a safe working environment).

Immigrants contributed to America's prosperity at high risk and low recognition. A discussion of the treatment of Chinese immigrants in the 1800s by Burt Wolf, powerfully illustrates the point. Chinese workers comprised a substantial labor pool during America's nascency. They, like most immigrants, were given "the toughest work for the least money and virtually no credit."[11] Over 10,000 Chinese workers helped complete America's first trans-continental railroad. Illustrating the disconnect between immigrant contributions and the treatment immigrants have historically received, the famous painting commissioned to commemorate the moment fails to depict a single Chinese despite their conspicuous presence in the photograph on which the painting was based.[12]

Relevant statistics expose current safety problems as an acutely immigrant problem, echoing the disturbing safety problems of a time considered by some to be long gone. The sad statistics of Hispanic worker injuries and deaths are the product of an all too typical scenario. The anatomy of worker exploitation is nothing new and easily grasped:

> Laborers from countries like Costa Rica and Mexico are recruited to work on roofing jobs for various roofing subcontractors. . . . Many of the workers are undocumented and the construction industry will often not question their immigration status and pay

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[11] Burt Wolf, *Travels & Traditions: Immigrating to America* 7 (2008), http://www.burtwolf.com/pdf/immigration.pdf. (*Exhibit G*).

[12] *Id.*

them in cash with no benefits. These workers usually have little or no training or experience.[13]

> The unfortunate reality in modern America is that many undocumented immigrants work in an environment rife with unsafe working conditions, wage abuse, and severe maltreatment by employers. . . . Foreign-born Latino workers are two and a half times more likely to suffer fatal injuries at work than the average working citizen.[14]

The construction industry is the single largest employer of undocumented workers in the United States, employing more than 1.7 million undocumented workers, or 21% of the entire undocumented work force.[15] Since Hispanics represent about 76% of all undocumented immigrant workers,[16] it should come as no surprise that they are dying in record numbers despite the general trend of increased workplace safety. Hard working Latin American immigrants like Cunha are especially vulnerable to the kind of exploitation seen here. They work long hours, with low pay, no benefits and no safety compliance measures. K. Hovnanian and Quality sought to continue this exploitation into the courtroom by slashing Cunha's claims entirely based on nothing more than his status as an immigrant who overstayed his visa.

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[13] LeWinter, *supra* note 2.

[14] Richard A. Johnson, Note, *Twenty Years of the IRCA: The Urgent Need for an Updated Legislative Response to the Current Undocumented Immigrant Situation in the United States*, 21 Geo. Immigr. L. J. 239, 265 (2007).

[15] Jeffrey S. Passel & D'Vera Cohn, Pew Hispanic Center, *A Portrait of Unauthorized Immigrants in the United States*, Apr. 14, 2009, http://pewhispanic.org/files/reports/107.pdf.

[16] LeWinter, *supra* note 2.

CONCLUSION

For all these reasons, Plaintiff respectfully requests that defendants' Motion for Summary Judgment be denied.

Respectfully submitted,
Clark Law Firm

By: ______________________________
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