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STATEMENT OF FACTS

I. The Project and the Parties

1. This is a safety rules violation construction project catastrophic loss personal injury case.

2. The project at issue was the development of "Shore Club," a 440 unit luxury high rise condominium complex consisting of two 27 story towers and a parking garage located at One Shore Lane, Jersey City, New Jersey. (*Exhibit N, Deposition of Daniel Gale at 11, 13*) (*Exhibit A, 7/7/14 Salvatore-Gallagher Report at 2*) (*Exhibit E, Newport Map*) (*Exhibit F, Progress Photos*) (*Exhibit G, Shore Club Tower Photos*) (*Exhibit K, Deposition of David Jenkins at 6*)

3. The owner and developer of the Shore Club project was the "LeFrak Organization." (*Exhibit A, 7/7/14 Salvatore-Gallagher Report at 2*) (*Exhibit O, Deposition of Paul Bozza at 5-19*) (*Exhibit K, Deposition of David Jenkins at 13-14, 16, 19-21, 23-24, 37-30*) (*Exhibit R, Deposition of Scott Rushkin at 18-19, 41-44*); *Slatina v. D. Const. Corp.*, 2012 WL 3140233 (App.Div. August 03, 2012)

4. The LeFrak Organization is a large scale developer responsible for, among other things, the Newport project in Jersey City and "LeFrak City" in Brooklyn. (*Exhibit K, Deposition of David Jenkins 10-11*) (*Exhibit E, Newport Map*)

5. The cost to build one tower was in excess of $30 million. (*Exhibit R, Deposition of Scott Rushkin at 96*)

6. The 440 Shore Club residential units sold for between $500,000 to $800,000 each. (*Exhibit N, Deposition of Daniel Gale at 13*)

7. The practice of the LeFrak Organization in developing land is to set up a network of corporations that it controls. As such, for any given project, the LeFrak Organization will set up a

corporation as the "owner," another to be the general contractor, and so on. (*Exhibit O, Deposition of Paul Bozza at 5-19*) (*Exhibit K, Deposition of David Jenkins at 13-14, 16, 19-21, 23-24, 37-30*) (*Exhibit R, Deposition of Scott Rushkin at 18-19, 41-44*); *Slatina v. D. Const. Corp.*, 2012 WL 3140233 (App.Div. August 03, 2012)

8. A "Construction Contract" for the project indicates that at one point the LeFrak Organization designated "Shore Club North Urban Renewal Company, LLC" as the "Owner" and "Shore Club North Construction Company, LLC" as the general contractor for the Shore Club project. (*Exhibit C, Construction Contract*).

9. At all relevant times the LeFrak Organization and/or its principal, Richard Lefrak, owned and/or controlled both "Shore Club North Urban Renewal Company, LLC" and "Shore Club North Construction Company, LLC." (*Exhibit O, Deposition of Paul Bozza at 5-19*) (*Exhibit K, Deposition of David Jenkins at 13-14, 16, 19-21, 23-24, 37-30)* (*Exhibit R, Deposition of Scott Rushkin at 18-19, 41-44*); *Slatina v. D. Const. Corp.*, 2012 WL 3140233 (App.Div. August 03, 2012)

10. As such, for all intents and purposes, and for ease of reference, the "LeFrak Organization" and/or various of its affiliate companies were both the owner and general contractor of the Shore Club project at issue. *Id.*[1]

11. As indicated above, the project included two 27 story high rise towers with a 9 level parking garage in between the two. One tower was commonly referred to on the project as the "Shore

---

[1]As indicated herein and in movant's brief (Db2), and as was the subject of a prior appeal (*Slatina v. D. Const. Corp.*, 2012 WL 3140233 (App.Div. August 03, 2012)), there is significant ambiguity as to exactly which entities were the owner and/or general contractor at any given time. Furthermore, the individuals actually running the project basically testified they understood they work for the "LeFrak Organization." As such, for purposes of the within motion practice, we simply and collectively refer to the "LeFrak Organization" interchangeably as the owner and general contractor.

South Tower" or "Shore South" and the other the "Shore North Tower" or "Shore North."

12. A significant portion of the project involved the construction of concrete block walls (also referred to as cinder block walls). (*Exhibit K, Deposition of David Jenkins at 41-42, 45-46*) (*Exhibit R, Deposition of Scott Rushkin at 65*)

13. Among other places, cinder block demising walls were constructed on floors 3 through 8 of each tower separating them from the parking garage. (*Exhibit K, Deposition of David Jenkins at 41-44*) (*Exhibit R, Deposition of Scott Rushkin at 65*)

14. These demising walls went approximately 10 feet high from the floor to the ceiling on each level. (*Exhibit L, 4/24/14 Shelia Mason Deposition at 11-12*)

15. Plaintiff Dashi Slatina's direct employer, D Construction, was hired by the LeFrak Organization general contractor as a subcontractor to construct many of these cinder block walls throughout the project. (*Exhibit T, Incident Reports*) (*Exhibit U, OSHA File at 11, 23*) (*Exhibit D, D Construction Sub-Contract*) (Exhibit Q, Deposition of Carmen Rullo at 11, 46)

II. As the General Contractor the Lefrak Organization Had a Responsibility to Prevent Needless Injury by Managing Safety and Enforcing OSHA and Industry Rules Applicable to the Work

1. Under well-settled construction law in New Jersey, OSHA and under well-recognized industry standards (including its own construction contract for the Shore Club project), general contractors like the LeFrak Organization have a non-delegable responsibility to maintain a safe workplace and make sure basic work safety rules are followed. This responsibility 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. at 237-38 (1999); *Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App Div. 1994); *Constantino v. Ventriglia*, 324 N.J.Super. 437 (App.Div. 1999) (industry safety standards are pertinent in determining negligence in construction injury case); 29 *C.F.R.* §1926.16. As such the general contractor is required to actively manage safety on this job site and see to it the subcontractors comply with the federal safety rules and other safety standards in the construction industry. *Id.*; (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit H, OSHA Fact Sheet- "Effective Workplace Safety and Health Management Systems"*) (*Exhibit I, "Wall Bracing 101" and FAQs*) (*Exhibit J, Defendant's Liability Expert Report at 5-11*) (*Exhibit C, Construction Contract, General Conditions at 2-4*)

2. As the general contractor on this project, LeFrak Organization was required under the law to comply with OSHA's general health and safety provisions. This required them to implement and enforce a safety and health management system ("SHMS") *Id.*

3. The critical elements of an effective SHMS are: management commitment and employee involvement; worksite analysis; hazard prevention and control; training for employees, supervisors and managers. In short, LeFrak Organization was required to implement and enforce a safety program, require safety training of all workers on the project and take proactive measures to manage safety and prevent accidents. (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit H, OSHA Fact Sheet- "Effective Workplace Safety and Health Management Systems"*) (*Exhibit I, "Wall Bracing 101" and FAQs*) (*Exhibit J, Defendant's Liability Expert Report at 5-11*)

4. As part of the requirement to enforce the OSHA regulations on his project, LeFrak Organization was also required to make sure its subcontractors do the same. *Id.*

5. The LeFrak Organization Construction Contract for the project echoes these basic OSHA

and industry standard requirements (which were simply ignored):

> 3.7 Compliance with Law. Contractor shall...comply with all laws, ordinances, rules, regulations, and orders of any public authority bearing on the performance of the Work, at Owner's expense.
>
> 3.11 Safety Precautions and Programs.
>
> 3.11.1 Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work.
>
> 3.11.2 Contractor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to:
> (a) all employees used for the Work and all other persons who may be affected thereby;
> ...
> 3.11.3 Contractor shall comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss, at Owner's expense
> ...
> 3.11.7 Contractor shall designate a responsible member of its organization at the site whose duty shall be the prevention of accidents.

(*Exhibit C, Construction Contract, General Conditions at 2-4*)

6. LeFrak Organization Superintendent Scott Rushkin, who has been in construction for nearly 20 years (*Rushkin Dep at 7-10*), agrees that the most important job of the general contractor in running a job like this is to follow these basic top-down safety principles. (*Exhibit R, Deposition of Scott Rushkin at 45, 48-50, 53-56*)

7. Scott Rushkin testified:

> Q. So LeFrak Organization, you guys were essentially managing this project, correct?
> A. Correct.
> ...
> Q. ...You see in section 1.1 of the [Associated General Contractors Manual of Accident Prevention].
> A. Uh-huh.

Q. Just read what is highlighted there in section 1-1 of the general section?

A. "Planning and controlling of basic functions of management. Accident prevention is a part of both functions. Assisting management to reach the goal of no accidents and lower operating costs."

Q. Do you agree with that?

A. Yes.

(*Exhibit R, Deposition of Scott Rushkin at 48-49*)

Q. And then taking a look in section 1-2, dealing with planning of the accident prevention program. Just read, if you would, what's highlighted in the second paragraph?

(*Exhibit R, Deposition of Scott Rushkin at 49*)

Q. ..."Management representatives should be responsible for coordinating loss control activities. This assignment should be delegated to an individual with basic training in accident prevention."

A. Just the highlighted areas?

Q. Yes. And then skipping down.

A. Okay. "Areas of responsibility should include preplanning, employee supervisory training, establishment of minimum safety standards, liaison with local medical facilities, accident investigation, inspection and recordkeeping."

Q. Do you agree with what you just read there?

A. ...I agree with that.

Q. Okay. Then in section 1-10, we have three sentences highlighted. If you could just read those into the record, and again, it's the same question, whether you agree or disagree with that. That deals with the safety meetings you talked about earlier.

A. "Talks should be held regularly at designated times. These meetings should be conducted under the direction of the safety staff. Accidents and near accidents should be reviewed. Safe methods of performing work and nature of the hazards involved should be featured."

Q. Do you agree with that?

A. Yes.

Q. So basically what we're talking about here is that in a project like this, there's

certain basic safety rules that have to be followed, right?
A. Correct.

Q. And the purpose of those rules is really to prevent needless injury to workers and anyone else that may come in or near a project like this, right?
A. Yes.

Q. And an important component of those safety rules is that the people that are on the job have training in work place safety so that, you know, unnecessary incidents and accidents can be prevented, right?
A. Yes.

Q. ...And it's important that the leaders on the job also have that safety training, right?
A. ...it would be recommended, yes.

Q. ...And also the workers that are actually doing the labor and, you know, swinging hammers and that kind of thing, it's important for them to also have safety training. Would you agree with that?
A. Absolutely, yes.

Q. And those safety rules are important not only for the workers, but they're also important for the public which may come near a job site like this, right?
A. I would say so, yeah.

(*Exhibit R, Deposition of Scott Rushkin at 50-56*)

8. LeFrak Organization was also required to comply with OSHA's safety rules about constructing concrete block walls (also referred to as cinder block walls), and enforce same among the subcontractors, including D Construction. *Id.*

9. OSHA's concrete block wall construction safety rules are not complicated. 29 C.F.R. §1926.706; (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit I, "Wall Bracing 101" and FAQs*) (*Exhibit J, Defendant's Liability Expert Report at 5-11*)

10. First, all concrete cinder block walls have to be cordoned off a distance equal to the final planned height of the wall plus four feet. This is to prevent people from being crushed by a collapsing

wall. 29 C.F.R. §1926.706(a); (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit I, "Wall Bracing 101" and FAQs*) (*Exhibit J, Defendant's Liability Expert Report at 5-11*)

11. Second, all cinder block walls over 8 feet must be braced during construction before the cement dries to prevent the wall from collapsing and crushing workers or anyone else that might come near it. 29 C.F.R. §1926.706(a); (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit I, "Wall Bracing 101" and FAQs*) (*Exhibit J, Defendant's Liability Expert Report at 5-11*)

12. There are also numerous construction industry safety standards that similarly require general health and safety management and specific steps to prevent people from being injured from unstable cinder block walls under construction. (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit H, OSHA Fact Sheet- "Effective Workplace Safety and Health Management Systems"*) (*Exhibit I, "Wall Bracing 101" and FAQs*) (*Exhibit J, Defendant's Liability Expert Report at 5-11*)

13. The LeFrak Organization did not enforce, and these safety rules were followed, on this project. (*Exhibit K, Deposition of David Jenkins at 16-17, 19-22, 30-38, 41-47, 50-51, 53-55, 57, 59-60*) (*Exhibit R, Deposition of Scott Rushkin at 9-10, 34, 39-40, 43-45, 65-66, 70, 76, 81*) (*Exhibit C, Construction Contract, General Conditions at 2-4*) (*Exhibit N, Deposition of Daniel Gale at 14, 16, 23, 28*) (*Exhibit M, 1/6/10 Shelia Mason Deposition at 7, 14-15, 20-23, 43, 48, 51-52, 55-57, 62*) (*Exhibit L, 4/24/14 Shelia Mason Deposition at 10-12, 14-15*) (*Exhibit T, Incident Reports*) (*Exhibit U, OSHA File at 11, 23*) (*Exhibit D, D Construction Sub-Contract*) (Exhibit Q, Deposition of Carmen Rullo at 11, 46) (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit H, OSHA Fact Sheet- "Effective Workplace Safety and Health Management Systems"*) (*Exhibit I, "Wall Bracing 101" and FAQs*) (*Exhibit J, Defendant's Liability Expert Report at 5-11*) (*Exhibit AA, Plaintiff's Answers to Interrogatories*) (*Exhibit Y, Weather Report at 5, 10*) (*Exhibit Q, Deposition of Carmen Rullo at 11*)

(*Exhibit Z, 6/11/09 Deposition of Dashi Slatina 13*) (*Exhibit S, Deposition of Dashi Slatina at 14-16, 72-76*) (*Exhibit X, Scene Photos*) (*Exhibit F, Progress Photos*)(*Exhibit CC, OSHA "Struck-By Hazards Participant Guide*) (*Exhibit EE, "Big Four Construction Hazards: Struck-By Hazards", abridged*)

A. LeFrak Organization Disregarded Basic Work Safety Rules

14. The corporate hierarchy of the Construction Department at the LeFrak Organization at the time of the incident was as follows.

15. Anthony Scavo was the Vice President of Construction for the LeFrak Organization. He worked in the corporate office rather than in the field on the Shore Club project. (*Exhibit K, Deposition of David Jenkins at 12*) (*Exhibit M, 1/6/10 Shelia Mason Deposition at 45-46*)

16. Directly Below Anthony Scavo was David Jenkins who has been an employee of the LeFrak Organization since 1980. (*Exhibit K, Deposition of David Jenkins at 12, 23*) Jenkins was the "General Superintendent" on the Shore Club project. (*Exhibit K, Deposition of David Jenkins at 11*)

17. Below Jenkins as the General Superintendent were regular project Superintendents. For the Shore Club project these were Shelia Mason, Scott Rushkin and Daniel Gale. Below the Superintendents were clerical staff and job foremen. (*Exhibit K, Deposition of David Jenkins at 13*) (*Exhibit M, 1/6/10 Mason Deposition at 37*)

18. As the general contractor, the LeFrak Organization selected, scheduled and coordinated the subcontractors on the project. (*Exhibit K, Deposition of David Jenkins at 30*)

19. As the General Superintendent of the Shore Club project, it was the job of David Jenkins to orchestrate and coordinate all that. (*Exhibit K, Deposition of David Jenkins at 19-21, 30-31*)

20. As such, David Jenkins was on site essentially 100% of the time on a daily basis

beginning at 7am. He was the hands on person in charge of the job to get the buildings built; he was the field supervisor. (*Exhibit K, Deposition of David Jenkins at 19-21, 33-36, 47*) (*Exhibit R, Deposition of Scott Rushkin at 34*)

21. David Jenkins was responsible to oversee and monitor the activities of the subcontractors LeFrak hired on the project. (*Exhibit K, Deposition of David Jenkins at 19-21, 33-35*)

22. Jenkins and LeFrak Organization had the power and authority to work out any disputes among the subcontractors. (*Exhibit K, Deposition of David Jenkins at 31*)

23. Jenkins and LeFrak Organization had the power and authority to correct or terminate subcontractors that did not follow its rules or otherwise did not do what was expected of them. (*Exhibit K, Deposition of David Jenkins at 31-32*) (*Exhibit R, Deposition of Scott Rushkin at 43-44*)

24. Scott Rushkin testified:

> Q. ...Did the general contractor on this job have the power to correct a subcontractor if they were not doing the work as expected?
> A. Yes.

(*Exhibit R, Deposition of Scott Rushkin at 44-45*)

25. In fact, under the Construction Contract, the LeFrak Organization general contractor was <u>required</u> to exercise substantial control over the subcontractors and work:

> <u>Supervision</u>. Contractor shall supervise and direct the Work, using its best skill and attention. <u>It shall be solely responsible for all construction means, methods, techniques, sequences and procedures</u> and for coordinating all portions of the Work under the Contract. Contractor shall be responsible to Owner for the acts and omissions of all its employees and all Subcontractors, their agents and employees, and all other persons performing any of the Work under a contract with Contractor.

(*Exhibit C, Construction Contract, General Conditions at 2*) (underline added)

26. It was David Jenkins' job to carry out these responsibilities for LeFrak Organization.

(*Exhibit K, Deposition of David Jenkins at 50-51*)

27. As such, LeFrak Organization required that whenever there was a subcontractor on the job, a LeFrak Organization superintendent also had to be there to supervise their work. (*Exhibit K, Deposition of David Jenkins at 34) (Exhibit R, Deposition of Scott Rushkin at 81, "If there's work going on a super would be expected to be there, yes.") (Exhibit N, Deposition of Daniel Gale at 28)*

28. The superintendents would be watching the subcontractors; one might be assigned to watch the concrete contractor, another to watch the carpenters, another to watch the mechanical trades, etc. *(Exhibit K, Deposition of David Jenkins at 34, 37-38) (Exhibit M, Deposition of Shelia Mason at 43) (Exhibit R, Deposition of Scott Rushkin at 39-40)*

29. In fact, with regard to the work of its subcontractors, both David Jenkins and Shelia Mason (a superintendent) testified, "<u>We watch everything</u>." (*Exhibit K, Deposition of David Jenkins at 35) Exhibit M, Deposition of Shelia Mason at 51-52*) (underline added) (*Exhibit R, Deposition of Scott Rushkin at 39-40*)

30. And in fact David Jenkins testified:

Q. If you see a danger on the job site where someone might be seriously injured or killed, are you supposed to do anything about that?
A. Yes.

Q. And what would that be?
A. I would stop the work immediately.

Q. And on the North Tower project, you did have the power and authority to stop work if you deemed that to be fit?
A. Yes.

(*Exhibit K, Deposition of David Jenkins at 54*)

31. Despite this substantial control over its subcontractors, and contrary to its basic

obligations under New Jersey law, federal law and industry standards, LeFrak Organization did nothing to manage safety or require its subcontractors follow basic safety rules. (*Exhibit K, Deposition of David Jenkins at 16-17, 19-22, 30-38, 41-47, 50-51, 53-55, 57, 59-60*) (*Exhibit R, Deposition of Scott Rushkin at 9-10, 34, 39-40, 43-45, 65-66, 70, 76, 81*) (*Exhibit C, Construction Contract, General Conditions at 2-4*) (*Exhibit N, Deposition of Daniel Gale at 14, 16, 23, 28*) (*Exhibit M, 1/6/10 Shelia Mason Deposition at 7, 14-15, 20-23, 43, 48, 51-52, 55-57, 62*) (*Exhibit L, 4/24/14 Shelia Mason Deposition at 10-12, 14-15*) (*Exhibit T, Incident Reports*) (*Exhibit U, OSHA File at 11, 23*) (*Exhibit D, D Construction Sub-Contract*) (Exhibit Q, Deposition of Carmen Rullo at 11, 46) (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit H, OSHA Fact Sheet- "Effective Workplace Safety and Health Management Systems"*) (*Exhibit I, "Wall Bracing 101" and FAQs*) (*Exhibit J, Defendant's Liability Expert Report at 5-11*) (*Exhibit AA, Plaintiff's Answers to Interrogatories*) (*Exhibit Y, Weather Report at 5, 10*) (*Exhibit Q, Deposition of Carmen Rullo at 11*) (*Exhibit Z, 6/11/09 Deposition of Dashi Slatina 13*) (*Exhibit S, Deposition of Dashi Slatina at 14-16, 72-76*) (*Exhibit X, Scene Photos*) (*Exhibit F, Progress Photos*)

32. LeFrak Organization did nothing to see to it OSHA or industry general health and safety standards were followed. It also did nothing to see to it safety standards specific to the construction of concrete block walls were followed. *Id.*

33. David Jenkins unambiguously testified:

Q. Did the LeFrak Organization require its subcontractors to have safety rules that have to be followed on the project? Did they require that?
A. I don't think there's any written documents that requires that, other than what's in their contract.

Q. Did the LeFrak Organization [its] subcontractors train their workers in safety and accident prevention?

A. Not that I'm aware of.

Q. ...Did the LeFrak [Organization] set forth any rules that had to be followed in connection with them building that wall?
A. No.

Q. To your recollection, did D. Construction also build walls in the South Tower project? That is cement block walls?
A. Yes.

Q. Did you or anyone else from the LeFrak Organization, to your knowledge, have any meetings with the people from D. Construction to discuss safety in connection with building these walls before the work started...?
A. No.

Q. You talked about how the subcontractors were watched, how the work was monitored. My question to you is: Did anyone from the LeFrak Organization conduct inspections of the work, specifically with respect to safety, to see to it that the work was being done in accordance with the federal OSHA workplace safety rules?
A. No.
...
Q. Did you or anyone from the LeFrak Organization, to your knowledge, conduct any evaluations of the safety performance of the subcontractors on the North Tower project?
A. No.

Q. To your knowledge, did the LeFrak Organization do anything to manage safety with respect to its subcontractors on the North Tower project?
A. No.

(*Exhibit K, Deposition of David Jenkins at 38-40*) (underline added)

34. David Jenkins also testified that no bracing was used on the wall that collapsed on the worker here, nor was it used on any of the cinder block walls throughout the project. (Exhibit K, Deposition of David Jenkins at 60)

35. Shelia Mason also testified she does not recall seeing any such bracing on any of the concrete block walls on the project at any time prior to the collapse. (*Exhibit L, 4/24/14 Shelia Mason*

Deposition at 14-15)

36. David Jenkins testified:

Q. In the photos in Number 13[2], do you see any bracing elements anywhere in any of those incident pictures? That would be bracing for the wall.
A. No.

Q. Was any bracing, like as shown in those pictures on Plaintiffs' Exhibit 16[3], used on any of the block wall that we've been speaking about, to your knowledge?
A. No.

Q. I mean at any time during the construction of the North Tower?
A. No.

(*Exhibit K, Deposition of David Jenkins at 60*)

37. Although David Jenkins says he was in charge of safety on the Shore Club project, (*Exhibit K, Deposition of David Jenkins at 57*) (*Exhibit W, Deposition Notice*), he has no OSHA nor any other workplace safety training to speak of. (*Exhibit K, Deposition of David Jenkins at 16, 59*)

38. In fact, as of the time of the incident, it appears none of the LeFrak Organization superintendents had any such work safety training. (*Exhibit N, Deposition of Daniel Gale at 16*) (*Exhibit R, Deposition of Scott Rushkin at 9-10*)

39. And although Shelia Mason has been employed by LeFrak Organization for 23 of her 27 years in the construction industry, she had no idea who was in charge of site safety on the Shore Club project. (*Exhibit M, 1/6/10 Shelia Mason Deposition at 7, 62*) (*Exhibit L, 4/24/14 Shelia Mason Deposition at 11*)

40. Yet the Construction Contract unambiguously states that the LeFrak Organization general

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[2]Deposition Exhibit 13 are the collapse scene photos and are attached hereto as Exhibit X.

[3]Deposition Exhibit 16 is attached hereto as Exhibit I.

contractor, "shall designate a responsible member of its organization at the site whose duty shall be the prevention of accidents." (*Exhibit C, Construction Contract, General Conditions at 4*) (underline added)

41. LeFrak Organization did not even have any kind of workplace safety manual applicable to the work. (*Exhibit K, Deposition of David Jenkins at 16*)

42. LeFrak Organization also did not require its subcontractors to be safety competent. (*Exhibit K, Deposition of David Jenkins at 47*)

43. LeFrak Organization simply had no rules with regard to workplace safety that its subcontractors had to follow. (*Exhibit K, Deposition of David Jenkins at 17*)

44. The reality was that in practice, as long as the final product met the architectural plans and the subcontractors fell within budget, LeFrak Organization was not concerned about how the work got done from a safety standpoint. (*Exhibit K, Deposition of David Jenkins at 53-54*) (*Exhibit N, Deposition of Daniel Gale at 23*)

B. LeFrak Organization Knew it Ignored Basic Work Safety Rules Including That Concrete Block Walls on the Project Were Never Braced

45. The sequence of the job was that the South Tower was built first, then the garage, then the North Tower. (*Exhibit K, Deposition of David Jenkins at 21-22*)

46. Each tower took about two years. The entire project took about 4 years. (*Exhibit K, Deposition of David Jenkins at 22*)

47. The construction process for both towers was essentially the same. (*Exhibit K, Deposition of David Jenkins at 35-36*) (*Exhibit M, Deposition of Shelia Mason at 52*).

48. Concrete masonry walls were common on this project; they were constructed on an

ongoing basis at various points throughout the project. (*Exhibit K, Deposition of David Jenkins at 41-42, 45-46*) (*Exhibit R, Deposition of Scott Rushkin at 65*)

49. Essentially the same masonry walls constructed in the South Tower were also constructed in the North Tower; the towers are mirrors of each other. (*Exhibit M, 1/6/10 Shelia Mason Deposition at 52*) (*Exhibit N, Deposition of Daniel Gale at 14*)

50. The concrete block demising walls separating the towers from the garage were built from the floor to the ceiling starting on floor 3 and working the way up through floor 8. (*Exhibit K, Deposition of David Jenkins at 41-44*) (*Exhibit R, Deposition of Scott Rushkin at 65*)

51. The finished walls were about the 10 foot height of each floor. (*Exhibit L, 4/24/14 Shelia Mason Deposition at 11-12*)

52. D Construction built these walls. (*Exhibit T, Incident Reports*) *(Exhibit U, OSHA File at 11, 23*) (*Exhibit D, D Construction Sub-Contract*) (Exhibit Q, Deposition of Carmen Rullo at 11, 46)

53. The wall that collapsed on Dashi Slatina was on the eighth floor of the North Tower and was about nine feet high. (*Exhibit T, Incident Reports*) (*Exhibit U, OSHA File at 11, 23*)

54. This sequence of constructing these demising walls from the third to the eighth floor took place over the course of an extended period of time, about 6 to 12 months. (*Exhibit K, Deposition of David Jenkins at 45-46*)

55. As indicated above, LeFrak Organization superintendents were required to monitor the work of their subcontractors; they "watch everything." (*Exhibit K, Deposition of David Jenkins at 34-35, 37-38*) (*Exhibit M, Deposition of Shelia Mason at 43, 51-52*) (*Exhibit R, Deposition of Scott Rushkin at 39-40*) (*Exhibit R, Deposition of Scott Rushkin at 81*)

56. Shelia Mason watched D Construction build these unbraced concrete block walls on the

project prior to the collapse incident. (*Exhibit M, 1/6/10 Shelia Mason Deposition at 48*) (*Exhibit L, 4/24/14 Shelia Mason Deposition at 10, 12*)

57. LeFrak Organization was also well aware from the building plans these walls would be built throughout the project. (*Exhibit R, Deposition of Scott Rushkin at 66*)

58. The dangerous condition of unbraced walls on the project was "in plain view." (*Exhibit U, OSHA File at 23*)

59. Despite the substantial control over its subcontractors, its responsibility under clear New Jersey law, federal law, industry standards and its own construction contract, and despite the simple OSHA and industry standards to the contrary, LeFrak Organization simply did not require these walls to be braced. *Alloway v. Bradlees Inc.,* 157 N.J. at 237-38 (1999); *Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App Div. 1994); *Constantino v. Ventriglia*, 324 N.J.Super. 437 (App.Div. 1999) (industry safety standards are pertinent in determining negligence in construction injury case); 29 *C.F.R.* §1926.16; (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit H, OSHA Fact Sheet- "Effective Workplace Safety and Health Management Systems"*) (*Exhibit I, "Wall Bracing 101" and FAQs*) (*Exhibit J, Defendant's Liability Expert Report at 5-11*) (*Exhibit C, Construction Contract, General Conditions at 2-4*) (*Exhibit K, Deposition of David Jenkins at 43-44*) (*Exhibit AA, Plaintiff's Answers to Interrogatories*) (*Exhibit L, 4/24/14 Shelia Mason Deposition at 14-15*)

60. David Jenkins unambiguously testified:

Q. Did the LeFrak Organization require that when this wall got eight feet or higher, that it was to be braced to prevent a collapse? Did they specifically require that?
A. No.

(*Exhibit K, Deposition of David Jenkins at 43-44*)

III. The Inevitable Result of Lefrak Organization's Decision to Disregard Basic Safety Rules

1. As is common in Jersey City along the Hudson River in January, it was very windy on the day of the incident, January 6, 2007. There were sustained winds of 15-29 mph with gusts up to 36 mph. (*Exhibit Y, Weather Report at 5, 10*) (*Exhibit T, Incident Reports*) (*Exhibit U, OSHA File*)

2. The weather forecast in the days leading up the incident predicted these conditions. *(Exhibit Y, Weather Records*) (*Exhibit A, 7/7/14 Salvatore-Gallagher Report at 2*) (*Exhibit B, 11/4/14 Supplemental Salvatore-Gallagher Report at 3*)

3. Two D Construction workers were assigned to build this wall at the time of the incident, plaintiff Dashi Slatina and Edip Ramadani. (*Exhibit Q, Deposition of Carmen Rullo at 15*)

4. Dashi Slatina was a relatively inexperienced laborer and Edip Ramadani was his foreman supervisor. (*Exhibit Q, Deposition of Carmen Rullo at 11*)

5. Dashi Slatina had only been working with D Construction for about two weeks before the incident. (*Exhibit Z, 6/11/09 Deposition of Dashi Slatina 13*)

6. Dashi Slatina never received any workplace safety training. (*Exhibit S, Deposition of Dashi Slatina at 75*)

7. At the time of the incident the wall was about 9 feet high. (*Exhibit S, Deposition of Dashi Slatina at 72-73*) (*Exhibit R, Deposition of Scott Rushkin at 76*) (*Exhibit T, Incident Reports*) (*Exhibit U, OSHA Reports*)

8. As was the standard practice on this LeFrak Organization project, the walls were not braced during construction. (*Exhibit S, Deposition of Dashi Slatina 74-76*) (*Exhibit K, Deposition of David Jenkins at 60*) (*Exhibit L, 4/24/14 Shelia Mason Deposition at 14-15*) (*Exhibit AA, Plaintiff's Answers to Interrogatories*)

9. The wall was open to the wind as no windows were in. At about 2:00 pm as the workers were cleaning excess cement holding the blocks together, a gust of wind blew the wall over. The workers were struck by the falling blocks. (*Exhibit M, 1/6/10 Shelia Mason Deposition at 55-57*) (*Exhibit F, Progress Photos*) (*Exhibit S, Deposition of Dashi Slatina at 14-16, 72-73*) (*Exhibit T, Incident Reports*) (*Exhibit X, Scene Photos*)

10. Shelia Mason was on scene shortly after the collapse. She photographed the two men lying on the ground and the rubble. (*Exhibit M, 1/6/10 Shelia Mason Deposition at 20-23*) (*Exhibit X, Incident Scene Photos*)

11. OSHA found its rules about bracing walls over 8 feet were not followed and that this "Serious" violation caused it to collapse and injure Dashi Slatina. (*Exhibit U, OSHA File at 11, 23*)

12. Dashi Slatina, 29 years old at the time, sustained catastrophic crush injuries. He has undergone numerous surgeries and will require more into the future. He has been declared totally disabled. His net wage loss alone is in excess of $988,377. (*Exhibit V, Damage Reports*) (*Exhibit AA, Plaintiff's Answers to Interrogatories*)

13. LeFrak Organization conducted no kind of investigation into this incident to determine the cause and prevent it from happening again. (*Exhibit K, Deposition of David Jenkins at 55*)

14. In fact, prior to coming to his deposition, David Jenkins gave no thought as to what he might have been able to do to prevent this incident. (*Exhibit K, Deposition of David Jenkins at 55*)

15. After the incident LeFrak Organization promoted David Jenkins to Director of Construction. (*Exhibit K, Deposition of David Jenkins at 11*)

RESPONSE TO MOVANT'S STATEMENT OF MATERIAL FACTS

1. Admitted.

2. Admitted but added that the wall blew over because the general contractor defendant(s) decided basic work safety rules would not be enforced on the project. Defendants ignored OSHA and industry general health and safety standards and safety standards specific to the construction of cinderblock masonry walls. These walls were constructed at various points throughout this four year project. LeFrak Organization had actual and implied knowledge, and it was their practice, that these walls were never braced during construction to prevent them from collapsing, contrary to law. As such, the "cause" of the collapse is far more than just wind, it is the inevitable result of the defendant's decision to disregard basic work safety rules. (*Exhibit K, Deposition of David Jenkins at 16-17, 19-22, 30-38, 41-47, 50-51, 53-55, 57, 59-60*) (*Exhibit R, Deposition of Scott Rushkin at 9-10, 34, 39-40, 43-45, 65-66, 70, 76, 81*) (*Exhibit C, Construction Contract, General Conditions at 2-4*) (*Exhibit N, Deposition of Daniel Gale at 14, 16, 23, 28*) (*Exhibit M, 1/6/10 Shelia Mason Deposition at 7, 14-15, 20-23, 43, 48, 51-52, 55-57, 62*) (*Exhibit L, 4/24/14 Shelia Mason Deposition at 10-12, 14-15*) (*Exhibit T, Incident Reports*) (*Exhibit U, OSHA File at 11, 23*) (*Exhibit D, D Construction Sub-Contract*) (Exhibit Q, Deposition of Carmen Rullo at 11, 46) (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit H, OSHA Fact Sheet- "Effective Workplace Safety and Health Management Systems"*) (*Exhibit I, "Wall Bracing 101" and FAQs*) (*Exhibit J, Defendant's Liability Expert Report at 5-11*) (*Exhibit AA, Plaintiff's Answers to Interrogatories*) (*Exhibit Y, Weather Report at 5, 10*) (*Exhibit Z, 6/11/09 Deposition of Dashi Slatina 13*) (*Exhibit S, Deposition of Dashi Slatina at 14-16, 72-76*) (*Exhibit X, Scene Photos*) (*Exhibit F, Progress Photos*)(*Exhibit CC, OSHA "Struck-By Hazards Participant Guide*) (*Exhibit EE, "Big Four Construction Hazards: Struck-By Hazards", abridged*)

3. That is an incomplete "straw man" characterization. Plaintiff alleges far more than that. Plaintiff's claims are more fully set forth in the complaint and this summary judgment presentation, including all exhibits.

4. As indicated herein and in movant's brief (Db2), and as was the subject of a prior appeal (*Slatina v. D. Const. Corp.*, 2012 WL 3140233 (App.Div. August 03, 2012)), there is significant ambiguity as to exactly which entities were the owner and/or general contractor at any given time. In fact, there is conflict among defendant's own prior affidavits, briefs and paper on this identification issue. Furthermore, the individuals actually running the project basically testified they understood and at all relevant times held themselves out to the world as being employees of the "LeFrak Organization." A "Construction Contract" for the project indicates that at one point the LeFrak Organization designated "Shore Club North Urban Renewal Company, LLC" as the "Owner" and "Shore Club North Construction Company, LLC" as the general contractor for the Shore Club project. (*Exhibit C, Construction Contract*). Furthermore, at all relevant times the LeFrak Organization and/or its principal, Richard Lefrak, owned and/or controlled both "Shore Club North Urban Renewal Company, LLC" and

"Shore Club North Construction Company, LLC." (*Exhibit O, Deposition of Paul Bozza at 5-19*) (*Exhibit K, Deposition of David Jenkins at 13-14, 16, 19-21, 23-24, 37-30)* (*Exhibit R, Deposition of Scott Rushkin at 18-19, 41-44*); *Slatina v. D. Const. Corp.*, 2012 WL 3140233 (App.Div. August 03, 2012) As such, for purposes of the within motion practice, we simply and collectively refer to the "LeFrak Organization" interchangeably. For purposes of this motion, it need not be determined precisely which entities held which positions.

5. Please see response to # 4 above.

6. Please see response to # 4 above.

7. Please see response to # 4 above.

8. Please see response to # 4 above.

9. Admitted.

10. Admitted that plaintiff was a W2 payroll "employee" of D Construction. However, for purposes of New Jersey construction site safety law and OSHA, as LeFrak Organization was the general contractor on this "multi-employer" worksite, it too is considered an "employer" and Dashi Slatina is also considered one of its "employees." That is, the OSHA standards speak in terms of things the "employer" is supposed to do. The general contractor's requirement to comply with the regulations *vis a vis* the employees of its subcontractors is derived from 29 *C.F.R.* § 1926.32 where the term "employer" means "contractor or subcontractor." *See also Meder*, 240 N.J.Super. at 476 (declaring the reasoning that the OSHA definition of "employer" does <u>not</u> include general contractors as "flawed."); *Kane,* 278 *N.J.Super.* at 142-43 (considered the effect of OSHA regulations on the existence and scope of a duty of care, and stating that general and subcontractors have a joint, 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*, 157 N.J. at 238 ("'the prime contractor assumes all obligations prescribed as employer obligations under the [OSHA] standards...'" *citing,* 29 *C.F.R.* § 1926.16(b)

11. Admitted. And it was the ongoing practice of this contractor to not brace walls over 8 feet which LeFrak Organization was well aware of. (*Exhibit K, Deposition of David Jenkins at 16-17, 19-22, 30-38, 41-47, 50-51, 53-55, 57, 59-60*) (*Exhibit R, Deposition of Scott Rushkin at 9-10, 34, 39-40, 43-45, 65-66, 70, 76, 81*) (*Exhibit N, Deposition of Daniel Gale at 14, 16, 23, 28*) (*Exhibit M, 1/6/10 Shelia Mason Deposition at 7, 14-15, 20-23, 43, 48, 51-52, 55-57, 62*) (*Exhibit L, 4/24/14 Shelia Mason Deposition at 10-12, 14-15*) (*Exhibit T, Incident Reports*) (*Exhibit U, OSHA File at 11, 23*) (Exhibit Q, Deposition of Carmen Rullo at 11, 46) (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit AA, Plaintiff's Answers to Interrogatories*) (*Exhibit Q, Deposition of Carmen Rullo at 11*) (*Exhibit Z, 6/11/09 Deposition*

of Dashi Slatina 13) (*Exhibit S, Deposition of Dashi Slatina at 14-16, 72-76*) (*Exhibit X, Scene Photos*)

12. Admitted.

13. This is another "straw man" argument. Plaintiff's liability experts rely on far more than merely the OSHA citation to the direct employer. The fact of the matter here is this general contractor made a decision to not follow basic OSHA or industry safety standards on this project, as readily admitted to by its head job superintendent. Please see response to #2 above.

14. Please see response to # 4 above and Plaintiff's Statement of Facts.

15. Please see response to # 4 above and Plaintiff's Statement of Facts. These were the four superintendents of the LeFrak Organization on this project.

16. Denied. First, the "incident" which gives rise to this action is defendant's wholesale decision to disregard basic safety rules on this project. This decision was in place long before the inevitable result of it occurred. (*Exhibit K, Deposition of David Jenkins at 16-17, 19-22, 30-38, 41-47, 50-51, 53-55, 57, 59-60*) (*Exhibit R, Deposition of Scott Rushkin at 9-10, 34, 39-40, 43-45, 65-66, 70, 76, 81*) (*Exhibit N, Deposition of Daniel Gale at 14, 16, 23, 28*) (*Exhibit M, 1/6/10 Shelia Mason Deposition at 7, 14-15, 20-23, 43, 48, 51-52, 55-57, 62*) (*Exhibit L, 4/24/14 Shelia Mason Deposition at 10-12, 14-15*) (*Exhibit T, Incident Reports*) (*Exhibit U, OSHA File at 11, 23*) (Exhibit Q, Deposition of Carmen Rullo at 11, 46) (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit AA, Plaintiff's Answers to Interrogatories*) (*Exhibit Q, Deposition of Carmen Rullo at 11*) (*Exhibit Z, 6/11/09 Deposition of Dashi Slatina 13*) (*Exhibit S, Deposition of Dashi Slatina at 14-16, 72-76*) (*Exhibit X, Scene Photos*) And with respect not bracing walls and LeFrak Organization's knowledge about this, a significant portion of the project involved the construction of concrete block walls (also referred to as cinder block walls). (*Exhibit K, Deposition of David Jenkins at 41-42, 45-46*) (*Exhibit R, Deposition of Scott Rushkin at 65*) Among other places, cinder block demising walls were constructed on floors 3 through 8 of each tower separating them from the parking garage. (*Exhibit K, Deposition of David Jenkins at 41-44*) (*Exhibit R, Deposition of Scott Rushkin at 65*) These demising walls went approximately 10 feet high from the floor to the ceiling on each level. (*Exhibit L, 4/24/14 Shelia Mason Deposition at 11-12*) LeFrak Organization required that whenever there was a subcontractor on the job, a LeFrak Organization superintendent also had to be there to supervise their work. (*Exhibit K, Deposition of David Jenkins at 34) (Exhibit R, Deposition of Scott Rushkin at 81, "If there's work going on a super would be expected to be there, yes.") (Exhibit N, Deposition of Daniel Gale at 28)* The superintendents would be watching the subcontractors; one might be assigned to watch the concrete contractor, another to watch the carpenters, another to watch the mechanical trades, etc. *(Exhibit K, Deposition of David Jenkins at 34, 37-38) (Exhibit M, Deposition of Shelia Mason at 43) (Exhibit R, Deposition of Scott Rushkin at 39-40)* In fact, with regard to the

work of its subcontractors, both David Jenkins and Shelia Mason (a superintendent) testified, "We watch everything." (*Exhibit K, Deposition of David Jenkins at 35) Exhibit M, Deposition of Shelia Mason at 51-52*) (underline added) (*Exhibit R, Deposition of Scott Rushkin at 39-40*) Shelia Mason was on scene shortly after the collapse and photographed the two men lying in the rubble. (*Exhibit M, 1/6/10 Shelia Mason Deposition at 20-23*) (*Exhibit X, Incident Scene Photos*) David Jenkins also testified that no bracing was used on the wall that collapsed on the worker here, nor was it used on any of the cinder block walls throughout the project. (Exhibit K, Deposition of David Jenkins at 60) Shelia Mason also testified she does not recall seeing any such bracing on any of the concrete block walls on the project at any time prior to the collapse. (*Exhibit L, 4/24/14 Shelia Mason Deposition at 14-15*)

17. Denied. Please see response to #16 above.

18. The deposition speaks for itself and this quote is ambiguous. Shelia Mason clearly testified she was familiar with D Construction's work on this and other projects. (Exhibit M, Mason deposition at 48)

19. Denied. Shelia Mason clearly testified she was familiar with D Construction's work on this and other projects. (*Exhibit M, Mason deposition at 48*) LeFrak Organization required that whenever there was a subcontractor on the job, a LeFrak Organization superintendent also had to be there to supervise their work. (*Exhibit K, Deposition of David Jenkins at 34) (Exhibit R, Deposition of Scott Rushkin at 81, "If there's work going on a super would be expected to be there, yes.") (Exhibit N, Deposition of Daniel Gale at 28)* The superintendents would be watching the subcontractors; one might be assigned to watch the concrete contractor, another to watch the carpenters, another to watch the mechanical trades, etc. *(Exhibit K, Deposition of David Jenkins at 34, 37-38) (Exhibit M, Deposition of Shelia Mason at 43) (Exhibit R, Deposition of Scott Rushkin at 39-40)* In fact, with regard to the work of its subcontractors, both David Jenkins and Shelia Mason (a superintendent) testified, "We watch everything." (*Exhibit K, Deposition of David Jenkins at 35) Exhibit M, Deposition of Shelia Mason at 51-52*) (underline added) (*Exhibit R, Deposition of Scott Rushkin at 39-40*) Shelia Mason was on scene shortly after the collapse and photographed the two men lying in the rubble. (*Exhibit M, 1/6/10 Shelia Mason Deposition at 20-23*) (*Exhibit X, Incident Scene Photos*) And this particular cited quote references personal interaction in the area of the collapse, not the entire job as is mis-characterized here. (*Exhibit M, Mason deposition at 53*)

20. Admitted because in reality LeFrak Organization had no one in charge of safety, contrary to its obligations.

21. Please see response to # 4 above.

22. Denied that LeFrak Organization had a "complete lack of control" with regard to its subcontractors. To the contrary, as the general contractor, the LeFrak Organization selected, scheduled and coordinated the subcontractors on the project. (*Exhibit K, Deposition of David*

Jenkins at 30) As the General Superintendent of the Shore Club project, it was the job of David Jenkins to orchestrate and coordinate all that. (*Exhibit K, Deposition of David Jenkins at 19-21, 30-31*) As such, David Jenkins was on site essentially 100% of the time on a daily basis beginning at 7am. He was the hands on person in charge of the job to get the buildings built; he was the field supervisor. (*Exhibit K, Deposition of David Jenkins at 19-21, 33-36, 47*) (*Exhibit R, Deposition of Scott Rushkin at 34*) David Jenkins was responsible to oversee and monitor the activities of the subcontractors LeFrak hired on the project. (*Exhibit K, Deposition of David Jenkins at 19-21, 33-35*) Jenkins and LeFrak Organization had the power and authority to work out any disputes among the subcontractors. (*Exhibit K, Deposition of David Jenkins at 31*) Jenkins and LeFrak Organization had the power and authority to correct or terminate subcontractors that did not follow its rules or otherwise did not do what was expected of them. (*Exhibit K, Deposition of David Jenkins at 31-32*) (*Exhibit R, Deposition of Scott Rushkin at 43-44*)

Scott Rushkin testified:

> Q. ...Did the general contractor on this job have the power to correct a subcontractor if they were not doing the work as expected?
>
> A. Yes.

(*Exhibit R, Deposition of Scott Rushkin at 44-45*) In fact, under the Construction Contract, the LeFrak Organization general contractor was required to exercise substantial control over the subcontractors and work:

> Supervision. Contractor shall supervise and direct the Work, using its best skill and attention. It shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract. Contractor shall be responsible to Owner for the acts and omissions of all its employees and all Subcontractors, their agents and employees, and all other persons performing any of the Work under a contract with Contractor.

(*Exhibit C, Construction Contract, General Conditions at 2*) (underline added) In fact, Scott Rushkin agreed that the basic function of LeFrak Organization on the job was to plan and control safety on the project. (*Exhibit R, Deposition of Scott Rushkin at 45, 48-50, 53-56*) It was David Jenkins' job to carry out these responsibilities for LeFrak Organization. (*Exhibit K, Deposition of David Jenkins at 50-51*) Defendant's own liability expert report discusses that at the "controlling employer" on this project, that LeFrak Organization had site safety responsibility. (*Exhibit J, Defendant's Liability Expert Report at 5-11*)

23. As discussed above in response to #16, this is denied. LeFrak Organization superintendents

“watch everything.” (*Exhibit K, Deposition of David Jenkins at 35) (Exhibit M, Deposition of Shelia Mason at 51-52*)

24. Denied. Please see responses to numbers 4 and 16 above.

25. Admitted.

26. Under New Jersey law, OSHA and the contract for this project, as the general contractor LeFrak Organization was required to manage safety and have a competent person in charge of this. *Alloway v. Bradlees Inc.,* 157 N.J. at 237-38 (1999); *Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App Div. 1994); *Constantino v. Ventriglia*, 324 N.J.Super. 437 (App.Div. 1999) (industry safety standards are pertinent in determining negligence in construction injury case); 29 *C.F.R.* §1926.16. As such the general contractor is required to actively manage safety on this job site and see to it the subcontractors comply with the federal safety rules and other safety standards in the construction industry. *Id.*; (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit H, OSHA Fact Sheet- “Effective Workplace Safety and Health Management Systems”*) (*Exhibit I, “Wall Bracing 101” and FAQs*) (*Exhibit C, Construction Contract, General Conditions at 2-4*) Defendant’s own expert report discusses this concept. (*Exhibit J, Defendant’s Liability Expert Report at 5-11*) In response to this question Rushkin said, “there's no particular person or entity that's responsible for site safety.” (Exhibit R, Rushkin dep at 91). This is further reason defendant’s summary judgment motion should be denied and plaintiff’s granted.

27. Please see response to # 26 above.

28. Admitted.

29. Admitted. It should have.

30. Denied. Please see response to numbers 4 and 22 above.

31. Denied. That is an inaccurate characterization of the testimony on this issue. Please see response to numbers 16 and 22 above for more details.

32. Admitted, contrary to their clear obligations under the law.

33. As discussed in detail herein, LeFrak Organization maintained substantial control over the work and the subcontractors. LeFrak Organization Superintendent Scott Rushkin, who has been in construction for nearly 20 years (*Rushkin Dep at 7-10*), agrees that the most important job of the general contractor in running a job like this is to follow these basic top-down safety principles. (*Exhibit R, Deposition of Scott Rushkin at 45, 48-50, 53-56*) For corner-cutting reasons, LeFrak Organization simply decided not to do so on this project.

34. Please see response to numbers 2, 10, 11, 16, 22, 26, 33 above and Plaintiff’s Statement of Facts.

35. Please see response to numbers 2, 10, 11, 16, 22, 26, 33 above and Plaintiff's Statement of Facts.

36. As discussed in **§II(B)** *infra*., this is not a material fact. And even if plaintiff did have to prove defendant got involved in the manner and means of the work, which is not the law, summary judgment would still be denied. In fact, under the Construction Contract, the LeFrak Organization general contractor was required to exercise substantial control over the subcontractors and work:

> Supervision. Contractor shall supervise and direct the Work, using its best skill and attention. It shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract. Contractor shall be responsible to Owner for the acts and omissions of all its employees and all Subcontractors, their agents and employees, and all other persons performing any of the Work under a contract with Contractor.

(*Exhibit C, Construction Contract, General Conditions at 2*) (underline added) It was David Jenkins' job to see to it these responsibilities were carried out by LeFrak Organization. (*Exhibit K, Deposition of David Jenkins at 50-51*) To this end, whenever there was a subcontractor on the job, a LeFrak Organization superintendent also had to be there to supervise the work. (*Exhibit K, Deposition of David Jenkins at 34*) (*Exhibit R, Deposition of Scott Rushkin at 81*, "If there's work going on a super would be expected to be there, yes.") (*Exhibit N, Deposition of Daniel Gale at 28*) The superintendents keep a close eye on the subcontractors. (*Exhibit K, Deposition of David Jenkins at 34, 37-38*) (*Exhibit M, Deposition of Shelia Mason at 43*) (*Exhibit R, Deposition of Scott Rushkin at 39-40*) Both David Jenkins and Shelia Mason testified, "We watch everything." (*Exhibit K, Deposition of David Jenkins at 35*) (*Exhibit M, Deposition of Shelia Mason at 51-52*) (underline added) (*Exhibit R, Deposition of Scott Rushkin at 39-40*)

37. The reality was that in practice, as long as the final product met the architectural plans and the subcontractors fell within budget, LeFrak Organization was not concerned about how the work got done from a safety standpoint, contrary to their obligation under the law to manage safety. (*Exhibit K, Deposition of David Jenkins at 53-54*) (*Exhibit N, Deposition of Daniel Gale at 23*).

38. Denied.

39. Admitted that Edip Ramadani was the foreman for D Construction and had the authority attendant of any foreman in his position. This does not in any way detract from the general contractor's non-delegable obligation to manage safety on the project.

40. Admitted- LeFrak Organization did nothing to enforce basic safety rules on the project, including about bracing masonry walls. Had they done so and made this a clear job requirement, this incident never would have happened. (*Exhibits A and B, Salvatore-Gallagher Reports*).

41. Denied that D Construction was in "complete control" of the project. D Construction's "standard procedure" was to violate the OSHA and industry standards applicable to the work. It was safety incompetent. LeFrak Organization knew all of that, but preferred it that way because it sped up the work. (*Exhibit K, Deposition of David Jenkins at 16-17, 19-22, 30-38, 41-47, 50-51, 53-55, 57, 59-60*) (*Exhibit R, Deposition of Scott Rushkin at 9-10, 34, 39-40, 43-45, 65-66, 70, 76, 81*) (*Exhibit C, Construction Contract, General Conditions at 2-4*) (*Exhibit N, Deposition of Daniel Gale at 14, 16, 23, 28*) (*Exhibit M, 1/6/10 Shelia Mason Deposition at 7, 14-15, 20-23, 43, 48, 51-52, 55-57, 62*) (*Exhibit L, 4/24/14 Shelia Mason Deposition at 10-12, 14-15*) (*Exhibit T, Incident Reports*) (*Exhibit U, OSHA File at 11, 23*) (*Exhibit D, D Construction Sub-Contract*) (Exhibit Q, Deposition of Carmen Rullo at 11, 46) (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit H, OSHA Fact Sheet- "Effective Workplace Safety and Health Management Systems"*) (*Exhibit I, "Wall Bracing 101" and FAQs*) (*Exhibit J, Defendant's Liability Expert Report at 5-11*) (*Exhibit AA, Plaintiff's Answers to Interrogatories*) (*Exhibit Y, Weather Report at 5, 10*) (*Exhibit Z, 6/11/09 Deposition of Dashi Slatina 13*) (*Exhibit S, Deposition of Dashi Slatina at 14-16, 72-76*) (*Exhibit X, Scene Photos*) (*Exhibit F, Progress Photos*)(*Exhibit CC, OSHA "Struck-By Hazards Participant Guide*) (*Exhibit EE, "Big Four Construction Hazards: Struck-By Hazards", abridged*) Please also see response to numbers 22, 26 and 33 above.

42. Please see response to number 41 above.

43. As discussed above, LeFrak Organization was well aware of the dangerous ongoing method D Construction used to build the walls.

44. Dashi Slatina was a relatively inexperienced laborer who had only been working for D Construction for about 2 weeks. He had no safety training. (*Exhibit Q, Deposition of Carmen Rullo at 11*) (*Exhibit Z, 6/11/09 Deposition of Dashi Slatina 13*) (*Exhibit S, Deposition of Dashi Slatina at 75*)

45. Admitted.

46. Carmen Rullo was never at the Shore Club project so he has little knowledge of any details that went on there. (*Exhibit Q, Rullo deposition at 53*).

47. As stated, this is not a material fact and is in any event denied. Please see responses to numbers 22, 26, 33 and 41 above.

48. Admitted, and had the general contractor in charge of the project taken its safety management

responsibilities seriously, it would have required D Construction employees be properly trained and instructed in how to build these walls in line with the OSHA and industry safety standards, the walls would thus have been braced and this incident never would have occurred. (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit H, OSHA Fact Sheet- "Effective Workplace Safety and Health Management Systems"*) (*Exhibit I, "Wall Bracing 101" and FAQs*) (*Exhibit J, Defendant's Liability Expert Report at 5-11*)

49. Admitted. Please see response to number 48 above.

LEGAL DISCUSSION

I. OSHA Was Passed to Prevent the Kind of Needless Job Site Injury Plaintiff Sustained

In the United States, about a million workers have been killed on-the-job since the 1920's. Our country's prior industrial history is even more compelling. 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 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. Linder, Marc. *Fatal Subtraction: Statistical MIAs on the Industrial Battlefield.* 20 J. Legis. 99 (1994).

Shamefully 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. Responding to National Safety Council statistics suggesting that 14,000 Americans are killed and 2.5 million permanently injured in the workplace every year, 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); *Gonzalez v. Ideal Tile Importing Co., Inc.,* 371 N.J. Super. 349, 359 (App. Div. 2004). At the time of OSHA's passage, the country was losing more men and women to workplace accidents than to the war in Vietnam. Linder, Marc. *Fatal Subtraction: Statistical MIAs*

on the Industrial Battlefield. 20 J. Legis. 99 (1994); *see also Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents.* 101 Harv. L. Rev. 535 (1987). Death and disability due to unsafe workplaces persist. In 2007 for example, there were 4 million non-fatal workplace injuries and illnesses and 5657 fatal injuries in the United States. Bureau of Labor Statistics, *Workplace Injuries and Illnesses in 2007; National Census of Fatal Occupational Injuries in 2007*; (*Exhibit A, Salvatore-Gallagher Report at 19-20*)

Immigrant workers like Dashi Slatina disproportionately suffer workplace injury and death. In 2009 the following headline appeared in *USA Today*, "Hispanic worker deaths up 76%, [while] U.S. job fatalities fall in same span."[4] Workplace safety violations of the kind this case is about disproportionately maim immigrant workers in America today. "[R]ecent statistics reveal an ethnic fatality trend evidenced by an alarming increase in Hispanic worker deaths."[5] A recent article from the New Jersey Law Journal discusses this problem:

> 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. <u>Falls from elevation continue to be the leading cause of fatalities</u> and the highest proportion of those killed worked for small contractors with less than 10 employers.
> . . . .
> While injury on residential work-sites certainly occurs across all demographics, <u>recent statistics reveal an ethnic fatality trend evidenced by an alarming increase in Hispanic worker deaths</u>. The NAHB concluded that 28 percent of all fall fatalities were Hispanic workers and 29 percent were foreign born. Between 2003–2006, 34 percent

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

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

> 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.[6]

The federal government recently reported that 937 immigrant workers died from job-related injuries in 2007, representing a 76% increase from 1992.[7] Most striking, however, is that the nationwide total decreased during the same period; immigrant workers died in record numbers as the American workplace became safer. *See also* (*Exhibit A, Salvatore-Gallagher Report at 19-20*)

OSHA was implemented with these systemic inadequacies, as well as our country's bloody industrial history, 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 ignore basic work safety rules, the imposition of liability through tort law is essential 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. Application of tort law is particularly important in this case where this major developer apparently made a conscious decision to risk the lives of workers by cutting these corners.

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[6]LeWinter, *Supra.*

[7]Jervis, *Supra.*

II. The Summary Judgment Motion of LeFrak Organization Should Be Denied Because New Jersey, Federal Law and Industry Standards Recognize That in Order for Meaningful Workplace Safety Practices to Occur, General Contractors Have the Non-delegable Duty to Manage Safety and Enforce OSHA Standards

A. LeFrak Organization Has a Non-Delegable Duty Under *Bortz, Meder, Kane, Alloway* and OSHA to Prevent Needless Injury to Subcontractor Employees

Congress enacted the Occupational Safety and Health Act (the OSH Act), 29 *U.S.C.A.* § 651 to § 678, 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); *see Gonzalez v. Ideal Tile Importing Co., Inc.,* 371 N.J. Super. 349, 359 (App. Div. 2004). In pursuing those goals, Congress authorized the Secretary of Labor to promulgate health and safety standards for workplaces, 29 *U.S.C.A.* § 655, and established the Occupational Safety and Health Administration (OSHA) to enforce those standards through inspections and investigations, 29 *U.S.C.A.* § 657; The OSHA Act requires employers to comply with specific standards and also imposes a general duty on employers to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 *U.S.C.A.* § 654(a); *Gonzalez* at 359-60. Violators of specific OSHA standards or OSHA's general duty to provide a safe workplace face civil monetary penalties, as well as criminal sanctions, 29 *U.S.C.A.* § 666. *Gonzalez, supra.* Specifically, the OSHA regulations provide that:

> [N]o contractor or subcontractor for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety.

29 *C.F.R.* § 1926.20. While it is recognized subcontractors have a responsibility to the OSHA regulations, it is ultimately the general contractor that must enforce these rules and determine whether

or not they are being followed by the subcontractors. 29 *C.F.R.* § 1926.16. As such, a general contractor like LeFrak Organization cannot delegate its duty to maintain a safe workplace under the federal OSHA regulations to another; but rather, the general contractor must maintain overall responsibility for the project.

> (a) The prime contractor and any subcontractors may make their own arrangements with respect to obligations which might be more appropriately treated on a jobsite basis rather than individually. Thus, for example, the prime contractor and his subcontractors may wish to make an express agreement that the prime contractor or one of the subcontractors will provide all required first-aid or toilet facilities, thus relieving the subcontractors from the actual, but not any legal, responsibility (or, as the case may be, relieving the other subcontractors from this responsibility). ***In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this part for all work to be performed under the contract***.
>
> (b) 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.***
>
> (c) To the extent that a subcontractor of any tier agrees to perform any part of the contract, he also assumes responsibility for complying with the standards in this part with respect to that part. Thus, the prime contractor assumes the entire responsibility under the contract and the subcontractor assumes responsibility with respect to his portion of the work. ***With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.***
>
> (d) Where joint responsibility exists, both the prime contractor and his subcontractor or subcontractors, regardless of tier, shall be considered subject to the enforcement provisions of the Act.

29 *C.F.R.* §1926.16 (emphasis added); *see Alloway v. Bradlees*, 157 N.J. 221, 237-38 (1999) (a general contractor on a work site has a non-delegable duty to maintain a safe workplace).

Under well-settled construction law in New Jersey, general contractors like LeFrak Organization (and/or its designated general contractor entity, as the case may be) have 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. at 237-38 (1999), *citing, Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App. Div. 1994) State public policy and OSHA impose a duty on the general contractor to ensure the protection of all of the workers on a construction project, irrespective of the identity and status of their various and several employers, by requiring, either by agreement or by operation of law, the designation of a single repository of the responsibility for the safety of them all. *Alloway*, 157 N.J. at 238, *citing Bortz v. Rammel,* 151 *N.J.Super.* 312, 321 (App. Div. 1977), *cert. den.* 75 N.J. 539. As a matter of public policy and federal law, the general contractor is the single repository of responsibility for the safety of all employees on the job. As such, the general contractor bears responsibility for all OSHA violations on a project. *Meder v. Resorts International*, 240 N.J.Super. 470, 473-77 (App. Div. 1989), *cert. den.* 121 N.J. 608; *Kane*, 278 N.J.Super. at 142-43; *Dawson v. Bunker Hill Plaza Assocs.,* 289 N.J.Super. 309, 320-21 (App.Div.1996). This was also discussed at length in plaintiff's liability expert reports. (*Exhibits A and B, Salvatore-Gallagher Reports*).

Indeed, the law recognizes the realities of construction sites, that it is the general contractor that has the power and position to enforce workplace safety rules and to generally foster an environment where workplace safety and the well being of the workers on the job are given high priority. While certainly everyone on a construction site should adhere to the OSHA safety regulations, the law recognizes that the workers at the bottom of the hierarchy are powerless to take any real enforcement role and will in fact often be pressured to work in unsafe conditions without complaint, or risk losing their job. *Crumb v. Black & Decker*, 204 N.J.Super. 521, 527 (App.Div. 1985) ("He either worked at his assigned task or was subject to discipline or being labeled as a

troublemaker."), *citing*, *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 167 (1979); *see also Green v. Sterling Extruder Corporation*, 95 N.J. 263 (1984) (comparative negligence may be disregarded in a workplace safety negligence case); *Bexiga v. Havir Mfg. Corp.,* 60 N.J. 402 (1972); *Cavanaugh v. Skil Corporation*, 331 N.J.Super. 134, 185 (App. Div. 1999) (workers on construction sites often have no real choice about working under known unsafe conditions.)

As such, general contractor enforcement is a key component of the federal workplace safety scheme embodied in OSHA. The argument of the LeFrak Organization defendants that they owed no duty to the plaintiff contradicts long-standing workplace safety law in the State of New Jersey.

B. Defendants' Manner and Means Argument and its Reliance upon the *Wolczak* Line of Cases from the 1950s Is Based upon an Outmoded Approach to Construction Safety Law

LeFrak Organization relies upon an argument that they did not get involved in the manner and means of the project, and therefore they are entitled to summary judgment. Putting aside for the moment the record is clear the LeFrak Organization maintained significant control over the work, defendant's argument is based on a line of cases that no longer represents the state of the law in New Jersey. New Jersey construction accident law dealing with a general contractor's duty to enforce safety standards and regulations for the protection of the subcontractor's employees has evolved over time. Prior to the passage of the New Jersey Construction Safety Act and the case of *Bortz v. Rammel*, 151 N.J.Super. 312 (App.Div. 1977), the controlling precedent on the issue was *Wolczak v. National Electric Products Corp.*, 66 N.J.Super. 64 (App.Div. 1961). The antiquated rule under *Wolczak* was as follows:

> Absent control over the job location or direction of the manner in which the delegated tasks are carried out, the general contractor is not liable for injuries to employees of

> the subcontractor resulting from either the condition of the premises or the manner in which the work is performed.

Wolczak, 66 N.J.Super. at 71. As stated however, with the enactment of the New Jersey Construction Safety Act (and later OSHA) and the case of *Bortz v. Rammel* and its offshoots, *Meder v. Resorts International*, 240 N.J.Super. 470 (App. Div. 1989), *cert. den.* 121 N.J. 608, *Kane v. Hartz Mountain*, 278 N.J.Super. 129 (App. Div. 1994) and the seminal case of *Alloway v. Bradlees Inc.,* 157 N.J. 221 (1999), the law changed away from the *Wolczak* general contractor non-liability rule in favor of the non-delegable duty articulated above. *Alloway*, 157 N.J. at 236-237; *Kane*, 278 N.J.Super. at 140-143; *Meder*, 240 N.J.Super. at 473-477.

The Appellate Division in *Bortz* recognized that the common law non-liability of the general contractor could no longer remain viable in the face of the Construction Safety Act which imposed a non-delegable duty for safety on the general contractor to prevent injuries to employees of its subcontractors. The *Bortz* court found the *Wolczak* rule to have been "substantially qualified by subsequent legislative action." *Bortz,* 151 *N.J.Super.* at 319. The court there took note of the adoption, following the "restrictive decision" in *Wolczak,* of the Construction Safety Act, *N.J.S.A.* 34:5-166 *et seq.,* which was:

> [E]xpressly designed to protect the health and safety of all construction employees as well as the public in general by requiring all construction employers to comply with all safety rules and regulations promulgated under the act.

Id. Of "primary importance," the *Bortz* court held, was *N.J.A.C.* 12:180-3.15.1, part of the Construction Safety Code promulgated pursuant to the Act, which mandated that:

> [W]here one contractor is selected to execute the work of the project, he shall assure compliance with the requirements of this Chapter from his employees as well as all subcontractors.

Given the legislation and regulations, the *Bortz* court held that the general contractor could be found to have "a statutory obligation to take the necessary steps to insure the safety of [the subcontractor's] employees and that he failed to do so." *Bortz*, 151 *N.J.Super.* at 320.

The Appellate Division in *Bortz* thus nullified the *Wolczak* rule which LeFrak Organization basis its motion on upon. The *Bortz* Court found that the legislation and regulations had "a substantial impact on the continued viability of our quoted holding in *Wolczak.*" *Bortz* at 320. Invoking the rule that deviation from a statutory standard of conduct is a "relevant circumstance to be considered by the trier of fact in assessing tort liability," as well as the principle of *Restatement, Torts* 2d, § 874A that a legislative provision may justify the court's granting a right of action to a member of the class sought to be benefitted, the court held that:

> It was obviously the legislative intention to ensure the protection of all of the workers on a construction project, irrespective of the identity and status of their various and several employers, by requiring, either by agreement or by operation of law, the designation of a single repository of the responsibility for the safety of them all. The assurance of prospective and continuing compliance by that repository with his responsibility demands, in our view, a right of tort action in those who are injured when there is a failure of compliance.

Bortz, at 320-21. Thus LeFrak Organization's reliance upon the outdated argument about not getting involved in the manner and means of the work, which is based upon the old *Wolczak* rule, to argue they owed no duty to plaintiff as an employee of a subcontractor is entirely misplaced and a misstatement of New Jersey law. Its motion for summary judgment should be denied.

In 1975 New Jersey repealed implementing regulations of the Construction Safety Act, whereupon jurisdiction was vested with the United States Department of Labor for the regulation of occupational safety and health under the Federal Occupational Safety and Health Act of 1970, 29 *U.S.C.* § 651 ("OSHA") The Construction Safety Act itself, however, remained in effect. As a result

of this legislative change, the Law Division in *Meder v. Resorts International*, 240 N.J.Super. 470 (App. Div. 1989), *cert. den.* 121 N.J. 608 incorrectly decided that the non-delegable duty set forth in *Bortz* was no longer applicable and that instead the *Wolczak* rule of no duty on the part of the general contractor was again controlling. The Law Division incorrectly reasoned:

> I am now back at Point A with *Wolczak.* The statutory right, the cause of action created by the provisions of the regulations as interpreted [in *Bortz*], it is my judgment, is no longer applicable.

Meder, 240 N.J.Super. at 476. The Appellate Division reversed finding a misapplication of the law as follows:

> We find that analysis flawed. The OSHA regulations direct that no contractor or subcontractor for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety.
>
> 29 *C.F.R.* § 1926.20(a). The regulations also impose upon "the employer" the responsibility "to initiate and maintain such programs as may be necessary" to comply with OSHA's prohibition on "[t]he use of any machinery, tool, material, or equipment which is not in compliance with any applicable requirement of [OSHA regulations]." 29 *C.F.R.* § 1926.20(b)(1), (3). The "employer" is also "responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions." 29 *C.F.R.* § 1926.28(a).
>
> Under 29 *C.F.R.* § 1926.50(j) the term "employer" means "contractor or subcontractor." That a prime or general contractor bears responsibility for all OSHA violations on the job is made clear by 29 *C.F.R.* § 1926.16...We are satisfied that the OSHA regulations imposed obligations upon Resorts essentially comparable to those imposed on general contractors by the regulations relied on in *Bortz.* The fact that New Jersey has ceded regulation of occupational safety and health to OSHA does not in any way affect the public policy expressed and applied by *Bortz.* In our view, violation of the obligations imposed by the federal regulations supports a tort claim under state law.
>
> Since a jury could properly find that Meder's death was proximately caused by Resorts' negligent failure to assure compliance with OSHA regulations, the dismissal of plaintiff's complaint must be reversed.

Meder v. Resorts International, 240 N.J.Super. at 476-477 (App. Div. 1989). Thus it is clear the

Wolczak rule no longer represents the state of the law in New Jersey and LeFrak Organization's motion for summary judgment should be denied. *See also Kane v. Hartz Mountain*, 278 N.J.Super. 129, 140-143 (App. Div. 1994) (reiterating the *Wolczak* rule has been replaced with the general contractor's non-delegable duty to enforce safety regulations and industry standards); *Izzo v. Linpro Company*, 278 N.J.Super. 550, 555-556 (App.Div. 1995) (same).

The Supreme Court took the opportunity to speak on the issue of a general contractor's non-delegable duty to enforce OSHA safety regulations and industry standards for the protection of the employees of subcontractors in *Alloway v. Bradlees Inc.,* 157 N.J. 221(1999). The Court recognized with favor the change in the law away from the *Wolczak* rule brought about by *Bortz. v. Rammell*:

> [The *Bortz* court] determined that the Construction Safety Act and its implementing regulations, primarily *N.J.A.C.* 12:180-3.15.1, "substantially qualified" the common-law rule by imposing a non-delegable duty on a general contractor to "assure compliance with the requirements of this Chapter from his employees as well as all subcontractors," and that those legislative mandates gave rise to a duty on the part of a general contractor "to take the necessary steps to insure the safety of [the subcontractor's] employees." *Id.* at 319-20.
>
> In *Meder, supra,* the court observed that OSHA regulation 29 *C.F.R.* § 1926.16 imposed the same non-delegable duty for workplace safety on a general contractor as had the Construction Safety Act. 240 *N.J.Super.* at 476.

Alloway, 157 N.J. at 236-237. The Court then recounted the development of the non-delegable duty principle beyond *Bortz,* through *Meder* and *Kane*, and stated, "We find the reasoning of those decisions to be sound..." *Id.* at 236. The Court reaffirmed the principle advanced by plaintiff in the instant matter, that as the general contractor, LeFrak Organization had the non-delegable responsibility to manage safety on the work site and enforce the OSHA regulations:

> The Appellate Division in *Kane, supra,* considered the effect of OSHA regulations on the existence and scope of a duty of care, and stated that general and subcontractors have a joint, 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." 278 *N.J.Super.* at 142-43 (citation omitted).
> ...
> The court in *Bortz, supra,* concluded that the State's statutory imposition of a duty on the general contractor expressed a clear legislative intention "to ensure the protection of all of the workers on a construction project, irrespective of the identity and status of their various and several employers, by requiring, either by agreement or by operation of law, the designation of a single repository of the responsibility for the safety of them all." 151 *N.J.Super.* at 321, 376 *A.*2d 1261; *cf. Dawson v. Bunker Hill Plaza Assocs.,* 289 *N.J.Super.* 309, 320-21, 673 *A.*2d 847 (App.Div.1996) (reaffirming state public policy favoring general contractor as single repository of responsibility of safety of all employees on job but declining to extend liability to landowner, upon whom OSHA imposes no affirmative duties).

Alloway v. Bradlees, 157 N.J. at 237-38. Thus in this case, as the general contractor in charge of hiring, scheduling and overseeing the project, LeFrak Organization had a duty under the law to manage safety for the protection of anyone who comes near the worksite, including Dashi Slatina. According to its own extensive admissions, not only did LeFrak Organization do nothing to meet this duty, they seek to explain this failure by disclaiming it all together. Plaintiff was injured due to his being directed to work on a dangerous job site where basic work safety rules were ignored. He was directed to construct a 10 foot high block wall without collapse protection. This was a product of LeFrak Organization's admitted decision to ignore its obligations under state and federal law and industry standards to itself follow, and see to it the subcontractors follow, basic safety standards.

It is on the above premise that LeFrak Organization incorrectly argues it had have no duty to the plaintiff because it did not get involved in the manner and means of the work. However, this is simply not the standard under the current state of New Jersey law. In fact, the role of the general contractor is just that- general. Typically they do not get involved in the manner and means of completing the job; that is left up to the various subcontractors specifically hired for that purpose.

Meder, *supra,* 240 N.J.Super. 470 ("Resorts concedes that it hired the various contractors on the job and assumed the responsibility of coordinating their work, but asserts that it did not attempt to direct or control the manner in which they performed their contracts.") Indeed, as indicated in *Meder*, at a bare minimum, general contractors are characterized by their hiring of subcontractors and coordinating their work. *Id.*

Were liability of a general contractor to turn on whether it controlled the "manner and means" of the work of the subcontractors, liability would usually not attach and the safety policies behind OSHA and clear New Jersey law would be thwarted. In fact the Appellate Division in a recent reported decision responded to the same kind of arguments LeFrak Organization makes here:

> Gaccione allegedly performed many of the general contractor functions; he hired various subcontractors and an architect, scheduled their work, and purchased building materials which the contractors requested. Gaccione frequented the job site, oversaw the work and performed some managerial tasks; however, he maintains that he did "not retain control over the means or methods of work ... or [] work-site safety," but rather relied on the contractors' "professional experience" to perform the work correctly and safely. ... Indeed, for the purposes of summary judgment, the trial court [correctly] assumed Gaccione was in fact the general contractor. *Id.* at 366.
>
> ***
>
> He may have placed Copeland's name on the permits as general contractor as a personal convenience, but there is sufficient factual evidence in the record to support the conclusion that Gaccione, on his own volition, acted as the de facto general contractor and could at least be found jointly liable with others sharing control of the locus of the accident.

Costa v. Gaccione, 408 N.J.Super. 362, 374-375 (App.Div. 2009) (emphasis added). This same outmoded "manner and means" argument should be rejected here too. Summary judgment should be denied.

All the cases defendant relies upon in making this defunct "manner and means" argument have

at least one of the following distinguishing characteristics. They either predate *Bortz v. Rammel*, 151 N.J.Super. 312 (App.Div. 1977) which marked the change in the law away from *Wolczak v. National Electric Products Corp.*, 66 N.J.Super. 64 (App.Div. 1961), or they involve an *owner* hiring a contractor as opposed to a general contractor hiring subcontractors on a multi-employer worksite.

Defendant's reliance upon *Muhammad v. New Jersey Transit*, 176 N.J. 185 (2003), a premises liability case against a public entity property owner that hired a contractor to remove asbestos from a New Jersey Transit roof, is particularly misplaced. Plaintiff's only claim was that it was "palpably unreasonable" for the owner to not warn about the dilapadated condition of the roof he fell through. But there was no dispute New Jersey Transit did in fact warn, multiple times. *Id.* at 188. The instant matter is an OSHA and industry work place safety standards case brought primarily against the general contractor on a multi employer worksite. Like the other cases LeFrak Organization relies upon, not the least of which is the *McDonald* case from 1903 (Db25), *Muhammad* is neither controlling nor instructive. Defendant's mis-citation to *Muhammad* for the legal standard upon which to determine the liability of a general contractor in a multi-employer worksite is improper.

LeFrak Organization begins its presentation to the Court by advancing the antiquated *Wolczak* non-liability rule (setting up the straw man). It then continues its brief knocking down the straw man arguing that none of the "exceptions" to the *Wolczak* rule apply. It couples this with discussions about a series of inapplicable cases that do not address the question of a general contractor's duty for safety to the employees of its subcontractors. The fact of the matter is that discussions about the "exceptions" to the *Wolczak* rule are entirely irrelevant given the *Wolczak* general contractor rule has not applied as a threshold matter in New Jersey since at least 1977.

LeFrak Organization also relies upon another series of inapplicable cases, principally

Mavrikidis v. Petullo, 153 N.J. 117 (1998). None of these cases address the question of a general contractor's duty for safety to the employees of its subcontractors. These cases dealt with the question about when a principal (usually a landowner) can be held liable to a third party- not an injured employee of a subcontractor- for the negligent acts of an independent contractor or agent. The rules discussed in those cases is that a landowner who hires a general contractor is generally not responsible for the negligent acts of that contractor. *Mavrikidis v. Petullo*, 153 N.J. 117, 131 (1998); *Majestic Realty Associates v. Toti Contracting Co.,* 30 N.J. 425, 430-431 (1959); *Dawson v. Bunker Hill Plaza Assocs.,* 289 *N.J. Super*. 309, 318 (App.Div. 1996). There are, however, three exceptions to this general rule: (1) where the principal retains control of the manner and means of doing the work subject to the contract; (2) where the principal engages an incompetent contractor; or (3) where the activity constitutes a nuisance per se. *Majestic Realty,* 289 N.J.Super. at 430-431; *Dawson,* 289 *N.J. Super*. at 318. As discussed *infra*. and *supra*., with respect to LeFrak Organization in its capacity as owner and/or its owner entities, exceptions (1) and (2) apply here. But in its capacity as general contractor and/or as to its general contractor entities, this line of cases is inapplicable all together.

As stated earlier, the practice of the LeFrak Organization is to set up different corporations as the "owner" or "general contractor" on any given project, which could change during the course of the project. (*Exhibit O, Deposition of Paul Bozza at 5-19*) (*Exhibit K, Deposition of David Jenkins at 13-14, 16, 19-21, 23-24, 37-30*) (*Exhibit R, Deposition of Scott Rushkin at 18-19, 41-44*); *Slatina v. D. Const. Corp.*, 2012 WL 3140233 (App.Div. August 03, 2012) And although this has caused ambiguity, it seems at least at one point "Shore Club North Urban Renewal Company, LLC" was designated the "Owner" and "Shore Club North Construction Company, LLC" the general contractor for the Shore Club project. (*Exhibit C, Construction Contract*). Given these ambiguities and issues

about whether these were mere "shell" corporations, we have collectively referred to the LeFrak Organization as both the owner and general contractor. It should be noted that when the landowner chooses to serve as its own general contractor, then that landowner/general contractor is liable to the same extent, and with the same force and effect, as any other general contractor on a work site. That is, when the owner acts in the role of general contractor, then that landowner/general contractor too has a non-delegable duty to maintain a safe workplace and will bear responsibility for all OSHA violations. *Bozza v. Burgener*, 280 N.J.Super. 583, 586-87 (App. Div. 1995); *Meder v. Resorts International*, 240 N.J.Super. 470 (App. Div. 1989), *cert. den.* 121 N.J. 608; *see also Costa v. Gaccione*, 408 N.J.Super. 362, 367 (App.Div. 2009) (summary judgment in favor of owner serving as a *de facto* general contractor reversed.); *Kane*, 278 N.J.Super. at 134-35, 142-43 (owner serving as general contractor had non-delegable duty for safety on jobsite).

And even if plaintiff did have to prove defendant got involved in the manner and means of the work, which is not the law, summary judgment would still be denied. In fact, under the Construction Contract, the LeFrak Organization general contractor was required to exercise substantial control over the subcontractors and work:

> Supervision. Contractor shall supervise and direct the Work, using its best skill and attention. It shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract. Contractor shall be responsible to Owner for the acts and omissions of all its employees and all Subcontractors, their agents and employees, and all other persons performing any of the Work under a contract with Contractor.

(*Exhibit C, Construction Contract, General Conditions at 2*) (underline added) It was David Jenkins' job to see to it these responsibilities were carried out by LeFrak Organization. (*Exhibit K, Deposition of David Jenkins at 50-51*) To this end, whenever there was a subcontractor on the job, a LeFrak

Organization superintendent also had to be there to supervise the work. (*Exhibit K, Deposition of David Jenkins at 34*) (*Exhibit R, Deposition of Scott Rushkin at 81*, "If there's work going on a super would be expected to be there, yes.") (*Exhibit N, Deposition of Daniel Gale at 28*)

The superintendents keep a close eye on the subcontractors. (*Exhibit K, Deposition of David Jenkins at 34, 37-38*) (*Exhibit M, Deposition of Shelia Mason at 43*) (*Exhibit R, Deposition of Scott Rushkin at 39-40*) Both David Jenkins and Shelia Mason testified, "We watch everything." (*Exhibit K, Deposition of David Jenkins at 35*) (*Exhibit M, Deposition of Shelia Mason at 51-52*) (underline added) (*Exhibit R, Deposition of Scott Rushkin at 39-40*)

Summary judgment should be denied. As discussed *infra*., because LeFrak Organization admits it did nothing to meet its responsibility under the law to enforce basic safety rules, plaintiff's cross-motion for partial summary judgment on the issue of breach should be granted.

C. LeFrak Organization Further Has Liability Because it Listed Itself as the General Contractor on Government Permit Documents

Under the New Jersey Administrative Code, the application for a construction permit shall contain the name and address of the responsible person as the principal contractor who will be in charge of the work and who is responsible to the owner for ensuring that all work is installed and completed in conformity with the regulations. *N.J.A.C.* 5:23-2.15(b)(3). Furthermore, under *N.J.A.C.* 5:23-2.21, the owner on a construction permit shall designate a person to be in charge of the work who shall be responsible for the necessary services and be present on the construction site on a regular and periodic basis to determine that, generally, the work is proceeding in accordance with the code and any conditions of the construction permit. *N.J.A.C.* 5:23-2.21(b)(4).

Moreover, New Jersey law requires as follows:

5:23-2.21 "Construction control"
(a) Responsibilities: The provisions of this section shall define the construction controls required for all buildings involving professional architecture/engineering services and delineate the responsibilities of such professional services together with those services that are the responsibility of the contractor during construction.
...
(e) Construction contractor services: The actual construction of the work shall be the responsibility of the contractor(s) as identified on the approved construction permit and shall involve:
...

2. Execution and control of all methods of construction in a **safe** and satisfactory **manner**;

...

4. In general, render all such construction services as required to effect a **safe** and satisfactory installation of the project;

N.J.A.C. 5:23-2.21 LeFrak Organization affiliates were listed as contractors on the construction permit documents. (*Exhibit BB, Construction Permits*) As such, it is bound by the applicable Code provisions. *Id.*; *see also Costa v. Gaccione*, 408 N.J.Super. 362, 367 (App.Div. 2009) (referencing with favor lower court denial of summary judgment in favor of contractor who agreed to be listed as general contractor on town building permits, but did not actually perform general contractor functions.)

This is an additional reason why summary judgment should be denied.

D. Defendants Are Further Liable under General Negligence Principles and a "Fairness Analysis"

Defendant's motion for summary judgment should also be denied under the general negligence principles discussed in *Alloway v. Bradlees*, 157 N.J. 221(1999) and *Carvalho v. Toll Brothers*, 143 N.J. 565 (1996). Under those principles liability can also attach irrespective of the formal labels of the parties and instead by consideration of several factors- the foreseeability of harm, the relationship between the parties, and the opportunity and capacity to take corrective action.

Alloway at 230-233; *citing Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 439 (1993).

This incident was clearly foreseeable and the attendant risk was severe. In considering whether the risk of injury was foreseeable, the Court looks to the "likelihood of the occurrence of a general type of risk rather than the likelihood of the occurrence of the precise chain of events leading to the injury." *Wartsila NSD N. Am., Inc. v. Hill Int'l, Inc.*, 342 F.Supp.2d 267, 281-82 (D.N.J.2004); *Cassanello v. Luddy*, 302 N.J.Super. 267 (App.Div. 1997) ("Foreseeability does not depend on whether the exact incident or occurrences were foreseeable. The question is whether an incident of that general nature was reasonably foreseeable."). It is clearly foreseeable that an untrained laborer directed to work on an OSHA non-compliant construction project constructing a 10 foot high masonry block wall where the practice of the general contractor was to not require it be braced in violation of basic safety rules can foreseeably result in crush injuries of the kind this worker sustained. (*Exhibit A, Salvatore-Gallagher Report at 3-23*)

It is well known that "struck-by" hazards are one of the four most common deadly hazards found at construction sites run by contractors that ignore safety rules. In fact, OSHA safety training materials (like the kind LeFrak Organization chose to not require on this project), specifically state, "Workers are most often struck by:...concrete or masonry walls that are being constructed." (*Exhibit CC at 1, OSHA Struck-By Hazards Participant Guide, also available at https://www.osha.gov/dte/grant_materials/fy07/sh-16586-07/2_struckby_hazards_participant_guide.pdf*) (*Exhibit EE, "Big Four Construction Hazards: Struck-By Hazards" at 7-8*) Struck-By Hazards account for 10% of all occupational deaths in construction. As a construction worker on this site, Dashi Slatina was in the weakest possible position. In essence, his choice was to work under unsafe conditions or not to work at all. LeFrak Organization effectively acted to take advantage of

this weakness for its own advantage/profit, ease, and benefit. As the general contractor it and/or its entities were charged with the responsibility, under normal and accepted construction site practice and OSHA regulations, to manage safety for the protection of the workers. It shirked this responsibility. Critically needed safety measures were not required, no real safety meetings or instructions were undertaken, and there was not even the most minimal concern for enforcement with respect to site safety. Under these circumstances, it is was just a matter of time that this incident occurred. A wall collapse of this type was entirely predictable under the circumstances and should have been avoided by proper, normal, accepted and legally mandated job site safety. (*Exhibit A, Salvatore-Gallagher Report at 3-23*) There is also no real question that the attendant risk of workers being struck by a toppling wall of concrete blocks is severe. (*Exhibit A, Salvatore-Gallagher Report at 3-23*) (*Exhibit U, OSHA File*) (*Exhibit I, Wall Bracing 101*) (*Exhibit V, Damage Reports*) (*Exhibits CC and EE*) This incident was clearly foreseeable and the attendant risk was severe.

The relationship of the parties was such that LeFrak Organization had the "opportunity and capacity ... to have avoided the risk of harm." *Alloway* at 231. The risk of harm here was defendants' wholesale failure to manage safety and enforce basic safety rules, and knowingly allowing, if not in practice compelling, subcontractors to build concrete block walls without the necessary bracing. As the general contractor on the project, LeFrak Organization had the ability to set the rules of the road for the subordinate subcontractors. LeFrak had the power to hire and fire the down-the-chain contractors and could have- and in fact had the legal obligation to- enforce the safety rules and standards. 29 *C.F.R.* §1926.16 ("With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.... regardless of tier."); *Carvalho v. Toll Bros.*, 143 N.J. 565 (1996) (contractor with control over sub-contractor responsible

for job site OSHA violations); *Kane,* 278 *N.J.Super.* at 142-43 (*"*general and subcontractors have a joint, non-delegable duty to maintain a safe workplace that includes "ensur[ing] 'prospective and continuing compliance' with [OSHA regulations]"); *Alloway v. Bradlees Inc.*, 157 N.J. at 237-38 (1999) (same)

David Jenkins was the lead LeFrak Organization employee in charge of this project. He has been with the company since 1980. He was on site on the Shore Club project on a daily basis beginning at 7am. (*Exhibit K, Deposition of David Jenkins at 12, 19-21, 23, 33-36, 47*) (*Exhibit R, Deposition of Scott Rushkin at 34*) David Jenkins was responsible to oversee and monitor the activities of the subcontractors LeFrak hired on the project. (*Exhibit K, Deposition of David Jenkins at 19-21, 33-35*)

Jenkins and LeFrak Organization had the power and authority to work out any disputes among the subcontractors. (*Exhibit K, Deposition of David Jenkins at 31*) Jenkins and LeFrak Organization had the power and authority to correct or terminate subcontractors that did not follow its rules or otherwise did not do what was expected of them. (*Exhibit K, Deposition of David Jenkins at 31-32*) (*Exhibit R, Deposition of Scott Rushkin at 43-44*) Scott Rushkin specifically testified:

> Q. ...Did the general contractor on this job have the power to correct a subcontractor if they were not doing the work as expected?
> A. Yes.

(*Exhibit R, Deposition of Scott Rushkin at 44-45*) In fact, under the Construction Contract, the LeFrak Organization general contractor was required to exercise substantial control over the subcontractors and work:

> Supervision. Contractor shall supervise and direct the Work, using its best skill and attention. It shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work

> under the Contract. Contractor shall be responsible to Owner for the acts and omissions of all its employees and all Subcontractors, their agents and employees, and all other persons performing any of the Work under a contract with Contractor.

(*Exhibit C, Construction Contract, General Conditions at 2*) (underline added) It was David Jenkins' job to carry out these responsibilities for LeFrak Organization. (*Exhibit K, Deposition of David Jenkins at 50-51*)

As such, LeFrak Organization required that whenever there was a subcontractor on the job, a LeFrak Organization superintendent also had to be there to supervise their work. (*Exhibit K, Deposition of David Jenkins at 34*) (*Exhibit R, Deposition of Scott Rushkin at 81*, "If there's work going on a super would be expected to be there, yes.") (*Exhibit N, Deposition of Daniel Gale at 28*) The superintendents would be watching the subcontractors, including the concrete contractor. (*Exhibit K, Deposition of David Jenkins at 34, 37-38*) (*Exhibit M, Deposition of Shelia Mason at 43*) (*Exhibit R, Deposition of Scott Rushkin at 39-40*) In fact, both David Jenkins and Shelia Mason (a superintendent) testified, "<u>We watch everything</u>." (*Exhibit K, Deposition of David Jenkins at 35*) (*Exhibit M, Deposition of Shelia Mason at 51-52*) (underline added) (*Exhibit R, Deposition of Scott Rushkin at 39-40*)

LeFrak Organization superintendents knew these walls, which had been constructed on an ongoing basis throughout the project for four years and were in "plain view," were never braced. They had both implied and actual knowledge of this on going hazard. Bracing in accordance with the federal rules and industry standards was something LeFrak Organization simply did not require. (*Exhibit K, Deposition of David Jenkins at 16-17, 19-22, 30-38, 41-47, 50-51, 53-55, 57, 59-60*) (*Exhibit R, Deposition of Scott Rushkin at 9-10, 34, 39-40, 43-45, 65-66, 70, 76, 81*) (*Exhibit C, Construction Contract, General Conditions at 2-4*) (*Exhibit N, Deposition of Daniel Gale at 14, 16,*

23, 28) (*Exhibit M, 1/6/10 Shelia Mason Deposition at 7, 14-15, 20-23, 43, 48, 51-52, 55-57, 62*) (*Exhibit L, 4/24/14 Shelia Mason Deposition at 10-12, 14-15*) (*Exhibit U, OSHA File at 23*) But they should have required it and made sure it was done. In fact David Jenkins admitted he had a duty and requirement, and the power and authority, to take action to prevent the very harm that caused this catastrophic incident:

> Q. If you see a danger on the job site where someone might be seriously injured or killed, are you supposed to do anything about that?
> A. Yes.
>
> Q. And what would that be?
> A. I would stop the work immediately.
>
> Q. And on the North Tower project, you did have the power and authority to stop work if you deemed that to be fit?
> A. Yes.

(*Exhibit K, Deposition of David Jenkins at 54*) LeFrak Organization maintained significant control over the project. Defendant's own liability expert report discusses that as the "controlling employer" on this project, that LeFrak Organization had site safety responsibility. (*Exhibit J, Defendant's Liability Expert Report at 5-11*) LeFrak Organization had the opportunity, capacity and power to enforce safety standards.

Combining and weighing these factors--the foreseeability of the nature and severity of the risk of injury based on the defendant's actual and/or implied knowledge of dangerous conditions, the relationship of the parties and the connection between the defendant's legal responsibility for work progress and safety concerns, and the defendant's ability to take corrective measures to rectify the dangerous conditions- considerations of fairness and sound public policy further impel the recognition of a duty on LeFrak Organization to meet their obligations under the law. They had a duty to avoid

the risk of injury to employees of its subcontractors. Viewing all facts in the light most favorable to plaintiff's contentions, defendant's motion for summary judgment should be denied. *See Brill v. Guardian Life Ins. Co.,* 142 *N.J.* 520 (1995).[8]

In the instant matter plaintiff will present evidence at trial that LeFrak Organization disregarded their duty under the law to manage safety and enforce OSHA on this project. In the construction industry, everyone recognizes quickly that "time is money." The quicker you get the work done, the more money you can make. If you cut corners related to safety and no injury occurs, you can save money. That is why OSHA was passed. Struck-By incidents on construction sites are notorious for causing serious harm and death. But they are preventable. Had the OSHA and industry safety rules been enforced, this incident never would not have occurred. (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit H, OSHA Fact Sheet- "Effective Workplace Safety and Health Management Systems"*) (*Exhibit I, "Wall Bracing 101" and FAQs*) (*Exhibit J, Defendant's Liability Expert Report*) (*Exhibit CC, OSHA "Struck-By Hazards Participant Guide*) (*Exhibit EE, "Big Four Construction Hazards: Struck-By Hazards", abridged*)

[8] In fact, as discussed in Section V Infra, the evidence so overwhelming including defendant's admission of breach, that plaintiff's cross-motion for Partial Summary Judgement on the Issue of Breach should be granted.

E. Pertinent Industry Standards Are Equally Clear There Must Be Top-down Enforcement of Safety on a Construction Project

In determining liability against a general contractor in an OSHA workplace safety injury case, the Court and/or jury may also consider industry standards. *See, e.g., Model Jury Charge 5.10H*, "Standards of Construction, Custom and Usage in Industry or Trade." It states, among other things:

> Some evidence has been produced in this case as to the standard of construction in the industry. Such evidence may be considered by you in determining whether the defendant's negligence has been established. If you find that the defendant did not comply with that standard, you may find the defendant to have been negligent.

Model Jury Charge 5.10H. As the Appellate Division explained in *Constantino v. Ventriglia*, 324 N.J.Super. 437 (App.Div. 1999):

> Plaintiff was entitled to have the jury consider plaintiff's expert's reliance on the OSHA standards to demonstrate the construction industry standard of care, even though Ventriglia may not have been subject to OSHA regulations or jurisdiction.
> ...
> This conclusion is consistent with established precedent allowing industry standards as evidence of a standard of care. *See McComish v. DeSoi,* 42 *N.J.* 274 (1964) (manuals properly admitted as safety codes):
>
>> [A] safety code ordinarily represents a consensus of opinion carrying the approval of a significant segment of an industry. Such a code is not introduced as substantive law, as proof of regulations or absolute standards having the force of law or of scientific truth. It is offered in connection with expert testimony which identifies it as illustrative evidence of safety practices or rules generally prevailing in the industry, and as such it provides support for the opinion of the expert concerning the proper standard of care.

Constantino, 324 N.J.Super. at 442, 443.

The LeFrak Organization Construction Contract for the project echoes these basic OSHA and industry standard requirements (which were simply ignored):

3.7 Compliance with Law. Contractor shall...comply with all laws, ordinances, rules, regulations, and orders of any public authority bearing on the performance of the Work, at Owner's expense.

3.11 Safety Precautions and Programs.

3.11.1 Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work.

3.11.2 Contractor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to:
(a) all employees used for the Work and all other persons who may be affected thereby;
...

3.11.3 Contractor shall comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss, at Owner's expense
...

3.11.7 Contractor shall designate a responsible member of its organization at the site whose duty shall be the prevention of accidents.

(*Exhibit C, Construction Contract, General Conditions at 2-4*) Scott Rushkin of the LeFrak Organization also agrees with the industry standard that the most important job of the general contractor in running a job like this is to manage and enforce safety rules to prevent needless injury to anyone that comes near the job. (*Exhibit R, Deposition of Scott Rushkin at 45, 48-50, 53-56*) He specifically agrees with a leading industry treatise on the issue that safety must begin at the top. (*Exhibit R, Deposition of Scott Rushkin at 48-49, 50-56*)

Defendant violated virtually every applicable industry standard as far as safety management goes on this safety-dysfunctional project. There was simply no safety enforcement whatsoever. There was no safety management or oversight. There was no planning. There were no safety inspections. There were no safety meetings or established safety mechanism whatsoever. The employees had no

safety equipment or training to even recognize workplace hazards. Contrary to the law and industry standards, safety did not begin at the top. Danger began at the top and saturated the project. After the incident there was no investigation and nothing done to prevent a reoccurrence. (*Exhibit K, Deposition of David Jenkins at 16-17, 19-22, 30-38, 41-47, 50-51, 53-55, 57, 59-60*) (*Exhibit R, Deposition of Scott Rushkin at 9-10, 34, 39-40, 43-45, 65-66, 70, 76, 81*) (*Exhibit C, Construction Contract, General Conditions at 2-4*) (*Exhibit N, Deposition of Daniel Gale at 14, 16, 23, 28*) (*Exhibit M, 1/6/10 Shelia Mason Deposition at 7, 14-15, 20-23, 43, 48, 51-52, 55-57, 62*) (*Exhibit L, 4/24/14 Shelia Mason Deposition at 10-12, 14-15*) (*Exhibit T, Incident Reports*) (*Exhibit U, OSHA File at 11, 23*) (*Exhibit D, D Construction Sub-Contract*) (Exhibit Q, Deposition of Carmen Rullo at 11, 46) (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit H, OSHA Fact Sheet- "Effective Workplace Safety and Health Management Systems"*) (*Exhibit I, "Wall Bracing 101" and FAQs*) (*Exhibit J, Defendant's Liability Expert Report at 5-11*) (*Exhibit AA, Plaintiff's Answers to Interrogatories*) (*Exhibit Y, Weather Report at 5, 10*) (*Exhibit Q, Deposition of Carmen Rullo at 11*) (*Exhibit Z, 6/11/09 Deposition of Dashi Slatina 13*) (*Exhibit S, Deposition of Dashi Slatina at 14-16, 72-76*) (*Exhibit X, Scene Photos*) (*Exhibit F, Progress Photos*)(*Exhibit CC, OSHA "Struck-By Hazards Participant Guide*) (*Exhibit EE, "Big Four Construction Hazards: Struck-By Hazards", abridged*)

Defendants had a duty to manage safety on this project. Instead they made a conscious decision to risk the lives of workers because it would speed up the work and increase their profits. The summary judgment motions should be denied.

F. ***Tarabokia v. Structure Stone*** **Involved a Narrow Set of Circumstances Dealing with a Repetitive Stress Injury from a Power Tool and the Case Did Not**

<u>Overturn 30 Years of Construction Site Safety Law</u>

LeFrak Organization cites *Tarabokia v. Structure Stone,* 429 N.J.Super. 103 (App.Div. 2012) to argue it has no liability for its overt decision to disregard the OSHA rules and industry standards for safe workplaces. *Tarabokia v. Structure Stone* did not overturn some 30 years of construction site OSHA negligence law, and it certainly did not overturn *Alloway*. Instead, *Tarabokia* addressed a very narrow set of facts whereby a worker on a highly OSHA <u>compliant</u> worksite allegedly suffered a repetitive stress injury over the course of several weeks from the use of an otherwise perfectly safe tool for which the worker was trained and certified to operate.

Tarabokia v. Structure Stone involved the fit out of five floors of a large office building in Plainsboro, New Jersey. The owner of the project was Novo Nordisk, Inc. ("Novo"). Novo hired Structure Stone as the general contractor, which in turn hired plaintiff's employer, Hatzel & Buehler ("H&B"), as the electrical subcontractor. *Id.* at 107.

Unlike LeFrak Organization and D Construction here, in *Tarbokia* both the plaintiff's direct employer, H&B, and the general contractor, Structure Stone, took seriously their workplace safety obligations under OSHA and industry standards. As such, far from the instant matter, the plaintiff in *Tarabokia* had extensive worksite safety training, including in the use of the very tool which allegedly caused his repetitive stress injury over time. H&B had and enforced a comprehensive workplace safety manual which plaintiff Tarabokia was trained in, learned and understood. *Id.* at 107-111.

In the instant matter defendants knew long before the work began that employees would be exposed to serious injury or death associated with being struck by cinder blocks from unbraced walls under construction. Yet the record is clear defendants did absolutely nothing to meet their obligations

under the law to take the necessary steps to prevent those injuries. No safety measures whatsoever were taken. In *Tarbokia* on the other hand, before plaintiff was allowed to use the powder actuated tool (known as a "Hilti gun"), defendants required he received the appropriate training and demonstrated his ability to safely handle the tool. The court noted:

> Before plaintiff started work, H & B arranged for a Hilti representative to train plaintiff on the proper and safe operation of the tool at the job site. Plaintiff received a card from Hilti signifying his completion of that training. Additionally, plaintiff attended safety meetings conducted by H & B roughly once a week throughout the duration of his work on the project.

Tarabokia at 108. In the instant matter Dashi Slatina was a relatively inexperienced laborer who had only been working for D Construction for about 2 weeks. He had no safety training. (*Exhibit Q, Deposition of Carmen Rullo at 11*) (*Exhibit Z, 6/11/09 Deposition of Dashi Slatina 13*) (*Exhibit S, Deposition of Dashi Slatina at 75*)

In *Tarabokia* the plaintiff alleged a repetitive stress injury that developed gradually over the course of several weeks from firing the tool over 3000 times. *Tarabokia* at 108. The alleged danger was not readily apparent and the defendants in any event took all reasonable steps to manage safety, including specifically with respect to this tool. As the Law Division in *Tarabokia* noted:

> [T]here's nothing here to indicate that, somehow, there was some blatant misuse of a tool or the manner in which they were doing their work, which would call to the attention of [defendant]...

Tarabokia at 111-112. In the instant matter however, plaintiff and the other workers were exposed to the imminent risk of severe injury and death from collapsing walls which defendants full well knew about. LeFrak Organization knew well in advance from the building plans that concrete masonry walls in excess of 8 feet would be constructed on an ongoing basis throughout this four year project. These walls under construction were also in "plain view." (*Exhibit K, Deposition of David Jenkins*

at 41-42, 45-46) (*Exhibit R, Deposition of Scott Rushkin at 65*) (*Exhibit U, OSHA File at 23*) LeFrak Organization superintendents were required to "watch everything." (*Exhibit K, Deposition of David Jenkins at 34-35, 37-38*) (*Exhibit M, Deposition of Shelia Mason at 43, 51-52*) (*Exhibit R, Deposition of Scott Rushkin at 39-40*) (*Exhibit R, Deposition of Scott Rushkin at 81*)

Unlike the general contractor in *Tarbokia* that took its obligations seriously, LeFrak Organization just ignored the rules:

> Q. Did the LeFrak Organization [its] subcontractors train their workers in safety and accident prevention?
> A. Not that I'm aware of.
>
> Q. ...Did the LeFrak [Organization] set forth any rules that had to be followed in connection with them building that wall?
> A. No.
> ...
> Q. Did you or anyone else from the LeFrak Organization, to your knowledge, have any meetings with the people from D. Construction to discuss safety in connection with building these walls before the work started...?
> A. No.
>
> Q. You talked about how the subcontractors were watched, how the work was monitored. My question to you is: <u>Did anyone from the LeFrak Organization conduct inspections of the work, specifically with respect to safety, to see to it that the work was being done in accordance with the federal OSHA workplace safety rules?</u>
> A. <u>No</u>.
> ...
> Q. Did you or anyone from the LeFrak Organization, to your knowledge, conduct any evaluations of the safety performance of the subcontractors on the North Tower project?
> A. No.
>
> Q. To your knowledge, <u>did the LeFrak Organization do anything to manage safety with respect to its subcontractors on the North Tower project?</u>
> A. <u>No.</u>

(*Exhibit K, Deposition of David Jenkins at 38-40*) (underline added) To this end, LeFrak Organization simply did not require the walls to be braced:

> Q. Did the LeFrak Organization require that when this wall got eight feet or higher, that it was to be braced to prevent a collapse? Did they specifically require that?
> A. No.

(*Exhibit K, Deposition of David Jenkins at 43-44, 60*) *See also* (*Exhibit L, 4/24/14 Shelia Mason Deposition at 14-15*) Their summary judgment motion should be denied. *Alloway v. Bradlees Inc.,* 157 N.J. at 237-38 (1999); *Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App Div. 1994); *Constantino v. Ventriglia*, 324 N.J.Super. 437 (App.Div. 1999) (industry safety standards are pertinent in determining negligence in construction injury case); 29 *C.F.R.* §1926.16.

In *Tarabokia* there was a comprehensive safety management plan in place. Proactive measures were taken to prevent needless worker injury. Defendants played by the rules:

> [D]efendant appointed one of its representatives, Mike Pebley, as the site safety manager (SSM), and prepared a site-specific safety management plan (SSMP) for the project, available for review on site by all subcontractors, including H & B. The stated goal of the SSMP was "to provide for the systematic identification, evaluation and prevention or control of general workplace hazards, specific job hazards and potential hazards that may arise from foreseeable conditions on the Novo Nordisk project." The SSMP's declared policy was to "[p]rovide a safe working environment" and to "[n]ever accept any unsafe working condition for any reason and to take immediate corrective action when any safety violation is observed."
> ...
> To this end, the SSMP required all subcontractors to, among other things, designate a person with "the responsibility and full authority to enforce the [safety and loss prevention] program[,]" "assum[e] responsibility for complying with all applicable standards, regulations, rules or guidelines" to ensure safety, "establish safety methods and good practices to be carried out by [their] workers[,]" and make at least weekly inspections and report any unsafe practices or conditions. Furthermore, because "[r]ules cannot be written to cover every possible situation that may arise at the ... job site[,]" the SSMP placed certain responsibilities upon the site employees, "namely the protection of themselves and protection of fellow workers."

> Additionally, all project subcontractors were required to hold their own safety meetings, known as "toolbox talks." H & B held these meetings weekly, which plaintiff attended. H & B was also responsible for appointing a competent person who "has the ability to stop the work, and that person is responsible for their employees, [and is] responsible for the training of their employees while working on site."

Tarabokia at 108-111. No such structure existed on this project. There was no safety mechanism in place whatsoever, and to this day apparently nothing has changed. Summary judgment should be denied. *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 448 (1993) (the imposition of liability through tort law is essential to discourage irresponsible conduct and create incentives to minimize risks of harm.); *Weinberg v. Dinger*, 106 N.J. 469, 494 (1987) (same); *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)

Rather, the instant matter is far more analogous to the *Costa v. Gaccione* decision where summary judgment in favor of the general contractor was reversed on appeal. In *Costa* the plaintiff was injured when he fell from makeshift scaffold with no fall protection on a residential construction site. In applying the "fairness factors" the Court took particular note that:

> Plaintiff testified that he was not instructed to avoid the scaffolding. Moreover, he noted that all the other workers that used the scaffolding were similarly unwarned. Plaintiff also testified that he did not have any workplace safety training that could have helped him recognize the hazard.
>
> The Gacciones and Copeland admitted that the job site had no safety supervision or express safety rules. Gaccione testified that safety was not discussed, that there was no written safety policy, that there were no rules relating to the scaffolding, that he was never instructed or certified by OSHA, and that he did not investigate plaintiff's accident.

Costa v. Gaccione, 408 N.J.Super. 362, 366-67 (App.Div. 2009). The lack of safety enforcement which was pivotal to the court's decision in *Costa* is present here. In fact, Dashi Slatina faced a far more dangerous situation.

Indeed, as the Court in *Tarabokia* noted, "This case presents a very different factual scenario [than *Alloway* and *Carvalho*]." *Tarabokia* at 117. Unlike in *Alloway, Carvalho* and the instant case, there is no proof defendants knew about the gradually repetitive stress injury that can develop from firing the tool over 3000 times over the course of a month. As such, there is no real forseeability. Here however, it is highly foreseeable that injury would result from requiring workers to construct walls in excess of 8 feet with no collapse protection. As the court explained:

> Unlike *Alloway* and *Carvalho,* where the dangerousness of the condition, although not inherent in the work performed, was nonetheless immediate and clearly visible, here the actual risk of harm concerned a latent injury not readily apparent that developed gradually from the repeated use of the tool over an extended time period.
> ...
> As defense counsel acknowledged at oral argument before us, while <u>actual knowledge of the risk of harm may be dispositive for the imposition of a duty of care</u>, *Carvalho, supra,* 143 *N.J.* at 576–77, 675 *A.*2d 209, something less in the way of constructive notice may also suffice.

Tarabokia at 117-118 (underline added). As has been discussed, in the instant matter there was <u>actual knowledge</u> the practice at this site was to permit (if not compel) the walls to be built faster with no bracing. (*Exhibit K, Deposition of David Jenkins at 16-17, 19-22, 30-38, 41-47, 50-51, 53-55, 57, 59-60*) (*Exhibit R, Deposition of Scott Rushkin at 9-10, 34, 39-40, 43-45, 65-66, 70, 76, 81*) (*Exhibit C, Construction Contract, General Conditions at 2-4*) (*Exhibit N, Deposition of Daniel Gale at 14, 16, 23, 28*) (*Exhibit M, 1/6/10 Shelia Mason Deposition at 7, 14-15, 20-23, 43, 48, 51-52, 55-57, 62*) (*Exhibit L, 4/24/14 Shelia Mason Deposition at 10-12, 14-15) (Exhibit U, OSHA File at 23*)

Defendant relies upon two unpublished opinions including *Nanguelu v. Rodriguez,* 2014 WL 1796635 (App.Div. 2014) and *Andrews v. Jerud*, 2014 WL 4998417 (App.Div. 2014). The Court Rules provide that no unpublished opinion shall constitute precedent or be binding upon any court. *R*. 1:36-3; *see e.g., Trinity Cemetery v. Wall Tp.*, 170 N.J. 39, 48 (2001)(Verniero, J., concurring)(an unreported decision "serve[s] no precedential value and cannot reliably be considered part of our common law'). The rule only permits unpublished opinions to be called to the attention of the court by a party as a type of secondary research material. *Falcon v. American Cyanamid*, 221 N.J. Super. 252, 261 (App. Div. 1987). Accordingly, as a threshold matter, the unpublished opinions defendants cite have no precedential value and should be disregarded.

Nanguelu and *Andrews* are unpublished opinions in factually dissimilar matters. In *Nanguela* the unsafe scaffolding was only in place for 10-25 minutes before the incident and the general contractor had no actual or constructive notice. Andrews similarly involved an incident that occurred off the work site and the general contractor had no actual or constructive notice. In fact, there are many unpublished opinions which say many things. This is why *Rule* 1:36-3 mandates:

> No unpublished opinion shall constitute precedent or be binding upon any court. ... No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all other relevant unpublished opinions known to counsel including those adverse to the position of the client.

For example, movants have not cited to the Court the cases of *Analuisa v. Richards, et al.*, A-6669-03T1 (App.Div. 2005) or *Escobar v. Laumar Roofing Services,* 2012 WL 6049120 (App.Div. 2012) (*both attached as Exhibit FF*)

In *Analuisa v. Richards, et al.*, A-6669-03T1 (App.Div. 2005), plaintiff was standing on a ladder supplied by his employer when he fell and sustained multiple injuries. Plaintiff argued that

the contractor on the site- who did not get involved in the manner and means of the job- nevertheless owed him a non-delegable duty to maintain a safe work environment since under OSHA regulations and general negligence liability law, the contractor is responsible to ensure that the work site is safe. *Id*. at 2. The Appellate Division held that the contractor owed a duty to the plaintiff since obligations imposed against contractors under OSHA support a tort claim under state law citing *Alloway, supra*, 157 N.J. at 235-36 (violation of OSHA regulation relevant on liability inquiry). *Id*. at 7. Thus, plaintiff's evidence of OSHA violations supported his cause of action against the contractor. *Id*. at 11.

The limited nature of the *Tarabokia* decision is exemplified by *Escobar v. Laumar Roofing Services,* 2012 WL 6049120 (App.Div. 2012) (*Exhibit FF*). The plaintiff in *Escobar* was an employee of a roofing subcontractor on a renovation project at a school in Bridgewater, New Jersey. While he was working without the necessary safety protection he fell and was injured. Like in the instant matter, OSHA safety rules were not followed on the project. As such, the workers were neither provided with nor trained in the use of appropriate fall protection.

The Appellate Division reversed summary judgment in favor of the defendant contractor. The court recognized the general contractor's joint obligation with subcontractors to manage safety and enforce the OSHA rules on the project, including OSHA's fall protection standards. The Court took into account the defendant's failure to do so, the forseeability of the risk of falling from the height and the power of the general contractor for that portion of the work to enforce the fall protection rules and otherwise take preventative measures. Finally, the Court noted the uniquely distinguishing features of *Tarabokia v. Structure Stone* which involved a repetitive stress injury that develops over time from using on a hand tool. *Escobar,* 2012 WL 6049120 at 2-5 (App.Div. 2012)

III. Defendant's Argument– That Although LeFrak Organization Was the General Contractor on the Job Site, It Had No Duty for Safety– Is in Direct Conflict with the Federal Workplace Safety Statutory Scheme and its Implementing Regulations, and Is Thus Preempted

Congress enacted the Occupational Safety and Health Act (the OSH Act), 29 *U.S.C.A.* § 651 to § 678, 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); *see Gonzalez v. Ideal Tile Importing Co., Inc.,* 371 N.J. Super. 349, 359 (App. Div. 2004). In pursuing those goals, Congress authorized the Secretary of Labor to promulgate health and safety standards for workplaces, 29 *U.S.C.A.* § 655, and established the Occupational Safety and Health Administration (OSHA) to enforce those standards through inspections and investigations, 29 *U.S.C.A.* § 657; *Gonzalez, supra.* The OSHA Act requires employers to comply with specific OSHA standards and also imposes a general duty on employers to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 *U.S.C.A.* § 654(a); *Gonzalez, supra* at 359-60. Violators of specific OSHA standards or OSHA's general duty to provide a safe workplace face civil monetary penalties, as well as criminal sanctions, 29 *U.S.C.A.* § 666. *Gonzalez, supra.*

Specifically, the OSHA regulations provide that "no contractor or subcontractor for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety." 29 *C.F.R.* § 1926.20. While it is recognized that the subcontractors have a responsibility to the OSHA Regulations, it is ultimately the general contractor who must enforce these Regulations and determine whether or not they are being followed by the subcontractors. 29 *C.F.R.* § 1926.16. As such, a general contractor cannot delegate its duties to

maintain a safe workplace under the federal OSHA regulations to another; but rather, the general contractor must maintain overall responsibility for the project. 29 *C.F.R.* §1926.16 (emphasis added); *see Alloway v. Bradlees*, *supra* at 237-38. (a general contractor on a work site 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.")

Here, LeFrak Organization argues that although it was the general contractor on the job site, it had no duty for safety. However, the federal OSHA regulations preempt defendant's argument since such is in direct conflict with the federal workplace safety statutory scheme and its implementing regulations. OSHA unambiguously places the non-delegable duty for safety on the general contractor and it is a violation of the Supremacy Clause of the United States Constitution for states to adopt any contrary law, whether by statute of case law. Defendant's argument to the direct contrary of this basic OSHA principle can not be accepted by this Court.

Preemption may be either expressed or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit pre-emptive language, the United States Supreme Court has recognized at least two types of implied preemption: field preemption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it; and conflict preemption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Gade v. Nat'l Wastes Mgmt. Ass'n,* 505 U.S. 88, 98 (1992)(internal citations and quotations omitted).

Under conflict preemption, the federal Occupational Safety and Health Act (OSHA) preempts any state common-law claims that are contrary to the purposes and objectives of Congress in enacting OSHA. *See Gonzalez v. Ideal Tile Importing Co., Inc.*, 184 N.J. 415 (2005). In *Gonzalez*, the plaintiff, Armando Gonzalez, was seriously injured when he was struck by a forklift operated by a co-worker. Plaintiff sued the forklift's first-stage manufacturer contending that it should have installed additional warning devices on the machine in order to make its operation safe. *Id.* at 418. The defendant manufacturer moved for summary judgment on the grounds that the state tort claims for workplace injuries were preempted as in conflict with federal law. *Id*.

The New Jersey Supreme Court in *Gonzalez* held that the federal regulations regarding warning devices on the forklift pre-empted the plaintiff's common-law products liability claim against the manufacturer of the forklift, based on the conflict preemption theory, since plaintiff's product liability claims suggested a standard that was in direct conflict, and not merely supplemental, to the American National Standards Institute (ANSI) standards under the federal OSHA regulations. *Id*. at 423. The ANSI standards under the OSHA regulations did not merely set a mandatory minimum for forklift safety devices, but regulated the universe of the forklift warning devices. As such, plaintiff's application of a product liability standard regarding "other" warning devices stood "as an obstacle to the accomplishment and execution of" the important means-related federal objectives of the OSHA regulations. *Id*. Therefore, the Court held that plaintiff's product liability claim was pre-empted since his application of a product liability standard conflicted with the federal OSHA regulations regarding additional warning devices. *Id*. at 424.

Here, the federal OSHA regulations impose a non-delegable duty on LeFrak Organization as the admitted general contractor, to maintain a safe workplace. As such, this "ostrich defense" that

since he did nothing to adhere to the principles of construction safety as set forth in OSHA, therefore he as general contractor had no duty for site safety, must be rejected as in complete conflict with federal law which explicitly mandates to the contrary. *Gonzalez v. Ideal Tile Importing Co., Inc.,* 371 N.J. Super. 349, 359 (App. Div.), *judgment aff'd* 184 N.J. 415 (2005). Therefore, summary judgment should be further denied to LeFrak Organization since the argument it had no duty for safety is in direct conflict with the federal workplace safety statutory scheme and the federal OSHA Regulations, and is thus preempted.

IV. Plaintiffs' Cross Motion for Partial Summary Judgment on the Issue of Breach Should Be Granted

The present version of *Rule* 4:46-2(c) reflects the Court's decision in *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520 (1995), which held that a trial court should make the same type of evaluation of evidential materials in ruling on a motion for summary judgment as in ruling on a motion for judgment under Rule 4:37-2(b) or Rule 4:40-1 or a motion for judgment notwithstanding the verdict under Rule 4:40-2. The standard is "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. That is, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Brill*, 142 N.J. at 536. Summary judgment is appropriate where the evidence "is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). This means that a summary judgment motion cannot be defeated if the non-moving party does not "offer ... any concrete evidence from which a reasonable juror could return a verdict in his favor." *Id*. at 256.

Moreover, Rule 4:46-2(c) provides that:

> [S]ummary judgment or order, interlocutory in character, may be rendered on any issue in the action (including the issue of liability) although there is a genuine factual dispute as to any other issue (including any issue as to the amount of damages).

Accordingly, it is clear that a trial court is permitted to grant summary judgment as to a discrete issue rather than the entirety of an action. *Haelig v. Mayor & Council of Bound Brook Borough*, 105 N.J. Super. 7 (App. Div. 1969); see also, *Harrison Riverside v. Eagle Affiliates, Inc.*, 309 N.J. Super. 470

(App. Div. 1998), *cert. denied* 156 N.J. 384 (1998)(summary judgment granted as to method of calculating damages although issue of amount of damages remained in dispute).

Since there can be no material issue of fact that LeFrak Organization Corporation and/or its affiliates have breached their respective duties, plaintiff's motion for partial summary judgment on the issue of breach of those duties should be granted.

A. The Record Is Indisputably Clear That LeFrak Organization Did Nothing to Meet its Duty to Manage Safety or Enforce OSHA Standards

As set forth above, as the general contractor, LeFrak Organization had a duty to manage safety, enforce OSHA and take the necessary steps to prevent workplace injuries to the employees of its subcontractors. The wholesale failure of LeFrak Organization to literally do anything to meet its obligations under New Jersey state law and the federal OSHA statute is truly astonishing. Most importantly, given the overwhelming, one-sided evidence reflected in this record, there is no jury question that LeFrak Organization breached this duty. (*Exhibit K, Deposition of David Jenkins at 16-17, 19-22, 30-38, 41-47, 50-51, 53-55, 57, 59-60*) (*Exhibit R, Deposition of Scott Rushkin at 9-10, 34, 39-40, 43-45, 65-66, 70, 76, 81*) (*Exhibit C, Construction Contract, General Conditions at 2-4*) (*Exhibit N, Deposition of Daniel Gale at 14, 16, 23, 28*) (*Exhibit M, 1/6/10 Shelia Mason Deposition at 7, 14-15, 20-23, 43, 48, 51-52, 55-57, 62*) (*Exhibit L, 4/24/14 Shelia Mason Deposition at 10-12, 14-15*) (*Exhibit T, Incident Reports*) (*Exhibit U, OSHA File at 11, 23*) (*Exhibit D, D Construction Sub-Contract*) (Exhibit Q, Deposition of Carmen Rullo at 11, 46) (*Exhibits A and B, Salvatore-Gallagher Reports*) (*Exhibit H, OSHA Fact Sheet- "Effective Workplace Safety and Health Management Systems"*) (*Exhibit I, "Wall Bracing 101" and FAQs*) (*Exhibit J, Defendant's Liability Expert Report at 5-11*) (*Exhibit AA, Plaintiff's Answers to Interrogatories*) (*Exhibit Y, Weather*

Report at 5, 10) (*Exhibit Q, Deposition of Carmen Rullo at 11*) (*Exhibit Z, 6/11/09 Deposition of Dashi Slatina 13*) (*Exhibit S, Deposition of Dashi Slatina at 14-16, 72-76*) (*Exhibit X, Scene Photos*) (*Exhibit F, Progress Photos*)(*Exhibit CC, OSHA "Struck-By Hazards Participant Guide*) (*Exhibit EE, "Big Four Construction Hazards: Struck-By Hazards", abridged*) The head of the project and individual who said he was in charge of safety admitted:

> Q. To your knowledge, <u>did the LeFrak Organization do anything to manage safety with respect to its subcontractors on the North Tower project?</u>
> A. <u>No.</u>

(*Exhibit K, Deposition of David Jenkins at 38-40, 57*) (underline added) He also admitted LeFrak Organization did not require, and knew, the walls were never braced on this four year project, a condition that was in "plain view." (*Exhibit K, Deposition of David Jenkins at 16-17, 19-22, 30-38, 41-47, 50-51, 53-55, 57, 59-60*) (*Exhibit R, Deposition of Scott Rushkin at 9-10, 34, 39-40, 43-45, 65-66, 70, 76, 81*) (*Exhibit C, Construction Contract, General Conditions at 2-4*) (*Exhibit N, Deposition of Daniel Gale at 14, 16, 23, 28*) (*Exhibit M, 1/6/10 Shelia Mason Deposition at 7, 14-15, 20-23, 43, 48, 51-52, 55-57, 62*) (*Exhibit L, 4/24/14 Shelia Mason Deposition at 10-12, 14-15*) (*Exhibit U, OSHA File at 23*)

Accordingly, this Court should find as a matter of law that LeFrak Organization breached its duty to mange safety and enforce OSHA on this job site. The question of proximate cause to be left to another day to perhaps be decided by a jury. *See, e.g. Rule* 4:46-2(c) ("[S]ummary judgment ... may be rendered on any issue in the action..."); *Harrison Riverside v. Eagle Affiliates, Inc.*, 309 N.J. Super. 470 (App. Div. 1998) But as to the question of whether or not LeFrak Organization breached its duty to manage safety, there is simply nothing for a jury to decide. The evidence is overwhelming,

one sided and has been admitted. LeFrak Organization simply does not itself follow, nor does it require nor enforce the OSHA regulations among the subcontractors.

As set forth above, the OSHA regulations speak in terms of things the "employer" is supposed to do. The general contractor's requirement to comply with the regulations *vis a vis* the employees of its subcontractors is derived from 29 *C.F.R.* § 1926.32 where the term "employer" means "contractor or subcontractor." *See also Meder*, 240 N.J.Super. at 476 (declaring the reasoning that the OSHA definition of "employer" does not include general contractors as "flawed."); *Kane,* 278 *N.J.Super.* at 142-43 (considered the effect of OSHA regulations on the existence and scope of a duty of care, and stating that general and subcontractors have a joint, 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*, 157 N.J. at 238 ("'the prime contractor assumes all obligations prescribed as employer obligations under the [OSHA] standards...'" *citing,* 29 *C.F.R.* § 1926.16(b) As set forth herein, LeFrak Organization literally met none of these obligations and the Court should so find as a matter of law.

Despite being a major builder, LeFrak Organization did business as though these rules simply do not exist. In fact, LeFrak Organization did nothing to see to it its subcontracts were competent, were trained in OSHA or engaged in good construction safety practices. As such, the company has done nothing to investigate the incident to prevent a reoccurrence. As a result of its abysmally non-existent safe work practices, plaintiff, who must work to live, was directed to work in an unsafe manner with inappropriate materials and with no safety training and no accident protection enforcement of OSHA would have provided. (*Exhibits A and B, Salvatore-Gallagher Reports*) There

is simply no dispute in this regard. There is only an "ostrich defense" that the general contractor had no duty. This defense is not legally cognizable; the duty has been recognized under the law since at least 1977. Once the duty is identified, there is simply nothing for a jury to decide on the issue of breach; its is overwhelmingly and indisputably evident in the record. No reasonable juror could conclude other than that LeFrak Organization breached the duty it owed to manage safety on this project. There is simply nothing upon which LeFrak Organization can contest the admitted facts of its breach of its duty to the plaintiff and the Court should grant plaintiffs' Cross Motion for Partial Summary Judgment on the Issue of Breach.

B. Partial Summary Judgement is Also Proper on the Issue of Hiring a Safety Incompetent Contractor

In New Jersey, a landowner who hires a separate general contractor is generally not responsible for the negligent acts of that contractor. *Mavrikidis v. Petullo*, 153 N.J. 117, 131 (1998); *Majestic Realty Associates v. Toti Contracting Co.,* 30 N.J. 425, 430-431 (1959); *Dawson v. Bunker Hill Plaza Assocs.,* 289 *N.J. Super*. 309, 318 (App.Div. 1996). There are, however, three exceptions to this general rule: (1) where the principal retains control of the manner and means of doing the work subject to the contract; (2) where the principal engages an incompetent contractor; or (3) where the activity constitutes a nuisance per se. *Majestic Realty,* 289 N.J.Super. at 430-431; *Dawson,* 289 *N.J. Super*. at 318. Under the second exception, a principal may be held liable for injury caused by its independent contractor where the principal hires an incompetent contractor. As the Appellate Division explained in the *Majestic* case, "[t]he gravamen of th[is] exception is selection of a contractor who is incompetent." *Id.*; *Mavrikidis,* 153 N.J. at 136. Accordingly, a landowner will not escape liability

if he engages an incompetent contractor. *Majestic Realty,* 289 N.J.Super. at 430-431; *Dawson,* 289 *N.J. Super*. at 318; *Cassano v. Aschoff*, 226 N.J. Super. 110, 113 (App. Div. 1988).

Liability for hiring an unsafe contractor is derived from basic negligence principles. *Restatement (2nd) of Torts §411* (1965) *Puckrein v. ATI Transport, Inc.*, 186 N.J. 563, 575-76 (2006) is the seminal case on the issue. It states in pertinent part:

> *The Restatement (Second) of Torts section 411* (1965) states:
>
> > An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons.
>
> Comment a to *section 411*, in turn, defines a competent and careful contractor as "a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others." Comment b to *section 411* further explains:
>
> > The employer of a negligently selected contractor is subject to liability under the rule stated in this Section for physical harm caused by his failure to exercise reasonable care to select a competent and careful contractor, but only for such physical harm as is so caused. In order that the employer may be subject to liability it is, therefore, necessary that harm shall result from some quality in the contractor which made it negligent for the employer to entrust the work to him.

Puckrein at 575-76 (underline added). In other words, to prevail against the principal for hiring an incompetent contractor, a plaintiff must show that the contractor was incompetent or unskilled to safely perform the job for which he was hired, that the harm that resulted arose out of that safety incompetence, "and that the principal knew or should have known of the incompetence." *Puckrein* at 576 (underline added).

The purpose behind the basic requirement to hire a safety competent contractor is to prevent unnecessary injury to anyone affected by a contractor's operations. *Puckrein* involved an unsafe truck that overturned and injured and killed several people. *Id*. at 567-68. The Court noted key safety facts that led to its application of the incompetent contractor exception including, "Registration, concomitant to inspection, is a method of insuring the safety of vehicles that place the public at risk and insurance is the guarantee that innocent victims of errant truckers will be compensated." *Id.* at 578-79 (underline added). To satisfy the unsafe contractor standard, the principal is required, at a minimum, to make "reasonable inquiry" at the time of the hiring that the contractor is competent to safely and carefully perform the work. The principal must "exercise ...reasonable care [to ascertain]" that the contractor is safety competent. *Puckrein* at 579-80. Further, the principal has a "continuing duty to inquire" that the contractor is carrying out the work in a safety competent manner. *Puckrein* at 580-81; *citing* Reuben I. Friedman, *When is Employer Chargeable with Negligence in Hiring Careless, Reckless, or Incompetent Independent Contractor,* 78 *A.L.R.*3d 910, 920 (1977) (explaining that although originally unaware contractor was incompetent, employer who acquires or should have acquired knowledge of incompetence thereafter may be liable for inaction); *See also Basil v. Wolf*, 193 N.J. 38, 70 (2007) ("We explained [in *Puckrein*] that there was a question of fact regarding whether the principal made a reasonable inquiry of the trucker initially and that a continuing duty of inquiry existed.")

The owner and developer of the project was LeFrak Organization. It created and designated at least one other LeFrak Organization company to be the general contractor of the project. As has been shown herein, LeFrak Organization was a safety incompetent contractor. At a bare minimum there is a jury question of fact in this regard. An OSHA safety "Competent Person...means one who

is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." 29 C.F.R. §1926.32 As has been demonstrated herein and discussed in detail above, LeFrak Organization did nothing to meet its responsibility to manage safety on the project.

The same is true with respect to LeFrak Organization hiring D Construction, who was also a safety incompetent contractor that disregarded basic safety standards. The subcontractors were all selected by Anthony Scavo or his LeFrak Organization project managers in the corporate office. (*Exhibit K, Deposition of David Jenkins at 25-26*) (*Exhibit M, 1/6/10 Shelia Mason Deposition at 45-46*) David Jenkins and Shelia Mason has worked with D Construction in the past and were familiar with the way they built concrete block walls. (*Exhibit K, Deposition of David Jenkins at 19*) (*Exhibit M, 1/6/10 Shelia Mason Deposition at 48*)

And although OSHA and the other workplace safety standards call for all contractors on a worksite to have an OSHA competent person to oversee the work, this is not something LeFrak required nor enforced. (*Exhibit K, Deposition of David Jenkins at 47*) As stated above, under 20 C.F.R. §1926.1 and 1926.20 et seq., LeFrak Organization was required to maintain a health and safety program and take a series of affirmative, on-going steps to prevent work injuries. It simply did none of this.

Just as the New Jersey Supreme Court found in *Puckrein*, LeFrak Organization had a duty at the time of the hiring to ensure it was competent to run a safe, OSHA compliant construction project that would have prevented the unreasonable risk of injury the workers were exposed to here. LeFrak Organization's duty in this regard continued throughout the course of the project. The overwhelming

evidence in the record shows that neither the LeFrak Organization entities nor D Construction were safety competent and did nothing to meet their duties in this regard. Since there is no question LeFrak Organization selected them, their summary judgment motion should be denied. And because there is simply nothing for a jury to decide on the issue of breach, plaintiff's cross-motion for partial summary judgment on this issue should be granted.

CONCLUSION

For all these reasons, Plaintiff respectfully requests the Court deny the motion for summary judgment of the LeFrak Organization defendants and grant plaintiff's cross motion for partial summary judgment on the issue of breach.

Respectfully submitted,
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By: ______________________________
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