

WEXLER. J.

UNITED STATES DISTRICT COURT **FILED**
EASTERN DISTRICT OF NEW YORK CLERK'S OFFICE
U.S. DISTRICT COURT, E.D.N.Y.

PHILIP L. ASTUTO and MATELLA D. ASTUTO, * DEC 13 2002 *

BROOKLYN OFFICE

Plaintiffs,



-against-

LINDSAY, M.J.

VERIFIED COMPLAINT

02 05 23
JURY TRIAL DEMANDED

VERIZON INC., individually and as successor to
GTE OPERATIONS SUPPORT INCORPORATED,
GTE CORPORATION, GTE SYLVANIA INCORPORATED,
SYLVANIA-CORNING NUCLEAR CORPORATION,
GT&E SYLVANIA INCORPORATED,
SYLVANIA ELECTRIC PRODUCTS INCORPORATED,
and GENERAL TELEPHONE & ELECTRONICS
CORPORATION; SYLVANIA ELECTRIC PRODUCTS, INC.
SYLVANIA CORNING, JOINT VENTURE,
VERIZON COMMUNICATIONS. INC.. individually and
as successor to GTE OPERATIONS SUPPORT
INCORPORATED, GTE CORPORATION. GTE SYLVANIA
INCORPORATED, SYLVANIA-CORNING NUCLEAR
CORPORATION, GT&E SYLVANIA INCORPORATED,
SYLVANIA ELECTRIC PRODUCTS INCORPORATED.
and GENERAL TELEPHONE & ELECTRONICS
CORPORATION; GTE OPERATIONS SUPPORT
INCORPORATED, individually and as successor to GTE
OPERATIONS SUPPORT INCORPORATED. GTE
CORPORATION, GTE SYLVANIA INCORPORATED,
SYLVANIA-CORNING NUCLEAR CORPORATION,
GT&E SYLVANIA INCORPORATED, SYLVANIA
ELECTRIC PRODUCTS INCORPORATED, and
GENERAL TELEPHONE & ELECTRONICS CORPORATION;
GTE CORPORATION; HARRIS CORPORATION,
individually and as successor to HARRIS INTERTYPE
CORPORATION and PRD ELECTRONICS;
BARSON COMPOSITES CORPORATION; AIR
TECHNIQUES INC.. ANCHOR/LITH KEM KO,
individually and as successor to ANCHOR CHEMICAL
COMPANY; FUJI HUNT PHOTOGRAPHIC
CHEMICALS. INC.. individually and as successor to

Docket no.

*Please assign to Judge Wexler
as he is presiding over related
cases: 02CV2543 & 02CV2017*

ANCHOR/LITH KEM KO; JERRY SPIEGEL ASSOCIATES;
GILBERT DISPLAYS REALTY CO., LLC;
GENERAL SEMICONDUCTOR INC., individually and
as successor to GENERAL INSTRUMENT
CORPORATION; K.B. CO.; A-T REALTY; and
HARBOR DISTRIBUTING CORP.

Defendants.

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Plaintiffs, by their attorneys, Jaroslawicz & Jaros, complaining of the defendants, allege as follows:

INTRODUCTION

1. Plaintiffs bring this action against Defendants seeking redress for injuries they have suffered in the past and will continue to suffer as a result of Defendants' reckless, grossly negligent and negligent operation, ownership, remediation, and/or decommissioning of a nuclear materials processing facility first operated by SYLVANIA ELECTRIC PRODUCTS INCORPORATED, which is now known as VERIZON (hereinafter referred to as the "Sylvania Facility"), and/or other facilities and/or properties which emitted toxins into the surrounding environment located in Hicksville, New York near Cantiague Park, which upon information and belief is a part of the Nassau County Parks System. Throughout the operational history of these facilities, unbeknownst to plaintiffs and other residents of this community who were unaware that there was a nuclear processing facility and other facilities utilizing hazardous chemical materials in their neighborhood, defendants caused and/or allowed the release of radioactive, hazardous and other toxic substances into the surrounding environment. These releases have contaminated the air, soil, surface water and

ground water in the surrounding communities. The damages directly and proximately caused by Defendants include cancer and related injuries, blighted property and diminished property values.

JURISDICTION

2. This action arises under the United States Price Anderson Act, 42 U.S.C. §2210 et seq., as hereinafter more fully appears. Section 2210(n)(2) of that Act provides an express grant of jurisdiction to the United States District Courts and grants jurisdiction to this Court to consider Plaintiffs' claims.

3. This action arises under the United States Atomic Energy Act, 42 U.S.C. §2011, et seq., and the United States Price Anderson Act, 42 U.S.C. §2210 et seq., as hereinafter more fully appears. Therefore, this court also has jurisdiction over Plaintiffs' claims by virtue of 28 U.S.C. §1331.

4. Because this action also arises under laws of the United States regulating commerce, this court has jurisdiction over Plaintiffs' claims by virtue of 28 U.S.C. §1337, as hereinafter more fully appears. Both the Atomic Energy Act, 42 U.S.C. §2011 et seq., and the Price Anderson Act, 42 U.S.C. §2210 et seq., regulate commerce in the nuclear fuels and nuclear power industry.

5. Because Plaintiffs' state law claims arise out of the same case or controversy as their federal claims, this court has jurisdiction over those ancillary and pendant state law claims by virtue of 28 U.S.C. §1367(a).

VENUE

6. Venue is proper in this judicial district pursuant to 28 U.S.C. 1391(b)(2) and 42 U.S.C. 2210(n)(2) because Plaintiffs' causes of action arose in this district and because the incidents giving rise to Plaintiffs' claims transpired in this district.

7. There are related actions pending in this Court entitled, Stevens v. Verizon, docket no. 02 CV 2543 and Schwinger v. Verizon, et al., docket no. 02 CV 2017 which, upon information and belief, are on "Administrative Hold" by Judge Wexler as per His Honor's verbal directives on December 3, 2002.

THE PARTIES

8. At all times hereinafter mentioned, the plaintiffs, Philip L. Astuto and Matella D. Astuto are husband and wife ("plaintiffs").

9. At all times hereinafter mentioned, the plaintiffs currently reside and own their home and underlying property located at 11 Steuben Drive, Jericho, New York which they purchased in approximately 1960.

10. At all times hereinafter mentioned, plaintiffs' home and property was located in the vicinity of the aforementioned facility.

11. At all times hereinafter mentioned, the defendant VERIZON COMMUNICATIONS, Inc. ("Verizon") is a Delaware corporation, authorized to do business and doing business in the State of New York.

12. At all times hereinafter mentioned, the defendant GTE CORPORATION ("GTE") is a foreign corporation, authorized to do business and doing business in the State of New York.

13. At all times hereinafter mentioned, the defendant GTE was merged into VERIZON.

14. At all times hereinafter mentioned, the defendant SYLVANIA ELECTRIC PRODUCTS, INC. is a foreign corporation, authorized to do business and doing business in the State of New York.

15. At all times hereinafter mentioned, the defendant SYLVANIA ELECTRIC PRODUCTS, INC. was merged GTE and later VERIZON.

16. At all times hereinafter mentioned, the defendant SYLVANIA CORNING, JOINT VENTURE, is a foreign corporation, authorized to do business and doing business in the State of New York.

17. At all times hereinafter mentioned, the defendant SYLVANIA CORNING, JOINT VENTURE, is intended to be the joint venture of the SYLVANIA ELECTRIC PRODUCTS and CORNING plant located at 70, 100 and 140 Cantiague Rock Road in Hicksville, New York.

18. Defendant VERIZON, INC., individually and as successor to GTE OPERATIONS SUPPORT INCORPORATED, GTE CORPORATION, GTE SYLVANIA INCORPORATED, SYLVANIA ELECTRIC PRODUCTS INCORPORATED, GT&E SYLVANIA INCORPORATED and GENERAL TELEPHONE & ELECTRONICS CORPORATION is a foreign corporation authorized to do business in the State of New York with its principal place of business at 1095 Avenue of the Americas, New York, New York 10036.

19. Defendant VERIZON COMMUNICATIONS, INC., ("VERIZON") Individually and as successor to GTE OPERATIONS SUPPORT INCORPORATED, GTE CORPORATION, GTE

SYLVANIA INCORPORATED, SYLVANIA-CORNING NUCLEAR CORPORATION, GT&E SYLVANIA INCORPORATED. SYLVANIA ELECTRIC PRODUCTS INCORPORATED, and GENERAL TELEPHONE & ELECTRONICS CORPORATION is a foreign corporation authorized to do business in the State of New York with its principal place of business at 1095 Avenue of the Americas, New York, NY 10036.

20. Defendant GTE OPERATIONS SUPPORT INCORPORATED, individually and as successor to GTE CORPORATION. GTE SYLVANIA INCORPORATED. SYLVANIA-CORNING NUCLEAR CORPORATION. GT&E SYLVANIA INCORPORATED, SYLVANIA-CORNING NUCLEAR CORPORATION, GT&E SYLVANIA INCORPORATED. SYLVANIA ELECTRIC PRODUCTS INCORPORATED and GENERAL TELEPHONE & ELECTRONICS CORPORATION is a foreign corporation authorized to do business in the State of New York with its principal place of business as 1225 Corporate Drive. Irving. Texas 75038.

21. Defendant, GTE CORPORATION, is a domestic corporation with its principal place of business at 1095 Avenue of the Americas, New York. NY 10036.

22. Defendant, HARRIS CORPORATION. individually and as successor to HARRIS INTERTYPE CORPORATION and PRD ELECTRONICS, is a foreign corporation authorized to do business in the State of New York with its principal place of business at 1025 West NASA Boulevard. Melbourne. Florida 32919.

23. Defendant, BARSON COMPOSITES CORPORATION, is a foreign corporation authorized to do business in the State of New York with its principal place of business at 160 Sweet

Hollow Road, Old Bethpage, New York 11804.

24. Defendant, FUJI HUNT PHOTOGRAPHIC CHEMICALS, INC., individually and as successor to ANCHOR/LITH KEM KO is a foreign corporation with its principal place of Business at 115 West Century Road, Paramus, New Jersey 07652.

25. Defendant, FUJI PHOTO FILM USA, INC., individually and as successor to ANCHOR/LITH KEM KO, is a foreign corporation with its principal place of business at 555 Taxter Road, Elmsford, New York 10523.

26. Defendant, JERRY SPIEGEL ASSOCIATES. is a domestic corporation with its principal place of business at 375 North Broadway, Jericho, New York 11753.

27. Defendant, GILBERT DISPLAYS REALTY CO., LLC. is a domestic corporation with its principal place of business at 140 Cantiague Rock Road. Hicksville, New York 11801.

28. Defendant. GENERAL SEMICONDUCTOR, INC.. individually and as successor to GENERAL INSTRUMENT CORPORATION. is a domestic corporation with its principal place of business at 10 Melville Road, Melville. New York 11747.

29. Defendant. K.B. CO., is a domestic corporation with its principal place of business at 375 N. Broadway. Jericho. New York 11753.

30. Defendant A-T REALTY. is a domestic corporation with its principal place of business at 170 Old Country Road. Mineola, New York 11501.

31. Defendant, HARBOR DISTRIBUTING CORP., is a domestic corporation with its principal place of business at 120 Bethpage Road, Hicksville, NY 11801.

32. Defendants listed in paragraphs "11" through "21" will be referred to herein as the "VERIZON DEFENDANTS".

33. Defendants listed in paragraphs "22" through "31" will be referred to herein as the "NON-VERIZON DEFENDANTS".

34. At all times material hereto, each Defendant corporation, by itself or through its agents, is or has been engaged in the transporting, generating, processing, utilizing, releasing, sale, distribution, and/or disposal of nuclear materials and/or other toxic substances at facilities located at, in, near or around premises now known as 70 Cantiague Rock Road, 100 Cantiague Rock Road, 140 Cantiague Rock Road, 500 West John Street, 600 West John Street, Hicksville, New York and/or owned property that was used for these activities. Such facilities and/or the property thereon, including the Sylvania facility, are, or were at all times material hereto, owned, operated, maintained and/or utilized by these Defendants or by their agents.

35. Plaintiffs would show that for a period of many years, the land upon which their home is situated was exposed to hazardous, toxic or radioactive substances released by Defendants into the environment, including the air, water, and soil, of the aforementioned location. Plaintiffs would show that their property has been exposed on numerous occasions to hazardous, toxic or radioactive substances released or emanating from Defendants' facilities and/or properties, and the toxic substances, pollutants and contaminants have infiltrated, polluted and contaminated the land, groundwater etc. Plaintiffs further allege, that they have suffered property damage, diminution of real estate, loss of real estate investment value directly and proximately caused by the land's

exposure to and contamination of hazardous, toxic or radioactive substances released, emitted, or emanating from Defendants' facilities and/or properties.

36. Plaintiffs allege that as a result of the release of hazardous, toxic or radioactive substances and the recurring releases known to cause disease and that each exposure caused or contributed to Plaintiffs' damages in that their property has been blighted and damaged by hazardous and/or radioactive waters released from Defendants' facilities.

THE UNDERLYING FACTS

37. Beginning in or about 1952, Sylvania Electric Products, Inc. acquired property located at the aforementioned location where, first in a farmhouse, which was demolished in or about 1957, and then in other structures, they manufactured atomic fuel elements. Both uranium and thorium as well as other toxic substances were used in the manufacture of reactor parts. Upon information and belief, the nuclear waste from this manufacturing process was discharged into the drinking water and air of the adjoining residential neighborhood where the plaintiffs herein resided. These radioactive materials, their by-products and their decay, or "daughter," products are highly toxic and carcinogenic. At no time were any of the plaintiffs, or, upon information and belief, any of the other residents of their neighborhood, ever informed of the presence of a nuclear processing facility in their neighborhood nor were they ever warned of the attendant dangers of having a nuclear processing facility in their neighborhood. Since the closure of the Sylvania facility at least two (2) wells which supply drinking water to plaintiffs' neighborhood have been closed as a result of the contamination caused by the Sylvania Facility. Each of the Verizon defendants, alone or with each other, owned,

operated, managed and maintained the Sylvania facility.

38. The Non-Verizon Defendants caused and/or permitted chemical contamination and/or other toxins from their operations and properties at the aforementioned facility to be discharged into the ground water utilized by plaintiffs. Operations at the aforementioned locations have also involved the use of non-radioactive chemicals, many of which are classified as hazardous under applicable federal law.

39. Upon information and belief, Plaintiffs contend that from the time the Sylvania facility began operating in or about 1952 to its closure, including any remediation and/or decommissioning operations, it generated significant amounts of substances that are highly toxic to humans and the environment. Plaintiffs further contend that throughout the Sylvania facility's operating history, each licensee and/or operator and/or owner has caused recurrent releases of radioactive and toxic materials into the environment, in complete disregard of applicable law, and of the health and safety of the surrounding communities and the local environment. These reckless, negligent and grossly negligent releases occurred in various ways, including the discharge of radioactive and toxic materials into public water bodies, the emission of radioactive and toxic materials from facility stacks, the exposure of workers, who could then spread contamination outside the work-site, and improper disposal of materials which eventually leaked from storage tanks and other disposal systems.

40. These reckless, negligent and grossly negligent releases have in turn resulted in the exposure of persons living in the area to toxic and radioactive materials and contamination and

pollution of the surrounding areas. Because of the long half-life of the radioactive substances involved, property located and persons living at or near the Sylvania facility have also been exposed to and/or contaminated by these dangerous substances.

41. Upon information and belief, the substances to which Plaintiffs, their property and their communities were exposed include but are not limited to uranium, thorium and/or other nuclear materials and/or chemical toxins. Some of these substances were used in the actual conduct of Defendants' operations, and some were by-products or decay ("daughter") products.

42. Upon information and belief, Plaintiffs contend that the Sylvania facility was not operated in compliance with applicable state, local and federal laws. Further, Plaintiffs contend that from the beginning, the Verizon defendants engaged in a pattern of negligent, grossly negligent and reckless behavior in their operation, remediation and/or decommissioning of the Sylvania facility, and that this pattern of behavior was implemented with full knowledge of the hazards associated with the radioactive, toxic, and hazardous substances associated with their operations.

43. The Non-Verizon defendants negligently, recklessly and/or carelessly caused and/or permitted the release of chemicals and/or other toxins into the surrounding environment.

44. While conducting operations in a manner in clear violation other applicable laws, and common law duties, Defendants also sought to prevent details about their operations, and about the hazards of their operations and property, from reaching workers, Plaintiffs, or the surrounding community. During all relevant times, Defendants or their predecessors were aware of the fact that they were releasing toxic and radioactive materials into the air, water and soil. Defendants opted not

to take sufficient remedial measures to eliminate or abate the emissions and releases, manifesting a casual attitude towards environmental and health safety, even though they were aware of the health risks posed to these Plaintiffs by such releases. At the same time, Defendants withheld information about the dangers from Plaintiffs and the community.

45. Defendants' failure to inform Plaintiffs of the health risks and pollutants associated with the substances emitted from Defendants' facilities and property resulted in Plaintiffs being deprived of information crucial to their ability to limit their exposure or take other appropriate action. Plaintiffs could not therefore have reasonably determined the cause of their injuries and resultant property damage, diminution of real estate and loss of real estate investment value until recently, when outside consultants publicly revealed the presence of off-site contamination attributable to the facilities.

46. According to these independent reports, there is radiological contamination as deep as sixteen feet below the ground with high concentrations of tetrachloroethene in the ground water, and high levels of uranium and other toxins.

47. For many years, persons living in the vicinity of the defendants' plant, including the plaintiffs herein, were subjected to various illnesses and diseases, many of which could not be properly diagnosed due to the defendants' concealment as to the toxins in the soil, water and air in the area surrounding the plaintiffs' homes and property.

48. Those plaintiffs who have suffered property damage, diminution of real estate, loss of real estate investment value are entitled to recover for the loss of the value of their property by being blighted and contaminated.

CAUSES OF ACTION
AS AND FOR A FIRST CAUSE OF ACTION AGAINST ALL THE DEFENDANTS

49. The defendants' conduct in creating and dumping toxic wastes, and concealing it, violates the laws of the State of New York, the laws and regulations of the United States of America; constituted a public nuisance and a hazard and created dangerous and hazardous conditions.

50. The defendants are strictly liable for their conduct.

51. The plaintiffs have suffered property damage, diminution of real estate, loss of real estate investment value and are entitled to recover all of their damages, from the defendants, jointly and severally.

52. By reason of the foregoing, plaintiffs are entitled to recover all of their damages properly determined at trial plus costs, disbursements and attorneys' fees from the defendants.

AS AND FOR A FOURTH CAUSE OF ACTION AS AGAINST
THE VERIZON DEFENDANTS

53. Plaintiffs hereby repeat, reiterate and reallege each of the foregoing allegations with the same force and effect as if more fully set forth at length herein.

54. The Verizon defendants owned the Sylvania facility.

55. The Verizon defendants operated the Sylvania facility.

56. The Verizon defendants managed the Sylvania facility.

57. The Verizon defendants controlled the Sylvania facility.

58. The Verizon defendants maintained the Sylvania facility.

59. Plaintiffs in this case assert numerous state common law claims against Defendants for damages suffered. Because the Verizon defendants are regulated by the terms of the federal Price Anderson Act, as hereinafter more fully appears, those state law claims are statutorily deemed to arise under the federal Price Anderson Act, thereby stating a federal cause of action. 42 U.S.C. §2014(hh); §2210.

60. The Verizon defendants in this action have, at times material to this action, conducted various activities involving nuclear materials. These activities include collecting and processing uranium, thorium and other radioactive and/or toxic substances. They are therefore engaged in the development, use and control of atomic energy within the terms of the Atomic Energy Act. 42 U.S.C. §2011 et. seq. A consequence of these activities is the requirement that the Verizon defendants obtain a federal license authorizing their operations involving nuclear materials. 42 U.S.C. §§2210, 2075, 2092, 2093, 2111. Upon information and belief, the Verizon defendants or their predecessors and/or agents have at all relevant times held such federal licenses.

61. In 1957, Congress amended the Atomic Energy Act to implement its policy to foster private sector participation in the nuclear energy industry. These 1957 amendments became known as the Price Anderson Act. The uranium, thorium and other radioactive substances possessed, processed and stored by the Verizon defendants at the Sylvania facility are nuclear by-product materials, special nuclear materials and/or source materials. 42 U.S.C. §2014(e), (z). (aa). Any

release of these by-product, special nuclear, or source materials causing bodily injury, sickness, disease, death, loss or damage to property, or loss of use of property constitutes a "nuclear incident" under the terms of the Price Anderson Act. 42 U.S.C. §2014(q). Plaintiffs in this case contend that the Verizon Defendants operated the Sylvania facility in a negligent, grossly negligent, and reckless fashion, and have as a consequence caused the frequent release of by-product, special nuclear, and/or source materials into the surrounding communities, thereby causing a "nuclear incident" or series of "nuclear incidents" under the Price Anderson Act.

62. Plaintiffs further argue that these releases have exposed Plaintiffs and their property to highly dangerous materials. Plaintiffs have sustained serious injuries and damages as a direct and proximate cause of these exposures. Plaintiffs have suffered property damage, diminution of real estate, loss of real estate investment value as a direct and proximate result of their exposures. Plaintiffs' cause of action therefore asserts legal liability based upon a "nuclear incident," or series of such incidents, and is consequently a "public liability action" within the terms of the Price Anderson Act. 42 U.S.C. §2014(w), §2014(hh).

63. The Price Anderson Act further provides that in "public liability actions" arising under the Act, the law of the state in which the "nuclear incident" occurred shall provide the substantive rules of decision unless such law is inconsistent with the Act. The causes of action enumerated in §§ 49-52 & 65 through 105 exist by virtue of the laws of the state of New York in which the "nuclear incident" occurred, and are therefore properly before this court as both federal

causes of action arising under the Price Anderson Act and as state law claims ancillary and pendant to the federal claims. 42 U.S.C. §2014(hh), §2210.

64. By reason of the foregoing, plaintiffs are entitled to recover all of their damages properly determined at trial plus costs, disbursements and attorneys' fees from the defendants.

**AS AND FOR A FIFTH CAUSE OF ACTION AS AGAINST ALL THE DEFENDANT
(NEGLIGENCE)**

65. Plaintiffs hereby repeat, reiterate and reallege each of the foregoing allegations with the same force and effect as if more fully set forth at length herein.

66. Defendants owed to Plaintiffs a duty of due care which could only be satisfied by the legal, safe, and proper generation, use, management, storage and disposal of the radioactive, toxic and hazardous substances in Defendants' possession. Defendants also had a specific duty to prevent the discharge or release of such substances which might harm the persons, property or economic interests of Plaintiffs. Defendants also had a specific duty to warn or notify Plaintiffs of the potential hazards of exposure to radioactive, toxic and hazardous substances and to warn or notify Plaintiffs of the fact that discharges or releases of these substances had occurred, and were likely to occur in the future.

67. Further, Defendants had a duty to comply with applicable state, federal, and local governmental laws, regulations, and guidelines applicable to persons generating, managing, storing, using, and disposing of radioactive, hazardous and toxic substances.

68. Defendants breached these duties by their negligent, grossly negligent, and reckless generation, management, storage, use, and disposal of radioactive, hazardous and toxic substances

and their negligent, grossly negligent, and reckless conduct of operations at the Sylvania and/or adjoining facilities, including any remediation and decommissioning activities. Such conduct was in non-compliance with applicable federal, state and local laws, regulations, and guidelines. Defendants' reckless, grossly negligent, negligent, and illegal conduct resulted in the dangerous release of radioactive, hazardous and toxic substances into the communities surrounding the Sylvania facility. These actual and continued releases have subjected Plaintiffs to an unreasonable risk of harm, and to actual injuries to their persons, property damage, diminution of real estate, loss of real estate investment value and economic interests. Defendants also failed to warn Plaintiffs of the actual and threatened releases of such substances and of the reasonably foreseeable effects of such releases, an omission that was reckless, grossly negligent, and/or negligent. Finally, Defendants failed to act to prevent their releases from harming Plaintiffs and their property.

69. The Verizon defendants knew or should have known about the hazards associated with nuclear operations. Additionally, the legislative history of the Price Anderson Act, which was passed with the active participation of private companies involved in the nuclear power industry, is rife with references to the extreme consequences that could be expected in the event of a nuclear accident. Indeed, the gravity of such consequences was a major contributing factor to the passage of the Price Anderson Act.

70. The defendants clearly knew or should have known that their generation, management, storage, use, disposal, releases, or discharges of radioactive, toxic and hazardous substances at the Sylvania or adjoining facilities would result in actual injuries and increased risks

to the persons, property and economic interests of the public living near the facility.

71. The Non-Verizon defendants were negligent, careless and reckless in the generation, management, storage, use, disposal and/or discharge of chemicals and/or toxins and/or in failing to prevent and failing to warn of discharges from their property.

72. Defendants' negligence was a direct and proximate cause of injuries to Plaintiffs, causing both actual present harm and creating an increased risk of harm to their persons, property and economic interests. Plaintiffs are entitled to recover damages for such injuries.

73. By reason of the foregoing, plaintiffs are entitled to recover all of their damages properly determined at trial plus costs, disbursements and attorneys' fees from the defendants.

**AS AND FOR A SIXTH CAUSE OF ACTION AGAINST ALL THE DEFENDANTS
(NEGLIGENCE PER SE)**

74. Plaintiffs hereby repeat, reiterate and reallege each of the foregoing allegations with the same force and effect as if more fully set forth at length herein.

75. Plaintiffs contend that throughout their history, the Sylvania facility was operated in non-compliance with applicable federal, state and local laws and regulations promulgated thereunder. Applicable statutes include but are not limited to the Atomic Energy Act, 42 U.S.C. §2011 et. seq., and the regulations issued thereunder, the Price Anderson Act, 42 U.S.C. §2210 et seq., and regulations issued thereunder; the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9601, §9603, §9611(g), and regulations issued thereunder; the Toxic Substances and Control Act (TSCA), 15 U.S.C. §2601, §2607(e) and regulations issued thereunder; the Resource Conservation and Recovery Act (RCRA) 42 U.S.C.

§6901, §6924(d), §6925 and regulations issued thereunder; the Emergency Planning and Community Right to Know Act (EPCRTKA) 42 U.S.C. §11001, §11023 and regulations issued thereunder; and applicable New York air and water quality protection and waste disposal laws.

76. The Non-Verizon defendants operated their respective facilities in violation of applicable law.

77. These violations of applicable state, federal and local laws, regulations and guidelines were a direct and proximate cause of injuries to Plaintiffs. The increased risk of harm and the actual present harm to their person, property and economic interests are precisely the types of injuries these applicable laws were designed to prevent. Violation of these statutes thereby constitutes per se negligence.

78. By reason of the foregoing, plaintiffs are entitled to recover all of their damages properly determined at trial plus costs, disbursements and attorneys' fees from the defendants.

AS AND FOR A SEVENTH CAUSE OF ACTION AS AGAINST ALL THE DEFENDANTS (ABSOLUTE OR STRICT LIABILITY)

79. Plaintiffs hereby repeat, reiterate and reallege each of the foregoing allegations with the same force and effect as if more fully set forth at length herein.

80. The conduct of nuclear processing activities, and/or the use of industrial chemicals including any remediation and decommissioning activities, poses significant risk of harm to persons living and working in the vicinity of the operation. The consequences of nuclear accidents or incidents to health, property and the environment are extremely dire, and can be measured in the millions, if not billions of dollars. Nor is it possible to eliminate the risk

by taking reasonable precautions. Finally, processing nuclear materials has never been a matter of common usage; indeed, prior to 1957, private operators were not permitted to engage in such activities at all. The conduct of nuclear processing activities, and/or the use of industrial chemicals at the Sylvania and/or adjoining facilities clearly constituted abnormally dangerous activities.

81. In addition, with full knowledge of the environmental and health hazards associated with the processing of nuclear fuel components and the use of industrial chemicals, Defendants and their predecessors chose to establish the Sylvania and/or adjoining facilities in the midst of residential communities in Hicksville, Westbury and Jericho, New York with facilities being located literally across the street from homes. Although Plaintiffs maintain the Defendants' activities were abnormally dangerous per se, the location of such activities in a well-populated area such as Hicksville, Westbury or Jericho, New York, would independently have rendered them abnormally dangerous.

82. As a direct and proximate result of the Defendants' collection, handling, processing, storage and disposal of radioactive, toxic and hazardous substances at the Sylvania and/or adjoining facilities, there have been releases of such substances into the environment, thereby injuring Plaintiffs, which injuries include actual present harm and increased risks of harm to their persons, property damage, diminution of real estate, loss of real estate investment value and economic interests. Defendants' releases, and their conduct of abnormally dangerous activities at the Sylvania and/or adjoining facilities have also interfered substantially with

Plaintiffs' private use and enjoyment of their property. These injuries constitute the type of harm the possibility of which made the Defendants' activities abnormally dangerous.

83. Defendants are therefore strictly liable to Plaintiffs for all damages which have resulted and which will continue to result from the collection, handling, processing, storage and disposal of radioactive, toxic and hazardous substances at the Sylvania and/or adjoining facilities.

84. By reason of the foregoing, plaintiffs are entitled to recover all of their damages properly determined at trial plus costs, disbursements and attorneys' fees from the defendants.

AS AND FOR AN EIGHTH CAUSE OF ACTION AS AGAINST ALL THE DEFENDANTS (MISREPRESENTATION AND CONCEALMENT)

85. Plaintiffs hereby repeat, reiterate and reallege each of the foregoing allegations with the same force and effect as if more fully set forth at length herein.

86. Some or all of the Defendants, at various times, both negligently and/or intentionally failed to disclose to Plaintiffs material facts or, any facts, concerning the nature and the magnitude of the releases of radioactive, toxic and hazardous substances from the Sylvania nuclear processing facility and/or adjoining facilities despite the fact that the defendant knew for decades of the hazards of the substances they had released into the surrounding environments. Finally, Defendants have continued to make misrepresentations to members of the community regarding their ability to restore the land and water at or near the Sylvania facility such that those properties can safely be made available for unrestricted use.

87. Each of these misrepresentations and/or concealments were made by Defendants

individually, jointly and in conspiracy with each other, and were made with the intention of creating a false impression in the minds of the Plaintiffs as to the true environmental status of the community and the true health risks accompanying Defendants' releases of toxic, hazardous and radioactive substances such that Plaintiffs would be lulled into complacency, and would refrain from seeking redress or pursuing other remedial action.

88. Plaintiffs reasonably believed and in good faith relied upon Defendants' misrepresentations and concealments in making decisions regarding seeking legal redress or pursuing remedial actions.

89. Many of the injuries and damages to Plaintiffs and their property arising out of the releases of radioactive, toxic and hazardous substances by Defendants into the environment have been compounded by the passage of time and Plaintiffs' reliance upon Defendants' misrepresentations and concealments. Plaintiffs' injuries include both actual present harm and increased risk of harm to the person, property damage, diminution of real estate, loss of real estate investment value and economic interests of Plaintiffs. All injuries and damages were directly and proximately caused by Plaintiffs' reliance upon Defendants' false and misleading representations, omissions and concealments. Plaintiffs sustained property damage, diminution of real estate and loss of real estate investment value. Plaintiffs are entitled to recover for such damages.

90. Plaintiffs did not discover the fraud alleged until recently and plaintiffs further allege that the statute of limitations to commence these actions is tolled as a result of the defendants' fraudulent concealment and misrepresentations.

91. By reason of the foregoing, plaintiffs are entitled to recover all of their damages properly determined at trial plus costs, disbursements and attorneys' fees from the defendants.

**AS AND FOR AN NINTH CAUSE OF ACTION AS AGAINST ALL THE
DEFENDANTS(CIVIL CONSPIRACY)**

92. Plaintiffs hereby repeat, reiterate and reallege each of the foregoing allegations with the same force and effect as if more fully set forth at length herein.

93. Some or all of the Defendants, their officers and employees, and other persons and entities unknown to Plaintiffs, at various times, acted together with the common purpose of conducting operations at the Sylvania and nearby facilities in an unlawful manner, and with the further common purpose of unlawfully concealing operations at such facilities from the public and of concealing the fact that releases of toxic substances, radiation, and pollutants were occurring.

94. In furtherance of this conspiracy, Defendants have taken overt steps to conceal the nature of plant operations from the public and from regulators, and have failed in their legal duty to disclose the fact that releases of toxic pollutants and radiation have occurred. Such concealment is a violation of law, and a violation of Defendants' duty to Plaintiffs as members of the community.

95. In furtherance of this conspiracy, Defendants have also falsely and fraudulently represented the nature and extent of releases of toxic, hazardous and radioactive substances from the Sylvania and/or nearby facilities, have misrepresented the health and environmental risks associated with such releases and with the operations of Defendants' facilities, and have concealed information known to Defendants about the health risks and the status of knowledge regarding the

dangerous properties of the toxic, hazardous and radioactive substances used, processed, generated and released from the facilities.

96. As a direct and proximate result of Defendants' conspiracy, Plaintiffs have suffered injuries to their persons, property damage, diminution of real estate, loss of real estate investment value and economic interests and are entitled to recover damages for such injuries and damages.

97. By reason of the foregoing, plaintiffs are entitled to recover all of their damages properly determined at trial plus costs, disbursements and attorneys' fees from the defendants.

AS AND FOR A TENTH CAUSE OF ACTION AS AGAINST ALL THE DEFENDANTS
(PROPERTY DAMAGE)

98. Plaintiffs Philip L. Astuto and Matella D. Astuto repeat, reiterate and reallege each of the foregoing allegations with the same force and effect as if more fully set forth at length herein.

99. Plaintiffs Philip L. Astuto and Matella D. Astuto own their home and reside in close proximity to the Sylvania facility and as a result their home has decreased in value because of not only its proximity, but also because of the potential that their house has been contaminated due to the spread and dissemination of nuclear and other toxic contaminants.

100. By reason of the foregoing, plaintiffs are entitled to recover all of their damages properly determined at trial plus costs, disbursements and attorneys' fees from the defendants.

(DAMAGES)

101. Plaintiffs hereby repeat, reiterate and reallege each of the foregoing allegations with the same force and effect as if more fully set forth at length herein.

102. As a direct and proximate result of Defendants' tortious conduct as alleged above, Plaintiffs' have suffered property damage, diminution of real estate and loss of real estate investment value by exposure to toxic and radioactive substances.

103. Because Defendants' conduct was grossly negligent and reckless, Plaintiffs seek punitive damages;

104. To the extent that any plaintiff herein is required to, it is alleged that pursuant to CPLR 214-c. the technical, scientific or medical knowledge and information sufficient to ascertain the cause of their injury or damages have not been discovered, or identified, or determined prior to the expiration of the period within which this action could otherwise have been brought and that the plaintiffs would have otherwise satisfied the requirements of 214-c subdivisions 2 and 3.

105. By reason of the foregoing, plaintiffs are entitled to recover all of their damages properly determined at trial plus costs, disbursements and attorneys' fees from the defendants.

PRAYER FOR RELIEF

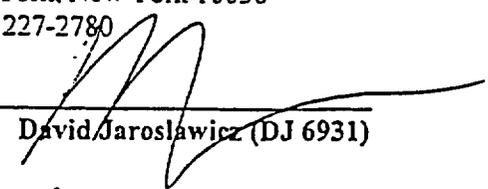
106. By reason of the foregoing, plaintiffs are entitled to recover all of their damages properly determined at trial plus costs, disbursements and attorneys' fees from the defendants.

107. Plaintiffs seek such other relief as is just and equitable.

108. Plaintiffs demand that all issues of fact in this case be heard before a jury.

WHEREFORE, plaintiffs demand judgment against the defendants, jointly and severally, for all of their damages, all together with the costs, disbursements and attorneys fees of this action.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PHILIP L. ASTUTO and MATELLA D. ASTUTO,

Plaintiffs,

-against-

VERIZON COMMUNICATIONS, INC., ET AL.

Defendants.

Complaint

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To:

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INTRODUCTION

The *Schwinger* and *Astuto* plaintiffs cannot state any viable claim in these cases. They filed these lawsuits -- relating to the former nuclear fuel processing facility in Hicksville, New York that closed more than 35 years ago -- without investigating the facts underlying their purported claims. If plaintiffs had looked into the facts before filing, they would have learned that the New York State Department of Environmental Conservation ("DEC") *has* been investigating the site -- "inside and out" -- and has found no public health concern. The multiple legal insufficiencies of the amended complaints outlined below must be viewed against this background: that plaintiffs lack a good-faith factual basis for a case.

These cases were originally filed on behalf of 214 identified plaintiffs, as well a purported class of individuals alleged to be similarly situated. On December 2, 2002, the Sylvania Defendants moved to dismiss those complaints as a matter of law, identifying multiple fundamental defects in the complaints. Before any further briefing occurred on those motions, this Court held a case management conference on December 3, 2002, and ordered plaintiffs to refile their complaints and commence new actions limited to four plaintiffs of their selection. Thereafter, plaintiffs revised and refiled their complaints. Given that they had received defendants' motions to dismiss prior to filing their new complaints, plaintiffs were fully aware of the legal challenges raised by defendants and defendants' position that plaintiffs lacked a good faith basis to bring their claims. Presumably, plaintiffs did all they could before refiling their complaints to respond to defendants' challenges, but the result has been, at most, the addition of scattered, purely conclusory allegations that fail to cure the complaints' multiple fatal defects.

The amended complaints fail as a matter of law on at least five fundamental grounds:

1. Failure to allege a violation of the controlling duty of care. Plaintiffs fail (and are unable) to allege adequately any specific violation of the defendants' controlling duty of care under the Price-Anderson Act, the federal statute that governs all actions based on alleged exposure to nuclear materials. All claims in both amended complaints must be dismissed on this ground alone.
2. Claims for non-compensable injuries. Plaintiffs seek damages for alleged injuries that are not compensable under the Price-Anderson Act. In *Astuto*, plaintiffs assert conclusory claims for diminution in property value that fall outside the realm of injuries cognizable under Price-Anderson.
3. Statute of limitations. Despite being on notice as to statute of limitations problems with their claims, plaintiffs have failed to plead sufficient information that would permit scrutiny of the timeliness of their claims.
4. Non-existent and insufficiently pled claims. Two counts of both amended complaints, asserting claims for "civil conspiracy" and "misrepresentation and concealment," as well as a property "damages" claim and a possible "public nuisance" claim hazily alleged in *Astuto*, either assert a claim that does not exist under law or fail to plead the requisite elements of a claim.
5. Improper parties. Verizon, Inc. and Verizon Communications Inc. must be dismissed as defendants as a matter of law: the former because it no longer exists, and the latter because the amended complaints fail to make any allegations that support either direct or indirect liability against it.

These fatal legal defects in both amended complaints are not mere pleading deficiencies that can be corrected with *more* amended complaints. Rather, because plaintiffs lack any factual basis for a case, the Sylvania Defendants move to dismiss with prejudice both the *Schwinger* and *Astuto* amended complaints.¹

¹ The defendants joining in this memorandum and the underlying motions to dismiss -- Verizon Communications Inc., GTE Corporation, GTE Products of Connecticut Corporation, and GTE Operations Support Incorporated --
(Continued...)

ALLEGATIONS OF THE AMENDED COMPLAINTS.

The present complaints arose from this Court's December 3, 2002 directive that plaintiffs were to refile the *Schwinger* case naming only three plaintiffs with alleged personal injury claims (hereinafter referred to as *Schwinger II*) and refile what was then called the *Stevens* case naming only one plaintiff with an alleged property damage claim (now captioned and hereinafter referred to as *Astuto*).² In their refiled complaints, plaintiffs' counsel have strategically avoided naming as plaintiffs individuals whose claims suffered from some of the most obvious fatal defects set out in defendants' December 2, 2002 motions challenging plaintiffs' prior complaints. These defects included claims that on their face were time-barred by the relevant statutes of limitations and claims for alleged injuries that were not compensable under the governing federal legislation, such as claims for the possibility of future bodily injury, for mental and emotional damage, or for loss of services and consortium of others. Despite counsel's apparent efforts to choose their present plaintiffs with care, the claims in the *Schwinger II* and *Astuto* amended complaints remain fatally flawed and must be dismissed.

A. Schwinger II.

The *Schwinger II* plaintiffs allege that, beginning in 1952, each of the so-called "Verizon defendants"³ operated a "nuclear materials processing facility" at what is now 70-140

are referred to as the "Sylvania Defendants." In the interest of avoiding largely duplicative memoranda supporting the motions to dismiss the two amended complaints, the Sylvania Defendants offer this single memorandum in support of both motions. Any points that are unique to one amended complaint or the other are addressed specifically herein as pertinent to *Schwinger* or *Astuto*; unless so specified, the arguments apply to both amended complaints.

² Following the December 3 Court conference, the *Astuto* plaintiffs filed an initial complaint on December 13, 2002, and an amended complaint on January 3, 2003. The *Schwinger* plaintiffs filed an initial complaint in *Schwinger II* on December 13, 2002, and an amended complaint on December 23, 2002.

³ The *Schwinger* plaintiffs define the "Verizon defendants" as "Verizon, Inc."; "Verizon Communications Inc."; "GTE Operations Support Incorporated"; "GTE Corporation"; and "GTE Products of Connecticut Corporation," together with alleged predecessor entities including "GTE Sylvania Incorporated"; "Sylvania Electric Products

(Continued...)

Cantiague Rock Road in Hicksville, New York. Schwinger II Am. Compl. ¶¶ 1, 12. Plaintiffs claim that “nuclear waste” from the manufacturing process “was discharged into the drinking water and air of the adjoining residential neighborhood” where plaintiffs lived and that these “releases” allegedly “resulted in the exposure of persons living in the area to toxic and radioactive materials.” *Id.* ¶¶ 12, 15.

The three individual plaintiffs claim exposure to these alleged “releases” at unspecified times since 1952 and allege that they lived in the general vicinity of the facility for varying time spans beginning in 1948. *Id.* ¶¶ 7(a)-(c). As a result of those alleged exposures, these plaintiffs claim to have developed the following medical conditions: Melvin Schwinger, multiple myeloma; Susan Maiers Wiseman, kidney cancer and “other injuries”; and Claire Hodgkinson, breast cancer. *Id.*

Count One of the *Schwinger II* complaint asserts a Public Liability Action (“PLA”) under the Price-Anderson Act against the Sylvania Defendants. *Id.* ¶¶ 21-39. The remaining five counts assert claims against all defendants under New York law for negligence, negligence per se, absolute or strict liability, misrepresentation and concealment, and civil conspiracy. *Id.* ¶¶ 40-72. Plaintiffs seek to recover \$90 million for the six counts as “general damages, special damages,” and “punitive and exemplary damages,” *id.* ¶ 77, allegedly to

Incorporated”; “GT&E Sylvania Incorporated”; “General Telephone & Electronics Corp.”; and “Sylvania-Corning Nuclear Corporation.” See Schwinger II Am. Compl. ¶¶ 8(p), 8(b)-(f). The Astuto plaintiffs define the “Verizon defendants” as “Verizon, Inc.”; “Verizon Communications Inc.”; “GTE Operations Support Incorporated”; “GTE Corporation”; and “GTE Products of Connecticut Corporation,” together with alleged predecessor entities See Astuto Am Compl. ¶¶ 11(o), 11(b)-(f).

The so-called “Verizon defendants” are more accurately referred to as the “Price-Anderson Defendants,” because they are the entities alleged to have some connection to alleged nuclear releases from the Hicksville facility. The name “Verizon defendants” is inaccurate in that the thread supposedly tying together these defendants is their connection to former *Sylvania* entities alleged to have operated the Hicksville facility. The defendants submitting this memorandum thus identify themselves as the “Sylvania Defendants.”

compensate them for physical and emotional harm, medical expenses, medical detection and surveillance services, loss of wages, domestic help, and to punish defendants, *id.* ¶ 74.

B. Astuto.

The named plaintiffs in *Astuto*, husband and wife Philip L. Astuto and Matella D. Astuto, allege that -- for “a period of many years” since approximately 1960, when they purchased their home and property in the vicinity of the Hicksville facility -- the land upon which their home is situated was “exposed to hazardous, toxic or radioactive substances released by Defendants into the environment.” *Astuto Am. Compl.* ¶¶ 8-10, 13. The Astutos allege that they have suffered “property damage, diminution of real estate, [and] loss of real estate investment value” resulting from their property’s exposure to and contamination by alleged hazardous substances emanating from defendants’ properties. *Id.* ¶ 13.

The *Astuto* amended complaint purports to assert eight “causes of action.” The legal claim in the “first cause of action” is difficult to pinpoint: plaintiffs allege that “defendants’ conduct . . . violates the laws of the State of New York, the laws and regulations of the United States of America; constituted a public nuisance and hazard and created dangerous and hazardous conditions,” and that “defendants are strictly liable for their conduct.” *Id.* ¶¶ 25-26. The Sylvania Defendants assume plaintiffs are attempting to state a claim for public nuisance under New York law.⁴ This “cause of action” asserts that plaintiffs have suffered property damage, diminution in real estate, and loss of real estate investment value. *Id.* ¶ 27.

The next six claims in the *Astuto* amended complaint (the second through seventh “causes of action”) appear to have been copied wholesale from the original *Schwinger* complaint.

⁴ Although this “first cause of action” could perhaps be read as attempting to assert a claim for strict liability under New York law, the *Astuto* plaintiffs explicitly assert such a claim in their “fifth cause of action.”

The “second cause of action” asserts a “public liability action” under the Price-Anderson Act. *Id.* ¶¶ 29-47. The third through eighth “causes of action” purport to state claims for negligence, negligence per se, absolute or strict liability, misrepresentation and concealment, and civil conspiracy. *Id.* ¶¶ 48-83. The eighth “cause of action,” entitled simply “damages,” purports to be a freestanding claim for diminution in the value of plaintiffs’ property. *Id.* ¶¶ 81-83.

ARGUMENT

I. THE REFILED COMPLAINTS FAIL TO STATE CLAIMS UNDER THE PRICE-ANDERSON ACT, THE FEDERAL LAW THAT GOVERNS ALL OF PLAINTIFFS’ CLAIMS AGAINST THE SYLVANIA DEFENDANTS.

A. Plaintiffs’ Claims Arise Under The Price-Anderson Act, And Their Sole Cause Of Action Is A “Public Liability Action” Under The Act.

Because the claims plaintiffs attempt to assert arise out of alleged exposure to *nuclear* materials, plaintiffs’ actions are governed by the federal Price-Anderson Act, enacted by Congress in 1957 to encourage the development of the nuclear industry. Congress determined “that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing.” *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 207 (1983). When “spokesmen for the private sector informed Congress that they would be forced to withdraw from the field if their liability were not limited,” *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 64 (1978), Congress enacted the Price-Anderson Act, in part to “encourage the development of the nuclear industry.” 42 U.S.C. § 2012. Over the past 45 years, therefore, the federal government has regulated the processing of nuclear materials through a comprehensive federal scheme, which preempts the states from regulating the health and safety aspects of nuclear materials. *See, e.g., Pacific Gas & Elec. Co.*, 461 U.S. at 208.

In 1988, Congress amended Price-Anderson to create an exclusive, federal cause of action -- called a "public liability action," or "PLA" -- for any "public liability" arising from a "nuclear incident." See, e.g., *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 857 (3d Cir., 1991), *cert. denied*, 503 U.S. 906 (1992). A "nuclear incident" is "any occurrence . . . within the United States causing . . . bodily injury, sickness, disease, or death, or loss or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. § 2014(q).

Circuit courts have uniformly held that by creating an exclusive federal remedy in a PLA and "channel[ing] all legal liability . . . through that cause of action," Congress intended to "supplant all possible state causes of action." *In re TMI Litig.*, 940 F.2d at 856-57. Consequently, a public liability action is "sweeping" in scope and encompasses *any* legal liability from "nuclear incidents." *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997), *cert. denied*, 522 U.S. 1090 (1998). Stated differently, after 1988, "no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the [1988 Amendments] or it is not compensable at all." *In re TMI Litig.*, 940 F.2d at 854; see also *Corcoran v. New York Power Auth.*, 202 F.3d 530, 537 (2d Cir. 1999) (the 1988 Amendments create an "*exclusive* federal cause of action for radiation injury") (emphasis in original).

The *Schwinger II* and *Astuto* plaintiffs allege they have been harmed by "exposure . . . to toxic and radioactive materials" caused by the operation of the Hicksville facility. *Schwinger II* Am. Compl. ¶ 15; *Astuto* Am. Compl. ¶ 18. Because plaintiffs claim damages from an alleged "nuclear incident," they have one, and only one, cause of action against the

Sylvania Defendants: a PLA under the Price-Anderson Act.⁵ For this reason, Counts 2 through 6 of the *Schwinger II* amended complaint, and Causes of Action 1 and 3 through 8 of the *Astuto* amended complaint, must be dismissed as a matter of law as to the Sylvania Defendants. Those claims are instead channeled into plaintiffs' respective PLA counts: Count 1 in *Schwinger II* and Cause of Action 2 in *Astuto*.

B. In A Price-Anderson Act Case, Substantive State Law Applies Only To The Extent It Is Not Inconsistent With The Federal Regulatory Scheme.

Congress provided in 1988 that the legal standards governing a PLA are to be derived from the laws of the state in which the nuclear incident at issue occurred *unless* that state's law is inconsistent with the Price-Anderson Act:

A public liability action shall be deemed to be an action arising under [the Act], and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions [of the Act].

42 U.S.C. § 2014(hh). As emphasized by the Seventh Circuit,

Congress did not adopt in wholesale fashion state law. State law serves as the basis for the cause of action only as long as state law is consistent with the other parts of the Act. Congress desired that state law provide the content for and operate as federal law; however, Congress recognized that state law would operate in the context of a complex federal scheme which would mold and shape any cause of action grounded in state law.

⁵ As the *Schwinger* plaintiffs have plainly stated to this Court, their case is "a Price-Anderson action, [which] arises from the exposure of [plaintiffs] to radioactive waste." Ex. A (*Schwinger* Plaintiffs' Memorandum of Law In Support Of Their Proposed Case Management Order, Nov. 15, 2002, at 2) (All documents referred to in this memorandum as "Ex." are provided in the Exhibits to Memorandum in Support of the Sylvania Defendants' Motions to Dismiss the Amended Complaints, submitted with the memorandum.) Because the *Astuto* complaint virtually copies the *Schwinger* allegations, the same is true of that case. Moreover, the *Schwinger* plaintiffs explicitly admit that the "statutory standard of care" governing their "Price-Anderson action" is the federal radiation dose standards, as set forth at 10 C.F.R. § 20 *et seq.* See Ex. A at 3.

O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1100 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994).

For this reason, with respect to any state law claim channeled into a PLA, the Price-Anderson Act requires a court "to assess whether the applicable state law is consistent with federal law," *id.*, or "conflict[s] with other parts of the Price-Anderson scheme," *In re TMI Litig.*, 940 F.2d at 858. Claims that are inconsistent with the federal scheme are "preempted . . . because any state duty would infringe upon pervasive federal regulation in the field of nuclear safety, and thus would conflict with federal law." *Id.* at 859-60.

Federal courts throughout the nation have consistently held that the applicable standard of care in a Price-Anderson case is set by the radiation dose standards in place at the time of the alleged nuclear incident, as promulgated by the AEC (or its successors, the Nuclear Regulatory Commission and the Department of Energy). *See, e.g., Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1308 (11th Cir. 1998) (observing that "virtually every federal court to consider the issue, including three circuit courts of appeals, have held that federal regulations must provide the sole measure of defendants' duty in a public liability cause of action"), *cert. denied*, 525 U.S. 1139 (1999); *O'Conner*, 13 F.3d at 1105 (reiterating that "federal regulations must provide the sole measure of the defendants' duty in a public liability action"). Every theory of liability set forth in the amended complaints (*i.e.*, the state law theories channeled into plaintiffs' exclusive PLA claim) is "inconsistent with" this standard of care and therefore is preempted. *See In re TMI Litig.*, 940 F.2d at 859-60.

C. Plaintiffs' Price-Anderson Act Claims Must Be Dismissed Because Plaintiffs Do Not Adequately Allege, And Lack A Good-Faith Basis For Alleging, That Defendants Violated The Radiation Dose Limits Established By Federal Law.

In a PLA, a plaintiff must adequately allege that the defendants breached the controlling duty of care under federal law -- the federal dose standards -- by exposing him or her

to radiation in excess of the dose standards set by federal law. Both amended complaints must be dismissed because plaintiffs have not adequately alleged, and cannot allege in good faith, that the Sylvania Defendants breached the only standard of care applicable to the operation of the Hicksville facility: the radiation dose standards promulgated by the Atomic Energy Commission, or "AEC," in effect during the time the facility operated.

Plaintiffs who have not adequately pleaded doses in excess of the applicable federal standards, or whose theories of liability are inconsistent with the dose standards, cannot state a PLA claim. *See, e.g., Roberts*, 146 F.3d at 1308 (dismissing negligence, strict liability and loss of consortium claims for failure to allege a violation of federal dose standards); *Gassie v. SMH Swiss Corp. for Microelectric and Watchmaking Indus. Ltd.*, No. Civ.A. 97-3557, 1998 WL 158737, at *4 (E.D. La. Mar. 26, 1998) (dismissing negligence, breach of warranty and battery claims channeled into a PLA for failure to plead a violation of the dose limits); *cf. Carey v. Kerr-McGee Chemical Corp.*, 60 F. Supp. 2d 800, 811 (N.D. Ill. 1999) (granting summary judgment on nuisance and trespass claims because no evidence of violation of dose standards); *but cf. Bohrmann v. Maine Yankee Atomic Power Co.*, 926 F. Supp. 211, 221 (D. Me. 1996) (stating that a violation of federal dose standards was necessary for recovery based on a negligence theory, but not for recovery based on theories of intentional tort and fraud).

The AEC regulations setting forth the maximum permissible doses to off-site residents caused by work performed under AEC *licenses* at the time the Hicksville facility was operated were published (as plaintiffs themselves note, *see supra* n.5) in the Federal Register, at 10 C.F.R. § 20 *et seq.* *See* Ex. B (CFR provisions from 1959, 1963, and 1967). Work performed under AEC *contracts* during the same time period was subject to the AEC numerical off-site

dose standards published in AEC "Manual Chapters." See Exs. C-E (AEC Manual Chapters from 1954 through 1968).⁶

As the Sylvania Defendants stressed in their December 2, 2002 motions to dismiss addressed to plaintiffs' prior complaints, nowhere in the combined 130 pages of those two complaints did plaintiffs allege that they were exposed to radiation at a level in excess of the radiation dose standards established by federal law. Despite having this omission brought to their attention before the filing of their present complaints, plaintiffs failed to cure this fatal defect, and their complaints must be dismissed on this basis alone. The *Astuto* amended complaint contains no allegation whatsoever regarding the radiation doses to which plaintiffs allege they were exposed or the amounts of radioactivity allegedly present on their property necessary to impart those doses. In *Schwinger II*, plaintiffs sought to address this defect in the most cursory way possible. In conclusory language, the *Schwinger II* plaintiffs allege merely that defendants breached their duty of care by permitting plaintiffs "to be exposed to an amount of radiation in excess of federally defined permissible radiation dose standards." *Schwinger II* Am. Compl. ¶¶ 43, 50. That conclusory assertion is insufficient to satisfy plaintiffs' pleading burden to state a PLA claim. Plaintiffs cannot salvage their Price-Anderson PLA claims simply by alleging in the vaguest and most conclusory terms that plaintiffs were exposed to radiation in excess of federal dose standards, while providing no allegations about the applicable standards or

⁶ Licensed activities generally involved the processing of nuclear materials for commercial purposes, whereas contract activities generally involved the processing of nuclear materials for military or government use. Compare *Roberts*, 146 F.3d at 1306 (involving claims against nuclear power plant operator licensed by AEC) with *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959, 960 (W.D. Ky. 1993) (involving claims against operators of gaseous diffusion plant that enriched uranium for military use). The Sylvania Defendants cite both the "licensee" radiation protection standards and the "contractor" standards in this memorandum because the Hicksville facility processed nuclear materials pursuant to both a license from and a contract with the AEC. The preemptive reach of both standards and the effect of those standards on the claims here is the same.

the levels to which plaintiffs were allegedly exposed. Plaintiffs similarly provide no allegations regarding the pathway or mechanism by which they and/or their property specifically were exposed to the radiation. It is insufficient, even under liberal notice pleading, not to allege how - and by how much -- the defendants supposedly failed to meet the *sole standard* against which defendants' conduct is to be evaluated. *See Roberts*, 146 F.3d at 1308; *Gassie*, 1998 WL 158737, at * 4.⁷

Not only do the *Schwinger II* and *Astuto* amended complaints fail adequately to plead that this governing duty of care was breached, plaintiffs do not deny that they lack a good-faith basis to make such an allegation. Shortly after these actions were filed, the local press reported the admission of Bob Sullivan, Esq., counsel for the *Schwinger* plaintiffs, that he had not conducted *any* pre-filing investigation of plaintiffs or their residences to ascertain whether they and their properties had actually been exposed to radiation originating from the Hicksville facility. Instead, counsel stated that they filed suit solely to attempt -- vainly, as established in Part II of this memorandum -- to beat the statute of limitations. *See Ex. F*, (Goodman, E., "Neighbors of Old Nuclear Fuel Plant Sue Over Sicknesses," *The New York Times*, April 4, 2002, Sec. B, at 5 (reporting that Mr. Sullivan stated that he "planned to" commission epidemiological and soil studies, but had not done so, despite the fact that, as the *Times* reported, "there is little to indicate the factory was at fault" for his clients' cancer)). Neither Mr. Sullivan and his firm, nor counsel for the *Astuto* plaintiffs, have denied this reported failure to conduct

⁷ In stark contrast to the present case, the court in *Corcoran v. New York Power Auth.*, 935 F. Supp. 376, 388 (S.D.N.Y. 1996), declined to dismiss a PLA complaint where the plaintiffs had pled exposure to levels of radiation in excess of the regulations and also provided detailed allegations setting out the path and mechanisms of the transmission of radiation from its source to the exposed individual. *See id.* at 382. In denying the motion to dismiss, the *Corcoran* court also stressed that "a *pro se* complaint such as this one is held to less stringent standards than formal pleadings drafted by lawyers " *Id.* (quotations omitted).

any pre-filing factual investigation.⁸ Moreover, although plaintiffs' inability to make the necessary allegations in good faith was called to their attention in the Sylvania Defendants' first motion to dismiss, plaintiffs failed to address the issue in their refiled complaints -- apparently, because they have no response. Rather than setting out adequate allegations demonstrating that the federal dose standards were violated, plaintiffs are forced to resort to conclusory assertions that lay bare their lack of sufficient investigation and absence of a good-faith basis to proceed.

This Court may also take judicial notice of public statements by the New York state agency that actually *has* been investigating the environment at and around the former Hicksville facility.⁹ The New York State Department of Environmental Conservation ("DEC") has stated publicly:

- (i) "Under the current site conditions, no exposure concerns have been identified for site workers or the general public." See Ex. G (New York State Department of Environmental Conservation Fact Sheet, November 2002, at 2); Ex. H

⁸ This Court may take judicial notice of the publication in the news media of plaintiffs' public statements. See Fed. R. Evid. 201(b) (judicial notice may be taken of fact readily determined by reference to sources whose accuracy cannot reasonably be questioned); Fed. R. Evid. 201(d) (judicial notice mandatory if requested by a party and necessary information supplied); *In re Sterling Foster & Co. Secs. Litig.*, 222 F. Supp. 2d 312, 321 (E.D.N.Y. 2002) (taking judicial notice of newspaper articles); *The Manufacturers Life Ins. Co. v. Donaldson, Lufkin & Jenrette Secs. Corp.*, No. Civ.A. 99-1944 (NRB), 2000 WL 709006 at *1 (S.D.N.Y. June 1, 2000) (taking judicial notice of newspaper article in context of motion to dismiss). The Court may take judicial notice of the fact that Mr. Sullivan's statements appeared in *The New York Times*, which does not require the Court to take notice of the truth of the contents. The truth of this admission does not appear to be in dispute, however, because as noted, none of plaintiffs' counsel deny that they conducted no pre-filing factual investigation. See *Estabrook v. City of Dayton*, No. Civ.A. 3-96-0071, 1997 WL 1764764, at *2 (S.D. Ohio 1997) (taking judicial notice of the facts as reported in newspaper articles not disputed by opposing party).

⁹ Judicial notice of public reports of government agencies is also appropriate under Fed. R. Evid. 201. See, e.g., *Nickens v. New York State Dep't of Correctional Servs.* No. Civ.A. 94-5424 (FB), 1996 WL 148479, at *1 (E.D.N.Y. Mar. 27, 1996) (taking judicial notice of documentation provided by the Equal Employment Opportunity Commission); *County Vanlines, Inc. v. Experian Info. Solutions, Inc.*, 205 F.R.D. 148, 154 (S.D.N.Y. 2002) (taking judicial notice of the findings of the National Labor Relations Board). Again, insofar as the Sylvania Defendants are aware, plaintiffs do not dispute the contents of the New York State DEC reports.

(New York State Department of Environmental Conservation News Release, Nov. 19, 2002, at 2 (same)).¹⁰

- (ii) “[N]o appreciable exposures have been identified for site workers or the general public.” See Ex. I (New York State Department of Environmental Conservation Fact Sheet, March 2002, Soil Remediation Work Plan, Former Sylvania Electric Products Facility, at 2).
- (iii) “[R]esults of . . . soil samples found no organic or inorganic compounds at levels that represent a public health concern.” See Ex. J (New York Department of Environmental Conservation Fact Sheet, May 2001, Voluntary Investigative Report, Former Sylvania Electric Products Incorporated Facility, at 4).
- (iv) The DEC has “studied this thing inside out and continue to do so, and we are not finding contaminants that pose a substantial risk, or pathways of exposure.” See Ex. K (Rather, J., “So How Contaminated Is The Old Nuclear Plant?,” *The New York Times*, January 13, 2002, Sec. 14LI, at 1).

Because plaintiffs have not pleaded, and lack a good-faith basis to plead, that they were exposed to radiation from the Hicksville facility in excess of the governing federal dose standards, the PLA claims against the Sylvania Defendants in both actions -- Count 1 of the *Schwinger II* amended complaint, and the Second Cause of Action of the *Astuto* amended complaint -- must be dismissed with prejudice. See, e.g., *Roberts*, 146 F.3d at 1308; *O’Conner*, 13 F.3d at 1105.

¹⁰ Although it is also public knowledge that the DEC has been working with certain of the defendants to test the facility and plans are being made to remediate the facility in order to remove soil from the site that may contain slightly above background levels of contaminants, that does not mean -- and has never been claimed by the DEC to mean -- that public health in the vicinity of the site has ever been threatened or that amounts in excess of applicable dose levels were found.

D. Plaintiffs' Claims For Alleged Diminution In Property Value Are Not Cognizable Under the Price-Anderson Act.

In the *Astuto* case, plaintiffs' claims are not cognizable under the Price-Anderson Act for another reason: the Price-Anderson Act permits property owner plaintiffs to seek compensation only for "*loss of or damage to property, or loss of use of property.*" 42 U.S.C. § 2014(q) (emphasis added). Congress chose not to allow recovery for a diminution in the *value* of property due to its proximity to a nuclear facility.

Although they attempt to disguise the fact with conclusory pleading, the *Astuto* plaintiffs are ultimately seeking compensation for diminution in the value of their property due to its proximity to the Hicksville site. They explicitly allege that they have suffered "diminution of real estate" and "loss of real estate investment value." *Astuto Am. Compl.* ¶ 13. In their "eighth cause of action" for damages, plaintiffs tellingly allege that they "reside in close proximity to the Sylvania facility and as a result their home has *decreased in value* because of not only its proximity, but also because of the *potential* that their house has been contaminated due to the spread and dissemination of nuclear and other toxic contaminants." *Id.* at 82 (emphasis added). Such alleged damages -- for diminution of property value and potential harm -- provide no basis for a Price-Anderson claim.

Apparently recognizing that the Price-Anderson Act does not allow such claims, plaintiffs allege in conclusory fashion that "their property has been exposed on numerous occasions to hazardous, toxic or radioactive substances," that such substances "have infiltrated, polluted and contaminated the land, groundwater etc.," and that plaintiffs have suffered "property damage." *Astuto Am. Compl.* ¶ 13. Such vague, generalized allegations fail to provide adequate notice that plaintiffs have property claims cognizable under the Price-Anderson Act. Plaintiffs have not alleged, and apparently cannot allege, that they have suffered any loss of

the use of their property nor do they specify any type of damage caused to the property. Although they alleged that their property was “exposed” to and “contaminated” by hazardous and toxic substances, plaintiffs fail to allege: what specific substances contaminated their property; the amounts of those substances involved; the means by which the alleged contaminants reached their property; and how they damaged plaintiffs’ property. At bottom, plaintiffs seek compensation because they believe that their house and property have decreased in value because of their *proximity* to the facility and the *potential* that their house has been contaminated due to the spread and dissemination of nuclear and other toxic contamination.

Congress, however, specifically excluded such claims under Price-Anderson. See S. Rep. No. 296 (1957), reprinted in 1957 U.S.C.C.A.N. 1803, 1818 (“[I]t is not the intention of the committee to have the damage to property which is included in the term ‘nuclear incident’ include the diminution in value or other similar causes of action which may occur, namely, from the location of an atomic energy activity at a particular location.”). Because the alleged property damages sought in the Astuto amended complaint are not cognizable under the Price-Anderson Act, that complaint must be dismissed.

In addition, state law is in accord with the Price-Anderson Act in holding that plaintiffs may not recover damages based on diminution in property value, but that plaintiffs must allege and prove actual physical harm to their property. The “widely accepted if not universal view among the courts in this country is that causing the value of another’s property to diminish is not in and of itself a basis for tort liability. Something more -- physical invasion or damage, or unreasonable interference with that person’s use and enjoyment of the property -- is required.” *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 71 F. Supp. 2d 179, 188 (W.D.N.Y. 1999) (applying New York law), *vacated and remanded on jurisdictional grounds*, 216 F.3d 291 (2d

Cir. 2000). As noted above, the *Astuto* amended complaint does not adequately allege actual physical contamination or interference with any use and enjoyment of property, but rather merely alleges diminution in property value because of the property's "proximity" to the Sylvania facility and the "potential" for contamination. This is precisely the kind of stigma-based claim for which the courts have held recovery is barred under state law. "Stigma damages alone are too remote and speculative to be recoverable." *Id.* at 185.

Accordingly, even if the *Astuto* plaintiffs' state law claims are not dismissed in the face of their Price-Anderson claim -- as is required -- dismissal of those claims would be required because plaintiffs have failed adequately to allege that they suffered the type of actual harm to their property for recovery is allowed under state law.

II. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED FOR FAILURE TO PLEAD DATES WITHIN THE STATUTE OF LIMITATIONS WHEN THEIR ALLEGED INJURIES WERE DISCOVERED.

This action, commenced in April 2002, relates to operations conducted in Hicksville beginning in 1952 and ending in 1967. For this reason, scrutiny of the timeliness of plaintiffs' claims is particularly important. Even if plaintiffs' claims against the Sylvania Defendants are not dismissed altogether, as they clearly should be as set forth in Part I above, many (if not all) of plaintiffs' claims likely fail as an independent matter because they are time-barred.

The Price-Anderson Act provides no statute of limitations applicable to PLAs, nor any rules as to when a PLA cause of action accrues. Therefore, the timeliness of a PLA is governed by the most analogous state law provisions, as long as those provisions are not inconsistent with federal law. *See* Part II.A. *infra*. Under New York law, the applicable statute of limitations for personal injury and property damage claims is three years. Such claims accrue upon discovery of the injury: the date when plaintiffs allegedly discerned any bodily symptoms

or received a diagnosis, whichever is earlier, or the date when plaintiffs discovered their property was damaged. *See* Part II. B. *infra*.

Although the Sylvania Defendants raised these deficiencies in their motions to dismiss the predecessor *Schwinger* and *Stevens* complaints, plaintiffs failed to correct these defects in the subsequently refiled *Schwinger II* and *Astuto* amended complaints that are the subject of the present motions. Plaintiffs' failure to correct these defects raises serious issues about plaintiffs' ability to plead in good faith any basis for determining that the relevant statutes of limitations can be satisfied. Because plaintiffs have failed to plead the dates on which they discovered their injuries, those claims should -- if not otherwise already dismissed altogether on Price-Anderson grounds -- be dismissed without prejudice as to those plaintiffs who can, in good faith, plead that they discovered their alleged injuries or diminution in property value less than three years before their claims were filed.¹¹

A. State Law Governs The Limitations Period And The Accrual Of Plaintiffs' Claims Against The Sylvania Defendants.

The Price-Anderson Act contains no statute of limitations provision for public liability actions, except for those involving an "extraordinary nuclear occurrence," which is not alleged to have occurred here.¹² The Second Circuit has therefore held that in a Price-Anderson

¹¹ Subsequent to the filing of the complaints at issue, plaintiffs began providing their initial disclosures to defendants as ordered by the Court. Although far from complete, the medical information in these initial disclosures already indicates that at least some of the present plaintiffs had their medical conditions diagnosed more than three years before claims were filed -- and accordingly could not satisfy the relevant statutes of limitations.

¹² An "extraordinary nuclear occurrence" ("ENO") is "any event causing a discharge . . . offsite, or causing radiation levels offsite, which the Nuclear Regulatory Commission or the Secretary of Energy . . . determines has resulted or will probably result in substantial damages to persons offsite or property offsite." 42 U.S.C. § 2014(j). In the case of an ENO, the Act authorizes the Department of Energy to require its contractors to waive any limitations defense if suit is brought within three years of a plaintiff's discovery of his injury. *See* 42 U.S.C. §§ 2014(j), 2210(n).

action, a federal court “must apply the limitations period of the state-law cause of action most analogous to the federal claim.” *Corcoran v. New York Power Auth.*, 202 F.3d 530, 542 (2d Cir. 1999) (internal quotation marks and citations omitted). The most analogous cause of action to plaintiffs’ Price-Anderson claims is a New York action for personal injury or property damage, the statute of limitations for which is three years from the date the claim accrues. *See* N.Y. CPLR § 214(4), (5).

New York law also governs the date on which the plaintiffs’ claims accrued. As discussed in Part I, the Price-Anderson Act provides that “the substantive rules for decision . . . shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [the Price-Anderson Act].” 42 U.S.C. § 2014(hh). Although the Second Circuit has not determined whether accrual rules are “substantive” within the meaning of the Act, *see Corcoran*, 202 F.3d at 544 (declining to address the question as unnecessary in order to dismiss plaintiffs’ claims), other courts, including the Southern District of New York, have indicated that accrual rules are indeed substantive and that state law therefore applies. *See Corcoran v. New York Power Auth.*, No. Civ.A. 95-5357 and 95-8102, 1997 WL 603739, at *5 (S.D.N.Y. Sept. 29, 1997) (applying New York law);¹³ *Tokerud v. Pacific Gas & Elec. Co.*, No. Civ.A. 96-16629 and 96-16631, 1998 WL 168716 at *1 (9th Cir. Apr. 8, 1998) (applying California law); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1554-60 (6th Cir. 1997) (applying Ohio law); *Tilley v. Pacific Gas & Elec. Co.*, No. Civ.A. 94-56313, 1996 WL 109385,

¹³ The District Court in *Corcoran* determined that the New York wrongful death and survival rules were substantive, a conclusion that applies with equal force to plaintiffs’ other tort claims. The CPLR’s statute of limitations provision governing personal injury and property damage claims is not distinguishable from, and indeed is phrased almost identically to, New York’s wrongful death statute. *Compare* N.Y. CPLR § 214(5) (“The following actions must be commenced within three years . . . an action to recover damages for an injury to property except as provided in sections 214-b, 214-c and 215.”) with N.Y. EPTL § 5.4-1 (“Such an action must be commenced within two years after the decedent’s death.”).

Mar. 12, 1996) (applying California law); *Lujan v. Regents of the University of California*, 69 F.3d 1511, 1517 (10th Cir. 1995) (applying New Mexico law); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1482 (D. Colo. 1991) (applying Colorado law).

New York statutes of limitations and accrual rules therefore apply -- unless they are "inconsistent with" the Price-Anderson Act. Unlike the precise federal duty of care under Price-Anderson, which preempts any contrary duties that state law might impose in PLAs, Congress provided no statutes of limitation or accrual rules with which state law might conflict. Therefore, New York's statutes of limitations and accrual rules are not "inconsistent with" the federal statutory scheme. *Cf. Corcoran*, 202 F.3d at 538-41 (holding that New York law provision barring claims against a public agency as to which notice was not provided within 90 days was not "inconsistent with" Price-Anderson). The absence of a specified limitations period and accrual rule in the statutory language of Price-Anderson reflects Congress's determination that borrowing analogous state law provisions is appropriate. *See, e.g., Lujan*, 69 F.3d at 1518 (noting that it is not inconsistent with Price-Anderson to apply state rules in public liability actions that, as in these cases, do not involve ENOs).

B. Plaintiffs' Claims Should Be Dismissed Without Prejudice To Refiling By Those Plaintiffs Who Can Allege In Good Faith That They Discovered Their Injuries Within Three Years Of Filing Their Claims.

The claims for personal injury and property damage in each amended complaint are governed by New York's three-year limitations period. The New York accrual rule applicable to plaintiffs' personal injury and property damage claims provides that "the three-year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances . . . shall be computed from *the date of discovery of the injury by the plaintiff* or from *the date when*

through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.” N.Y. CPLR § 214-c(2) (emphasis added).¹⁴

The seminal case interpreting CPLR 214-c(2) is *In re Matter of New York County DES Litigation (Wetherill v. Eli Lilly & Co.)*, 89 N.Y.2d 506, 655 N.Y.S.2d 862 (1997). There, the New York Court of Appeals was faced with the question of when a plaintiff who alleged injuries resulting from her mother’s ingestion of DES “discovered” her injuries for purposes of the statute. It held that “the time for bringing the action begins to run under the statute when the injured party discovers the primary condition on which the claim is based.” 89 N.Y.2d at 509, 655 N.Y.S.2d at 863. The Court of Appeals specifically rejected plaintiff’s argument that “the ‘discovery of the injury’ is not complete within the meaning of the statute until the injured party discerns both the bodily symptoms and the fact that those symptoms have a nonbiological cause.” 89 N.Y.2d at 511, 655 N.Y.S.2d at 864. To the contrary, it held that “discovery of the injury” within the meaning of CPLR 214-c(2) occurs when a plaintiff first becomes aware of “discernible bodily symptoms,” even though the plaintiff does not know the cause of the injury, or indeed even that the injury is attributable to an “outside, nonbiological source.” 89 N.Y.2d at 512, 655 N.Y.S.2d at 865. Under New York law, “‘discovery of the injury’ was intended [by the legislature] to mean discovery of the condition on which the claim was based and nothing more.” 89 N.Y.2d at 513, 655 N.Y.S.2d at 866.

¹⁴ The claims of certain plaintiffs may be governed by an even stricter accrual rule, that of New York common law, under which a claim accrues when a plaintiff is first *exposed* to a toxic substance. See *Schmidt v. Merchants Despatch Transportation*, 270 N.Y. 287, 300, 200 N.E. 824, 827 (1936). Under CPLR § 214-c(6), this accrual rule applies to any plaintiff who discovered, or reasonably should have discovered, his injury before July 1, 1983. See N.Y. CPLR 214-c(6). (Section 214-c(2) does not apply if the time period for plaintiff to assert his claim had expired before July 1, 1986.) Any such plaintiff, of course, would also be time-barred if CPLR § 214-c(2) applied.

Cases following *Wetherill* have made it clear that the three-year period for personal injury claims begins to run upon the *earlier* of diagnosis of a disease or the onset of symptoms. See *Searle v. City of New Rochelle*, 293 A.D.2d 735, 736, 742 N.Y.S.2d 314, 315 (2d Dep't 2002); *Chavious v. Tritec Asset Mgmt., Inc.*, 284 A.D.2d 362, 363, 726 N.Y.S.2d 676, 677 (2d Dep't 2001); *Krogmann v. Glens Falls City School Dist.*, 231 A.D.2d 76, 77, 661 N.Y.S.2d 82, 83 (3d Dep't 1997); *Sweeney v. General Printing, Inc.*, 210 A.D.2d 865, 866, 621 N.Y.S.2d 132, 133 (3d Dep't 1994); *Johnson v. Ashland Oil, Inc.*, 195 A.D.2d 980, 981, 601 N.Y.S.2d 756 (4th Dep't 1993); *Cochrane v. A C and S, Inc.*, No. Civ.A. 92-8841, 1998 WL 642719, at *3 (S.D.N.Y. Sept. 18, 1998).¹⁵

Both the *Schwinger II* and *Astuto* amended complaints pointedly remain silent as to the dates when plaintiffs discovered their symptoms or received a diagnosis or discovered damage to their property. Although pleading specific dates is not always mandatory under the Federal Rules, federal courts in personal injury have required plaintiffs to plead the dates of their injuries in appropriate circumstances. See, e.g., *Linnaberry v. DePauw*, 695 F. Supp. 411, 412 (C.D. Ill. 1988). Such a requirement is particularly appropriate -- and indeed, is arguably essential -- in an action like this one, in which exposures are alleged to have occurred over a great period of time commencing many years ago. In addition, requiring plaintiffs to plead the dates on which they discovered their symptoms or received a diagnosis (whichever was earlier) will streamline the discovery process, as there is no reason for the defendants to engage in costly discovery -- depositions, document requests, interrogatories -- of those plaintiffs whose claims are time-barred.

¹⁵ For property damage claims, the limitations period likewise commences on the earlier of when a plaintiff discovered, or through the exercise of reasonable diligence should have discovered, that his property was damaged. N.Y. CPLR § 214(4).

For the foregoing reasons, if the complaints are not dismissed as a matter of law in their entirety on Price-Anderson grounds, then the Court should dismiss the amended complaints on statute-of-limitations grounds. If plaintiffs can allege in good faith, in a subsequent amendment, that they discovered their symptoms or received a diagnosis -- whichever is earlier -- after April 3, 1999 (in the case of claims of plaintiffs Schwinger and Wiseman asserted in the original *Schwinger* complaint), or after September 13, 1999 (in the case of claims of plaintiff Hodkinson first asserted in the amended *Schwinger* complaint), then their claims would not be time-barred. See *Huntington Steel Corp. v. United States*, 153 F. Supp. 920, 922 (S.D.N.Y. 1957) (dismissing a complaint under the Federal Tort Claims Act without prejudice on the condition that the accrual date would be repleaded). The claims of those who cannot make such good-faith allegations, however, are time-barred under CPLR § 214-c(2).

Similarly, the *Astuto* plaintiffs have failed to plead the dates when they discovered the alleged injuries to their property, and these property damage claims should therefore be dismissed as well. The dismissal should be without prejudice if the *Astuto* plaintiffs can plead that they discovered the alleged injuries within three years of filing suit.

C. Plaintiffs Cannot Invoke The “Discovery Of The Cause” Exception In CPLR § 214-c(4).

New York law provides a narrow exception to the general rule that claims for personal injury and property damage accrue upon “discovery of the injury” for situations in which the medical and scientific communities have not yet discovered the cause of a particular kind of injury. This exception, contained in CPLR § 214(c)-4, provides that “where the discovery of the cause of the injury is alleged to have occurred less than five years after discovery of the injury or when with reasonable diligence such injury should have been

discovered, whichever is earlier, an action may be commenced or a claim filed within one year of such discovery of the cause of the injury.” N.Y. CPLR § 214-c(4).

A plaintiff seeking to qualify for this exception, however, “is *required to allege* and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of the injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized.” *Id.* (emphasis added). In *Wetherill*, the New York Court of Appeals interpreted CPLR § 214-c(4) narrowly, and stressed that this provision does not depend on plaintiffs’ “subjective understanding of the etiology of their conditions,” but rather only upon the state of “*technical knowledge of the scientific and medical communities.*” *Wetherill*, 89 N.Y.2d at 515, 655 N.Y.S.2d at 867 (emphasis added).

This “discovery of the cause” does not apply in these cases. Plaintiffs have not, in the amended complaints, made any allegations of the sort contemplated by CPLR § 214-c(4). Rather than alleging what knowledge the medical or scientific communities supposedly lacked that prevented the cause of plaintiffs’ alleged injuries from being discoverable, plaintiffs have merely parroted the words of the CPLR. *See* Schwinger II Am. Compl. ¶ 76 (“[T]o the extent that any plaintiff herein is required to, it is alleged that pursuant to CPLR 214-c, the technical, scientific or medical knowledge and information sufficient to ascertain the cause of their injury had not been discovered, or identified, or determined prior to the expiration of the period within which this action could otherwise have been brought”); *Astuto* Am. Compl. ¶ 87 (same).

These allegations are insufficient as a matter of law, because conclusory allegations are “not acceptable [in a complaint] . . . where no facts are alleged to support the conclusion.” *Mercado v. Kingsley Area Schools*, 727 F. Supp. 335, 338 (W.D. Mich. 1989). In

an analogous circumstance in a Price-Anderson case, the court found the mere restatement of statutory terms impermissible as a pleading matter and required the plaintiffs to come forward with some facts supporting their claim. *See Cook*, 755 F. Supp. at 1475 (requiring plaintiffs to allege at least one response cost).

Plaintiffs' inability to make the required allegations that the scientific and medical communities lacked any awareness of the connection between exposure to radiation and certain forms of disease until 2001 is, of course, not surprising: cases alleging off-site exposure to radiation as the cause of various injuries have been in the public realm for decades. *See, e.g., Good Fund, Ltd. v. Church*, 540 F. Supp. 519 (D. Colo. 1982), *rev'd, McKay v. United States*, 703 F.2d 464 (10th Cir. 1983); *Lamb v. Martin Marietta Energy Sys.*, 835 F. Supp. 959 (W.D. Ky. 1993). Moreover, many of the allegations in the amended complaints are flatly inconsistent with CPLR § 214-c(4). Plaintiffs have repeatedly alleged that the Price-Anderson Defendants had "full knowledge" for "decades" of the consequences of exposure to the substances allegedly released from the Hicksville facility. *See Schwinger II Am. Compl.* ¶¶ 17, 19, 44, 45, 56, 61; *Astuto Am. Compl.* ¶ 22.¹⁶

¹⁶ Nor do accrual rules that have been developed under federal common law in other contexts apply in Price-Anderson cases. That is because the Price-Anderson Act is readily distinguishable from other federal statutes to which certain courts have held that federal common law accrual rules apply, even when state statutes of limitations are borrowed. *See, e.g., Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998) (claims under the Federal Tort Claims Act do not accrue until plaintiffs have discovered their injuries and the cause of their injuries); *Eagleton v. County of Suffolk*, 790 F. Supp. 416, 418 (E.D.N.Y. 1992) (same accrual rule for claims under 42 U.S.C. § 1983), *aff'd*, 41 F.3d 865 (2d Cir. 1994), *cert. denied*, 516 U.S. 808 (1995). Unlike statutes such as the Federal Tort Claims Act and 42 U.S.C. § 1983, in the Price-Anderson Act, Congress made an explicit choice to enact a federal limitations period and accrual rule for a certain type of action under the statute (an ENO), and, equally explicitly, specified that *state* law should apply in all other circumstances, unless it is inconsistent with the statutory scheme. These legislative choices evince Congress's clear intent that federal law should not govern statute of limitations calculations outside the context of ENOs. Not a single Price-Anderson case has held to the contrary.

D. Equitable Tolling Is Inapplicable To The Running Of The Statute Of Limitations.

Plaintiffs' allegations of misrepresentations and "fraudulent concealment" are far too generalized to invoke tolling of the applicable limitations periods based upon equitable estoppel. Under New York law, fraud may equitably estop a defendant from asserting a statute-of-limitations defense, but only if the following elements are sufficiently alleged: (i) the defendant must have made intentional misrepresentations of a material fact to the plaintiff; and (ii) the plaintiff must actually, and justifiably, have relied on those misrepresentations in failing timely to commence the action. *See, e.g., Lindsley v. Lindsley*, 54 A.D.2d 664, 664, 387 N.Y.S.2d 840, 842 (1st Dep't 1976). With respect to estoppel based on fraudulent concealment, it must be alleged that the defendant was under a duty to disclose the information at issue to the plaintiff. *See, e.g., Cabrini Medical Center v. Desina*, 64 N.Y.2d 1059, 1062, 489 N.Y.S.2d 872, 875 (1985).

The amended complaints fail to meet these standards. First, the amended complaints offer no allegations of specific acts of misrepresentation or concealment by any of the defendants; rather, they merely allege a generalized "conspiracy" to conceal the alleged contamination. *See* Schwinger II Am. Compl. ¶¶ 68, 69; Astuto Am. Compl. ¶¶ 76, 77. Second, the amended complaints have not pleaded any facts that would give rise to the requisite inference that the defendants *intentionally* misled the plaintiffs. Third, no facts are alleged showing actual and justifiable reliance. Fourth, plaintiffs have not alleged that the Sylvania Defendants were under a duty to disclose information to the plaintiffs that would have allowed them to file suit earlier. For any or all of these reasons, the statute of limitations was not tolled in these actions. *See, e.g., Renda v. Frazer*, 75 A.D.2d 490, 493, 429 N.Y.S.2d 944, 946 (4th Dep't 1980) (holding that equitable estoppel will be rejected if plaintiff neither pleads, alleges, nor presents

evidentiary facts supporting a claim of fraud or fraudulent concealment); *Twine v. Mercy Hospital*, 173 A.D.2d 816, 816, 571 N.Y.S.2d 947 (2d Dep't 1991) (finding that plaintiff had not "alleged fraudulent concealment sufficient to invoke the doctrine of equitable estoppel"); *Jofen v. Epoch Biosciences, Inc.*, No. Civ.A. 01-4129 (JGK), 2002 WL 1461351, at *8 (S.D.N.Y. Jul. 8, 2002) (applying New York law and dismissing equitable estoppel allegations because plaintiffs had not allege a misrepresentation or concealment of a material fact).¹⁷

III. PLAINTIFFS' CLAIMS FOR "PUBLIC NUISANCE," "CIVIL CONSPIRACY," PROPERTY "DAMAGES" AND "MISREPRESENTATION AND CONCEALMENT" SHOULD BE DISMISSED BECAUSE OF ADDITIONAL PLEADING DEFECTS.

Certain of plaintiffs' purported claims suffer from additional pleading defects that would require their dismissal even if they were cognizable under the Price-Anderson Act.

A. The First Purported "Cause of Action" In The Astuto Amended Complaint Fails To Allege The Required Elements Of A "Public Nuisance" Under New York Law.

The first "cause of action" in the *Astuto* amended complaint -- which apparently purports to state a claim for "public nuisance" -- fails to state a cause of action under New York law, let alone under the Price-Anderson Act. Specifically, the amended complaint fails to allege an essential element for such a claim, namely, that plaintiffs have suffered a harm distinct from that of the general public or community as a result of the defendants' conduct. *See, e.g., Queens County Business Alliance, Inc. v. New York Racing Ass'n, Inc.*, 98 A.D.2d 743, 744, 469 N.Y.S.2d 448, 449 (2d Dep't 1983) (dismissing complaint for public nuisance because of the lack of such an allegation).

¹⁷ For the same reasons, plaintiffs have failed to allege fraudulent misrepresentations and concealment with the particularity required by Fed. R. Civ. P. 9(b). *See* Part III.C.

B. Plaintiffs' Claims For "Civil Conspiracy" and Property "Damages" Must Be Dismissed Because They Are Not Causes Of Action Under New York Law.

It is well-settled under New York law that "civil conspiracy" is not a freestanding tort. *See, e.g., Alexander & Alexander v. Fritzen*, 68 N.Y.2d 968, 969, 510 N.Y.S.2d 546 (1986); *Sokol v. Addison*, 293 A.D.2d 600, 601, 742 N.Y.S.2d 311, 312 (2d Dep't 2002); *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 128, 741 N.Y.S.2d 9 (1st Dep't 2002). Similarly, there is no support in New York law for "damages" to property as an independent cause of action; rather, it is merely an element of a claim for damages. *See, e.g., Mayes v. UVI Holdings, Inc.*, 280 A.D.2d 153, 157, 723 N.Y.S.2d 152, 154 (1st Dep't 2001). In addition, as noted above, *see* Part I.D., *supra*, all claims seeking to recover damages for alleged harm to property fail because plaintiffs have failed adequately to allege actual physical invasion or damage or unreasonable interference with use of property at issue -- which is required to recover damages for harm to property. *See, e.g., Mehlenbacher v. Akzo Nobel Salt, Inc.*, 71 F. Supp. 2d 179, 188 (W.D.N.Y. 1999), *vacated and remanded on jurisdictional grounds*, 216 F.3d 291 (2d Cir. 2000).

Accordingly, for these additional reasons, Count 6 of the *Schwinger II* amended complaint and the seventh and eighth purported causes of action in the *Astuto* amended complaint must be dismissed. Indeed, the *Schwinger II* plaintiffs conceded this point in a prior pre-motion letter to the Court. *See* Ex. L (Letter of Brian J. Shoot, Sullivan Papain Block McGrath & Cannavo P.C., June 25, 2002, at 2, fn. 1 (stating that defendants are "right in charging that 'civil conspiracy' is not a stand-alone tort, and right again in charging that property damage 'is merely a form of damages' and not a cause of action"))).

C. To The Extent They Are Alleged, The Misrepresentation, Concealment, And Fraud Claims In The Amended Complaints Must Be Dismissed Because Plaintiffs Have Failed To Allege Fraud With Particularity Under Federal Rule Of Civil Procedure 9(b).

Count 5 of the *Schwinger II* amended complaint and the sixth purported cause of action in the *Astuto* amended complaint are titled "Misrepresentation and Concealment." Notwithstanding this language, the *Schwinger II* plaintiffs previously represented in a pre-motion letter to the Court -- with respect to their prior complaint with an identical count -- that they "have not pleaded a cause of action for fraud." *Id.* at 5. For this reason, Count 5 of the *Schwinger II* amended complaint should be dismissed.

To the extent that the *Astuto* plaintiffs disagree (despite their having adopted the *Schwinger* language largely verbatim), their claim for misrepresentation and concealment should be dismissed for failure to plead fraud with particularity under Federal Rule of Civil Procedure 9(b). The *Astuto* plaintiffs have alleged summarily that the defendants "negligently and/or intentionally" made misrepresentations about alleged releases from the Hicksville facility. *See Astuto Am. Compl.* ¶¶ 69, 70. This simply does not suffice under the Federal Rules. *See Coffey v. Foamex L.P.*, 2 F.3d 157, 161-62 (6th Cir. 1993) (holding that Rule 9(b) requires, in a toxic exposure case, that the time, place and content of the alleged misrepresentation, the fraudulent scheme, the fraudulent intent of the defendants, and the resulting injury be alleged); *see also Caputo v. Pfizer*, 267 F.3d 181, 191 (2d Cir. 2001) (affirming district court's finding that plaintiffs failed to plead fraud with particularity in that they had not included the time and place of the alleged statements, or the identity of the speaker).

IV. "VERIZON, INC." AND "VERIZON COMMUNICATIONS INC." MUST BE DISMISSED AS DEFENDANTS AS A MATTER OF LAW.

Plaintiffs allege that "Verizon, Inc." and "Verizon Communications Inc." are "foreign corporations authorized to do business in the state of New York" and that they are

named as defendants “individually and as parent and/or successor” to various other Verizon, GTE and Sylvania entities. Schwinger II Am. Compl. ¶¶ 8(b), (c); Astuto Am. Compl. ¶¶ 11(b), 11(c). Both Verizon, Inc. and Verizon Communications Inc. must be dismissed as defendants in this action, due to the basic facts of their corporate existence, of which this Court may take judicial notice, and because plaintiffs have failed to plead -- and cannot in good faith plead -- any basis for direct or indirect liability against “Verizon Communications Inc.,” the only Verizon entity that actually exists.¹⁸ Plaintiffs’ continued insistence on naming these entities, in the face of defendants’ showing of their irrelevance, demonstrates plaintiffs’ lack of proper pre-filing investigation into their case and the absence of a good faith basis to proceed against certain of the named defendants.

A. “Verizon, Inc.” No Longer Exists.

Judicial notice of the basic facts of corporate existence is properly taken in the context of a Rule 12 motion. *See, e.g., Automated Salvage Transp., Inc. v. Wheelabrator Env'tl. Sys., Inc.*, 155 F.3d 59, 67 (2d Cir. 1998) (review on motion to dismiss extends to “matters of which judicial notice may be taken”); *Ackermann v. Doyle*, 43 F. Supp. 2d 265, 268 (E.D.N.Y. 1999) (same); *Ruca Hardware, Ltd. v. Chien*, No. Civ.A. 94-3635, 1995 WL 307172, at *8 (N.D. Ill. May 17, 1995) (taking judicial notice of articles of incorporation, and deciding duration of corporate existence, in context of motion to dismiss); *In re Spree.com Corp.*, No. Civ.A. 00-

¹⁸ Dismissal of Verizon, Inc. and Verizon Communications Inc. will leave the following entities as Sylvania Defendants: GTE Corporation, a wholly owned subsidiary of Verizon Communications Inc.; GTE Products of Connecticut Corporation, a wholly-owned subsidiary of GTE Corporation; and GTE Operations Support Incorporated, a wholly-owned subsidiary of GTE Products of Connecticut Corporation and the entity that is voluntarily working with the New York DEC on testing and plans for remediation of the Hicksville site.

34433 and 01-0161 (DWS), 2001 WL 1518242, at *10 (Bankr. E.D. Pa. Nov. 2, 2001) (taking judicial notice, as a public record, of certificate from Delaware Secretary of State).¹⁹

This Court may therefore take judicial notice of the fact that “Verizon, Inc.” no longer exists. Verizon, Inc. changed its name to Verizon Communications, Inc., which in turn merged into Bell Atlantic Corporation in September 2000. *See* Ex. M (certified copies of corporate documents relating to Verizon Communications, Inc. filed with Delaware Secretary of State). In late 2000, Bell Atlantic Corporation changed its name to “Verizon Communications Inc.” (no comma). *See* Ex. N (certified copies of corporate documents relating to Verizon Communications Inc. filed with Delaware Secretary of State).

Under Delaware law, applicable to these Delaware corporations, the liabilities of a merged corporation pass by operation of law to the surviving corporation. 8 Del. Corp. Code § 259. As to “Verizon, Inc.,” therefore, both amended complaints fail to state a claim upon which relief can be granted, and this non-existent entity must be dismissed as a defendant from both actions. *See* Fed. R. Civ. P. 12(b)(6).

B. The Amended Complaints Fail To Allege Direct Liability On The Part Of Verizon Communications Inc.

Although “Verizon Communications Inc.” (no comma) is an existing corporation, the allegations of the *Schwinger II* and *Astuto* amended complaints fail to state a claim of direct liability against it.

¹⁹ Matters of corporate existence are properly the subject of judicial notice because they are clear beyond doubt, as a matter of public record in the official files of the Secretary of State. *See* Fed. R. Evid. 201(b) (judicial notice may be taken of fact readily determined by reference to sources whose accuracy cannot reasonably be questioned); Fed. R. Evid. 201(d) (judicial notice mandatory if requested by a party and necessary information supplied).

1. The Allegations Against Verizon Communications Inc. Are Wholly Conclusory And Indistinguishable From Those Against Other Defendants.

Allegations of direct liability against a corporation must comport with basic federal pleading rules: even the liberal notice pleading afforded by Federal Rule of Civil Procedure 8(a) requires plaintiffs to give defendants “fair notice of what the plaintiff’s claim is and the ground upon which it rests.” *Ferro v. Railway Express Agency, Inc.*, 296 F.2d 847, 851 (2d Cir. 1961); *see also Simmons II v. Abruzzo*, 49 F.3d 83, 86 (2d Cir. 1995). A complaint that “consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6).” *DeJesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir.) (internal quotation marks omitted), *cert. denied*, 519 U.S. 1007 (1996). In this respect, the practice of “lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct . . . fail[s] to satisfy this minimum standard,” and complaints making such generalized allegations are properly dismissed under Rule 12(b)(6). *Atuahene v. City of Hartford*, No. Civ.A. 00-7711, 2001 WL 604902, at *1 (2d Cir. May 31, 2001).

Under these standards, both the *Schwinger II* and *Astuto* amended complaints are utterly deficient. First, their allegations are wholly conclusory, in that no facts are asserted suggesting that Verizon Communications Inc. ever owned or operated the Hicksville facility. Second, the allegations impermissibly “lump” Verizon Communications Inc. with the GTE entities, and in some allegations with all the rest of the defendants in the case as well, making it impossible to distinguish what conduct is being alleged on the part of any particular defendant. *See Schwinger II Am. Compl.* ¶ 9 (“At all times material hereto, each Defendant corporation, by itself or through its agents, is or has been engaged in the transporting, generating, processing, utilizing, releasing, sale, distribution, and/or disposal of nuclear materials and/or other toxic substances at [the Hicksville facilities] . . . owned, operated, maintained and/or utilized, by these

Defendants or by their agents.”); ¶ 12 (“Each of the Verizon defendants, alone or with each other, owned, operated, managed and maintained the Sylvania facility.”); ¶ 27 (“The Verizon defendants, and/or their corporate predecessors, owned, operated, managed, controlled and maintained the Sylvania facility as an enterprise.”); Astuto Am. Compl. ¶¶ 12, 13, 15 (making parallel allegations). Plaintiffs have therefore failed to plead any facts that sufficiently allege *direct liability* on the part of Verizon Communications Inc.

2. Verizon Communications Inc. Did Not Exist When The Hicksville Facility Was Operating.

Moreover, public documents filed with the Delaware Secretary of State establish that Verizon Communications Inc. is the name, adopted on September 22, 2000, of the former Bell Atlantic Corporation, which came into existence in 1983 -- 16 years after the Hicksville facility ceased operations. *See* Ex. N. It is therefore impossible that Verizon Communications Inc. could have any *direct liability* as an owner or operator of the Hicksville nuclear facility.

C. The Amended Complaints Make No Sufficient Allegations To Support Successor Liability Against, Or To Pierce The Corporate Veil Of, Verizon Communications Inc.

The amended complaints similarly fail to plead any sufficient facts showing *indirect liability* on the part of Verizon Communications Inc., either on the basis of successor liability or on the basis of piercing the corporate veil of another entity that actually did “own, operate, manage, or maintain” the Hicksville facility. “The imposition of successor liability, as with corporate veil-piercing, requires the *allegation* and proof of *specific facts*, none of which have been alleged in the . . . [a]mended [c]omplaint.” *Network Enter., Inc. v. APBA Offshore Prods., Inc.*, No. Civ.A. 01-11765, 2002 WL 31050846, at *7 (S.D.N.Y. Sept. 12, 2002) (emphasis added). Although dismissals of corporate defendants on these grounds are frequently made in the context of summary judgment, “courts have granted motions to dismiss as well as

motions for summary judgment in favor of defendant parent companies where there has been a lack of sufficient evidence” to pierce the corporate veil. *Fletcher v. ATEX, Inc.*, 68 F.3d 1451, 1458 (2d Cir. 1995); *see also, e.g., Akzona, Inc. v. E. I. Du Pont*, 607 F. Supp. 227, 237 (D. Del. 1984) (rejecting plaintiffs’ alter ego theory of corporate veil-piercing on a motion to dismiss).

In this case, dismissal as a matter of law in response to a Rule 12 motion is wholly appropriate. With respect to successor liability, the *Astuto* amended complaint alleges merely that Verizon Communications Inc. is being sued “individually and as parent and/or successor to Verizon Communications Inc., Verizon New York Inc., Verizon, Inc., GTE Operations Support Incorporated, GTE Corporation, GTE Sylvania Incorporated, Sylvania-Corning Nuclear Corporation, GT&E Sylvania Incorporated, Sylvania Electric Products Incorporated, GTE Products of Connecticut Corporation, and General Telephone & Electronics Corp.” *Astuto Am. Compl.* ¶ 11(c). Although the new *Schwinger II* amended complaint has added additional allegations, *Schwinger II Compl.* ¶¶ 27-33, those allegations remain completely conclusory and generalized and fall far short of the allegation of “specific facts” required to allege a successor liability or veil-piercing claim. *Network Enter.*, 2002 WL 31050846, at *7. Thus, these allegations continue to make vague, non-specific assertions about “the Verizon defendants and/or their corporate predecessors” as a group, asserting, for example, that that undifferentiated group of entities operated and controlled the Sylvania facility, *Schwinger II Compl.* ¶ 27; centrally controlled the operation of that facility, *id.* ¶ 29; and combined their assets with the assets of the wholly-owned subsidiaries that controlled the facility, *id.* ¶ 30. These allegations fail to state a successor liability or veil-piercing claim. They do not even specifically allege which corporate entity should be deemed a successor to which entity or which specific corporate veils should be pierced -- let alone alleging any basis for seeking those extreme remedies. Plaintiffs’ allegations

provide no notice whatsoever to the Sylvania Defendants of the basis for plaintiffs' successor liability or veil-piercing claim, or even whether plaintiffs are pursuing either of those theories or some other theory.

With respect to successor liability, no such facts can be pleaded, as Verizon Communications Inc. is the new name for the former Bell Atlantic Corporation, *see* Ex. N, and plaintiffs have not alleged that Bell Atlantic Corporation was connected with the Hicksville facility at all.

Moreover, in the June 2000 Bell Atlantic - GTE Corporation merger, GTE Corporation merged with a subsidiary of Bell Atlantic (Beta Gamma Corporation), thus becoming a wholly owned, independent subsidiary of Bell Atlantic. Thus, after Bell Atlantic changed its name to Verizon Communications Inc. in September 2000, GTE became a wholly owned, independent subsidiary of Verizon Communications Inc. *See* Ex. O (certified copy of corporate history of GTE corporation and Certificate of Merger, dated June 30, 2000 filed with New York Secretary of State). Verizon Communications Inc. is thus GTE Corporation's parent, and even if GTE itself faced any potential liability here, no Verizon entity is a "successor" to GTE as a matter of law.

The generalized allegations are similarly inadequate as a matter of law with respect to any veil-piercing theory against Verizon Communications Inc. To state a claim for veil-piercing, plaintiffs would be required to assert facts leading to a conclusion that Verizon Communications Inc. "exercised complete domination over [a subsidiary with direct responsibility for the Hicksville facility, and] that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil." *Thrift Drug, Inc. v. Universal Prescription Adm'rs*, 131 F.3d 95, 97 (2d Cir. 1997).

Plaintiffs, however, have not even attempted to make such allegations. They have not alleged -- nor is there any basis for them to allege -- that Verizon's corporate structure is a sham or that any entity that ever had actual responsibility for the Hicksville facility was a mere "agent" or "department" of Verizon Communications Inc., without any independent existence. *See, e.g., Jazini v. Nissan Motor Co.*, 148 F.3d 181, 183-86 (2d Cir. 1998); *see also DeJesus*, 87 F.3d at 69-70 (affirming dismissal of claims against corporate parent solely because of its relationship to subsidiary where complaint failed to allege any facts or circumstances supporting the assertion that the parent dominated or controlled the subsidiary); *Kirkpatrick v. Rays Group*, 71 F. Supp. 2d 204, 216 (W.D.N.Y. 1999) (dismissing claims against parent in the absence of any allegations of *alter ego* status).

For the foregoing reasons, Verizon, Inc. and Verizon Communications Inc. must be dismissed as defendants from both actions as a matter of law.

CONCLUSION

For the foregoing reasons, all of plaintiffs' state law claims against the Sylvania Defendants -- Counts 2 through 6 of the *Schwinger II* amended complaint and Causes of Action 1 and 3 through 8 of the *Astuto* amended complaint -- must be dismissed with prejudice because plaintiffs' sole cause of action against the Sylvania Defendants is a PLA under the Price-Anderson Act. The PLA against the Sylvania Defendants -- Count 1 of the *Schwinger II* amended complaint, and the Second Cause of Action in the *Astuto* amended complaint -- must itself be dismissed with prejudice because plaintiffs cannot in good faith adequately allege a breach of the controlling standard of care under the AEC's radiation dose standards.

In the alternative, the claims in both complaints should be dismissed with leave to replead only if plaintiffs can plead that they discovered their injuries within three years before they filed their claims.

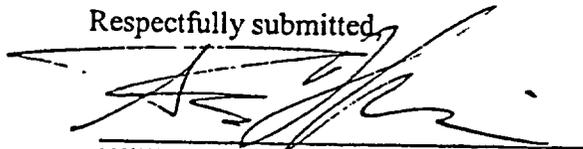
In any event, Verizon, Inc. and Verizon Communications Inc. should be dismissed as defendants.

Dated: January 27, 2003
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Respectfully submitted,



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Attorneys for The Sylvania Defendants

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELVIN SCHWINGER *et al.*,

Plaintiffs,

v.

VERIZON, INC. *et al.*,

Defendants.

02 CV 6530 (LDW, ARL)

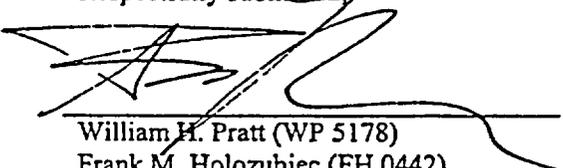
**THE SYLVANIA DEFENDANTS'
NOTICE OF MOTION TO DISMISS THE AMENDED COMPLAINT**

PLEASE TAKE NOTICE that, upon the accompanying memorandum and all other papers and proceedings in this action, Verizon Communications Inc., GTE Corporation, GTE Products of Connecticut Corporation and GTE Operations Support Incorporated (collectively, the "Sylvania Defendants") will move this Court before the Honorable Leonard D. Wexler at the United States Courthouse, 100 Federal Plaza, Central Islip, New York 11722, on a date and time to be scheduled by the Court, for an order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the Amended Complaint on the ground that it fails to state a claim upon which relief may be granted and for such other and further relief as may be just and proper.

Dated: January 27, 2003
New York, New York

Respectfully submitted,

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January 27, 2003

BY U.S. MAIL

Please See Attached Service List

Re: *Schwinger et al. v. Verizon, Inc. et al.*, Case No. CV 02-6530
Astuto v. Verizon, Inc. et al., Case No. CV 02-6529

Dear Counsel:

We represent Verizon Communications Inc., GTE Corporation, GTE Products of Connecticut Corporation, and GTE Operations Support Incorporated (the "Sylvania Defendants"). Enclosed are the Sylvania Defendants' motions to dismiss the above-captioned actions, together with a memorandum of law and accompanying exhibits in support of this motion.

Sincerely,



Frank Holozubiec

FMH:rvh
Enclosures

cc: Chambers of The Honorable Leonard D. Wexler (by U.S. Mail, without enclosures)
Chambers of The Honorable Arlene R. Lindsay (by U.S. Mail, without enclosures)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELVIN SCHWINGER; SUSAN MAIERS
WISEMAN; and CLAIRE HODKINSON,

Plaintiffs,

-against-

VERIZON, INC., Individually and as Successor to
GTE OPERATIONS SUPPORT INCORPORATED,
GTE CORPORATION, GTE SYLVANIA
INCORPORATED, SYLVANIA-CORNING
NUCLEAR CORPORATION, GT&E SYLVANIA
INCORPORATED, SYLVANIA ELECTRIC
PRODUCTS INCORPORATED, and GENERAL
TELEPHONE & ELECTRONICS CORPORATION;
VERIZON COMMUNICATIONS INC., Individually and as
Successor to GTE OPERATIONS SUPPORT
INCORPORATED, GTE CORPORATION, GTE SYLVANIA
INCORPORATED, SYLVANIA-CORNING NUCLEAR
CORPORATION, GT&E SYLVANIA INCORPORATED,
SYLVANIA ELECTRIC PRODUCTS INCORPORATED,
and GENERAL TELEPHONE & ELECTRONICS
CORPORATION; GTE OPERATIONS SUPPORT
INCORPORATED, Individually and as Successor to GTE
CORPORATION, GTE SYLVANIA INCORPORATED,
SYLVANIA-CORNING NUCLEAR CORPORATION,
GT&E SYLVANIA INCORPORATED, SYLVANIA
ELECTRIC PRODUCTS INCORPORATED, and GENERAL
TELEPHONE & ELECTRONICS CORPORATION; GTE
CORPORATION; HARRIS CORPORATION, Individually
and as Successor to HARRIS INTERTYPE CORPORATION
and PRD ELECTRONICS; BARSON COMPOSITES
CORPORATION; AIR TECHNIQUES INC.; ANCHOR/LITH
KEM KO, Individually and as Successor to ANCHOR
CHEMICAL COMPANY; FUJI HUNT PHOTOGRAPHIC
CHEMICALS, INC., Individually and as Successor to
ANCHOR/LITH KEM KO; JERRY SPIEGEL ASSOCIATES;
GILBERT DISPLAYS REALTY CO., LLC; GENERAL
SEMICONDUCTOR, INC., Individually and as Successor to

FILED
IN THE DISTRICT COURT
OF THE EASTERN DISTRICT OF NEW YORK

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CV

02 6530

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TRIAL BY JURY DEMANDED

COMPLAINANT
WEXLER, J.

Judge Leonard D. Wexler
Magistrate Arlene R. Lindsay

LINDSAY, M.J.

GENERAL INSTRUMENT CORPORATION; K.B. CO.; A-T
REALTY; and HARBOR DISTRIBUTING CORP.,

Defendants.

-----X

Plaintiffs, by their attorneys, SULLIVAN PAPAIN BLOCK MCGRATH
& CANNAVO, P.C., state and allege the following upon information and belief:

I.

INTRODUCTION

1. Plaintiffs bring this action against Defendants seeking redress for injuries they have suffered in the past and will continue to suffer as a result of Defendants' reckless, grossly negligent and negligent operation, ownership, remediation, and/or decommissioning of a nuclear materials processing facility first operated by SYLVANIA ELECTRIC PRODUCTS INCORPORATED, which is now known as VERIZON (hereinafter referred to as the "Sylvania Facility"), and/or other facilities and/or properties which emitted toxins into the surrounding environment located in Hicksville, New York near Cantiague Park, which upon information and belief is a part of the Nassau County Parks System. Throughout the operational history of these facilities, unbeknownst to plaintiffs and other residents of this community who were unaware that there was a nuclear processing facility and other facilities utilizing hazardous chemical materials in their neighborhood, defendants caused and/or allowed the release of radioactive, hazardous and other toxic substances into the surrounding environment. These releases have contaminated the air, soil, surface water and ground water in the surrounding communities. The damages directly and proximately caused by Defendants include cancer and related injuries.

II.

JURISDICTION

2. This action arises under the United States Price Anderson Act, 42 U.S.C. §2210 *et seq.*, which is premised on state tort law. Section 2210(n)(2) of that Act provides an express grant of jurisdiction to the United States District Courts and grants jurisdiction to this Court to consider Plaintiffs' claims.

3. This action arises under the United States Atomic Energy Act, 42 U.S.C. §2011, *et seq.*, and the United States Price Anderson Act, 42 U.S.C. §2210 *et seq.*, as hereinafter more fully appears. Therefore, this Court also has jurisdiction over Plaintiffs' claims by virtue of 28 U.S.C. §1331.

4. Because this action also arises under laws of the United States regulating commerce, this court has jurisdiction over Plaintiffs' claims by virtue of 28 U.S.C. §1337, as hereinafter more fully appears. Both the Atomic Energy Act, 42 U.S.C. §2011 *et seq.*, and the Price Anderson Act, 42 U.S.C. §2210 *et seq.*, regulate commerce in the nuclear fuels and nuclear power industry.

5. Because Plaintiffs' state law claims arise out of the same case or controversy as their federal claims, this court has jurisdiction over those ancillary and pendant state law claims by virtue of 28 U.S.C. §1367(a).

III.

VENUE

6. Venue is proper in this judicial district pursuant to 28 U.S.C. 1391(b)(2) and 42 U.S.C. 2210(n)(2) because Plaintiffs' causes of action arose in this district and because the nuclear incidents giving rise to Plaintiffs' claims transpired in this district.

IV.

THE PARTIES

7. The following persons are Plaintiffs in this action:

(a) Melvin Schwinger currently resides at 7 Hickory Lane, Closter, New Jersey. From the time period beginning in or around September of 1959 and ending in or around May of 2001, Melvin Schwinger resided at 15 Jackie Drive, Westbury, New York, within close proximity of the Sylvania facility sites. As a result of Defendants' repeated releases of toxic, hazardous and/or radioactive substances into the area surrounding their operations at or near the Sylvania facility, Melvin Schwinger developed multiple myeloma. While prior to the development of his disease, Melvin Schwinger had been a healthy and active person, the onset of the cancer had a debilitating effect on his life, causing him severe physical injury, pain and suffering, and mental and emotional damage, as well as causing him to incur extensive medical and related expenses and lost income.

(b) Susan Maiers Wiseman currently resides at 35 Heathcote Drive, Mount Kisco, New York. From the time period beginning in 1963 and ending in 1977, Susan Maiers Wiseman resided at 85 Sunnyside Lane, Westbury, New York, within close proximity of the Sylvania facility sites. As a result of Defendants' repeated releases of toxic, hazardous and/or radioactive substances into the area surrounding their operations at or near the Sylvania facility, Susan Maiers Wiseman developed kidney cancer and other injuries. While prior to the development of her disease, Susan Maiers Wiseman had been a healthy and active person, the onset of the cancer had a debilitating effect on her life, causing her severe physical injury, pain and suffering, and mental and emotional damage,

as well as causing her to incur extensive medical and related expenses.

(c) Claire Hodkinson currently resides at 187-B Cantiague Rock Road, Westbury, New York. From the time period beginning in 1948 and ending in 1980, Claire Hodkinson resided at 187-A Cantiague Rock Road, Westbury, New York, within close proximity of the Sylvania facility sites. From the time period beginning in 1980 and continuing through the present, Claire Hodkinson has resided at 187-B Cantiague Rock Road, Westbury, New York, within close proximity of the Sylvania facility sites. As a result of Defendants' repeated releases of toxic, hazardous and/or radioactive substances into the area surrounding their operations at or near the Sylvania facility, Claire Hodkinson developed breast cancer. While prior to the development of her disease, Claire Hodkinson had been a healthy and active person, the onset of the cancer had a debilitating effect on her life, causing her severe physical injury, pain and suffering, and mental and emotional damage, as well as causing her to incur extensive medical and related expenses and lost income.

8. The following persons are Defendants in this action:

(a) Defendant, VERIZON, INC., individually and as successor to GTE OPERATIONS SUPPORT INCORPORATED, GTE CORPORATION, GTE SYLVANIA INCORPORATED, SYLVANIA ELECTRIC PRODUCTS INCORPORATED, GT&E SYLVANIA INCORPORATED and GENERAL TELEPHONE & ELECTRONICS CORPORATION is a foreign corporation authorized to do business in the State of New York with its principal place of business at 1095 Avenue of the Americas, New York, New York 10036.

(b) Defendant, VERIZON COMMUNICATIONS INC., ("VERIZON") individually and as successor to VERIZON COMMUNICATIONS, INC., GTE OPERATIONS SUPPORT INCORPORATED, GTE CORPORATION, GTE SYLVANIA INCORPORATED, SYLVANIA-CORNING NUCLEAR CORPORATION, GT&E SYLVANIA INCORPORATED, SYLVANIA ELECTRIC PRODUCTS INCORPORATED, and GENERAL TELEPHONE & ELECTRONICS CORPORATION is a foreign corporation authorized to do business in the State of New York with its principal place of business at 1095 Avenue of the Americas, New York, New York 10036.

(c) Defendant, GTE OPERATIONS SUPPORT INCORPORATED, individually and as successor to GTE CORPORATION, GTE SYLVANIA INCORPORATED, SYLVANIA-CORNING NUCLEAR CORPORATION, GT&E SYLVANIA INCORPORATED, SYLVANIA-CORNING NUCLEAR CORPORATION, GT&E SYLVANIA INCORPORATED, SYLVANIA ELECTRIC PRODUCTS INCORPORATED and GENERAL TELEPHONE & ELECTRONICS CORPORATION is a foreign corporation authorized to do business in the State of New York with its principal place of business as 1225 Corporate Drive, Irving, Texas 75038.

(d) Defendant, GTE CORPORATION, is a domestic corporation with its principal place of business at 1095 Avenue of the Americas, New York, New York 10036.

(e) Defendant, HARRIS CORPORATION, individually and as successor to HARRIS INTERTYPE CORPORATION and PRD ELECTRONICS, is a foreign corporation authorized to do business in the State of New York with its principal place of business at 1025 West NASA Boulevard, Melbourne, Florida 32919.

(f) Defendant, BARSON COMPOSITES CORPORATION, is a foreign corporation authorized to do business in the State of New York with its principal place of business at 160 Sweet Hollow Road, Old Bethpage, New York 11804.

(g) Defendant, AIR TECHNIQUES, INC., is a domestic corporation with its principal place of business at 70 Cantiague Rock Road, Hicksville, New York 11801.

(h) Defendant, FUJI HUNT PHOTOGRAPHIC CHEMICALS, INC., individually and as successor to ANCHOR/LITH KEM KO is a foreign corporation with its principal place of Business at 115 West Century Road, Paramus, New Jersey 07652.

(i) Defendant, JERRY SPIEGEL ASSOCIATES, is a domestic corporation with its principal place of business at 375 North Broadway, Jericho, New York 11753.

(j) Defendant, GILBERT DISPLAYS REALTY CO., LLC, is a domestic corporation with its principal place of business at 140 Cantiague Rock Road, Hicksville, New York 11801.

(k) Defendant, GENERAL SEMICONDUCTOR, INC., individually and as successor to GENERAL INSTRUMENT CORPORATION, is a domestic corporation with its principal place of business at 10 Melville Road, Melville, New York 11747.

(l) Defendant, K.B. CO., is a domestic corporation with its principal place of business at 375 N. Broadway, Jericho, New York 11753.

(m) Defendant, A-T REALTY, is a domestic corporation with its principal place of business at 170 Old Country Road, Mineola, New York 11501.

(n) Defendant, HARBOR DISTRIBUTING CORP., is a domestic corporation with its principal place of business at 120 Bethpage Road, Hicksville, New York 11801.

(o) Defendants listed in paragraphs "a" through "d" will be referred to herein as the "Verizon defendants."

(p) Defendant listed in paragraphs "e" through "n" will be referred to herein as the "non-Verizon defendants."

9. At all times material hereto, each Defendant corporation, by itself or through its agents, is or has been engaged in the transporting, generating, processing, utilizing, releasing, sale, distribution, and/or disposal of nuclear materials and/or other toxic substances at facilities located at, in, near or around premises now known as 70 Cantiague Rock Road, 100 Cantiague Rock Road, 140 Cantiague Rock Road, 500 West John Street, 600 West John Street, Hicksville, New York and/or owned property that was used for these activities. Such facilities and/or the property thereon, including the Sylvania facility, are, or were at all times material hereto, owned, operated, maintained and/or utilized by these Defendants or by their agents.

10. Plaintiffs would show that, for a period of many years, they were exposed to hazardous, toxic or radioactive substances released by Defendants into the environment, including the air, water, and soil, of the aforementioned location. Plaintiffs would show that they have been exposed on numerous occasions to hazardous, toxic or radioactive substances released or emanating from Defendants' facilities and/or properties, and have thereby inhaled, ingested or otherwise absorbed into their bodies such substances. Plaintiffs further allege that they have suffered personal injuries directly and proximately caused by their exposure to hazardous, toxic or radioactive substances released, emitted, or emanating from Defendants' facilities and/or properties. Plaintiffs would also show

that their property has been contaminated by pollutants released or emanating from Defendants' facilities.

11. Plaintiffs allege that they were exposed to hazardous, toxic or radioactive substances known to cause disease and that each exposure caused or contributed to, Plaintiffs' injuries.

V.

RELEVANT FACTS

12. Beginning in or about 1952, Sylvania Electric Products, Inc. acquired property located at the aforementioned location where, first in a farmhouse, which was demolished in or about 1957, and then in other structures, it manufactured atomic fuel elements. Both uranium and thorium as well as other toxic substances, were used in the manufacture of reactor parts. Upon information and belief, the nuclear waste from this manufacturing process was discharged into the drinking water and air of the adjoining residential neighborhood where the plaintiffs herein resided. These radioactive materials, their by-products and their decay, or "daughter," products are highly toxic and carcinogenic. At no time were any of the plaintiffs, or, upon information and belief, any of the other residents of their neighborhood, ever informed of the presence of a nuclear processing facility in their neighborhood nor were they ever warned of the attendant dangers of having a nuclear processing facility in their neighborhood. Each of the Verizon defendants, alone or with each other, owned, operated, managed and maintained the Sylvania facility.

13. The Non-Verizon Defendants caused and/or permitted chemical contamination and/or other toxins from their operations and properties at the aforementioned facility to

be discharged into the ground water utilized by plaintiffs. Operations at the aforementioned locations have also involved the use of non-radioactive chemicals, many of which are classified as hazardous under applicable federal law.

14. Upon information and belief, Plaintiffs contend that from the time the Sylvania facility began operating in or about 1952 to its closure, including any remediation and/or decommissioning operations, it generated significant amounts of substances that are highly toxic to humans and the environment. Plaintiffs further contend that throughout the Sylvania facility's operating history, each licensee and/or operator and/or owner has caused recurrent releases of radioactive and toxic materials into the environment, in complete disregard of applicable law, and of the health and safety of the surrounding communities and the local environment. These reckless, negligent and grossly negligent releases occurred in various ways, including the discharge of radioactive and toxic materials into public water bodies, the emission of radioactive and toxic materials from facility stacks, the exposure of workers, who could then spread contamination outside the worksite, and improper disposal of materials which eventually leaked from storage tanks and other disposal systems.

15. These reckless, negligent and grossly negligent releases have in turn resulted in the exposure of persons living in the area to toxic and radioactive materials. Because of the long half-life of the radioactive substances involved, persons living at or near the Sylvania facility have also been exposed to these dangerous substances.

16. Upon information and belief, the substances to which Plaintiffs and their communities were exposed include but are not limited to uranium, thorium and/or other nuclear materials and/or chemical toxins. Some of these substances were used in the

actual conduct of Defendants' operations, and some were by-products or decay ("daughter") products.

17. Upon information and belief, Plaintiffs contend that the Sylvania facility was not operated in compliance with applicable state, local and federal laws. Further, Plaintiffs contend that from the beginning, the Verizon defendants engaged in a pattern of negligent, grossly negligent and reckless behavior in their operation, remediation and/or decommissioning of the Sylvania facility, and that this pattern of behavior was implemented with full knowledge of the hazards associated with the radioactive, toxic, and hazardous substances associated with their operations.

18. The Non-Verizon defendants negligently, recklessly and/or carelessly caused and/or permitted the release of chemicals and/or other toxins into the surrounding environment.

19. While conducting operations in a manner in clear violation of other applicable laws, and common law duties, Defendants also sought to prevent details about their operations, and about the hazards of their operations and property, from reaching workers, Plaintiffs, or the surrounding community. During all relevant times, Defendants or their predecessors were aware of the fact that they were releasing toxic and radioactive materials into the air, water and soil. Defendants opted not to take sufficient remedial measures to eliminate or abate the emissions and releases, manifesting a casual attitude towards environmental and health safety, even though they were aware of the health risks posed to these Plaintiffs by such releases. At the same time, Defendants withheld information about the dangers from Plaintiffs and the community.

20. Defendants' failure to inform Plaintiffs of the health risks associated with the substances emitted from Defendants' facilities and property resulted in Plaintiffs being deprived of information crucial to their ability to limit their exposure or take other appropriate action. Plaintiffs could not therefore have reasonably determined the cause of their injuries until recently, when outside consultants publicly revealed the presence of nearby contamination attributable to the facilities.

VI.

CAUSES OF ACTION

Count One

CLAIMS AGAINST THE VERIZON DEFENDANTS

21. Plaintiffs repeat the allegations contained in Paragraphs 1 through 20 and incorporate them by reference as if fully set forth herein.

22. The Verizon defendants owned the Sylvania facility.

23. The Verizon defendants operated the Sylvania facility.

24. The Verizon defendants managed the Sylvania facility.

25. The Verizon defendants controlled the Sylvania facility.

26. The Verizon defendants maintained the Sylvania facility.

27. The Verizon defendants, and/or their corporate predecessors, owned, operated, managed, controlled and maintained the Sylvania facility as an enterprise.

28. The Verizon defendants, and/or their corporate predecessors, capitalized the operation of the Sylvania facility.

29. At all relevant times, the Verizon defendants, and/or their corporate predecessors, centrally controlled the operation of the Sylvania facility, thereby providing a basis for

liability, notwithstanding the Verizon defendants' contention that the Sylvania facility was, in whole or in part, owned, operated, managed and controlled by wholly owned subsidiaries.

30. At all relevant times, the assets of the Verizon defendants, and/or their corporate predecessors, were combined with the assets of the wholly owned subsidiaries that defendants contend owned, operated, managed and controlled the Sylvania facility, thereby providing a basis for liability.

31. To the extent that the Sylvania facility was, in whole or in part, owned, operated, managed and controlled by wholly owned subsidiaries of the Verizon defendants, and/or their corporate predecessors, at all relevant times the Verizon defendants shared knowledge of the negligent, grossly negligent, reckless and careless operation of the Sylvania facility, the dangers it posed to the residents of the surrounding communities, and the potential liabilities the operation of the facility created, thereby providing a basis for liability.

32. The Verizon defendants, and their corporate predecessors, attempted to limit their responsibility for the injuries resulting from the negligent, grossly negligent, reckless and careless operation of the Sylvania facility through the creation of wholly, or partially, owned subsidiaries.

33. To the extent that the Verizon defendants assert that they are not liable for the operation of the Sylvania facility because such operation was, owned, operated, managed, controlled and maintained by wholly, or partially, owned subsidiaries, the Verizon defendants are liable in that the subsidiaries failed to maintain sufficient capital, bonds and/or insurance to be answerable in a multiple plaintiff personal injury action. Through

the creation of these subsidiaries, and their undercapitalization, the Verizon defendants externalized the costs and risks associated with the negligent, grossly negligent, reckless and careless operation of the Sylvania facility, thereby providing a basis for liability.

34. Plaintiffs in this case assert numerous state common law claims against Defendants for injuries suffered. Because the Verizon defendants are regulated by the terms of the federal Price Anderson Act, as hereinafter more fully appears, those state law claims are statutorily deemed to arise under the federal Price Anderson Act, thereby stating a federal cause of action. 42 U.S.C. §2014(hh); §2210.

35. The Verizon defendants in this action have, at times material to this action, conducted various activities involving nuclear materials. These activities include collecting and processing uranium, thorium and other radioactive and/or toxic substances. They are therefore engaged in the development, use and control of atomic energy within the terms of the Atomic Energy Act, 42 U.S.C. §2011 *et seq.* A consequence of these activities is the requirement that the Verizon defendants obtain a federal license authorizing their operations involving nuclear materials. 42 U.S.C. §§2210, 2073, 2092, 2093, 2111. Upon information and belief, the Verizon defendants or their predecessors and/or agents have at all relevant times held such federal licenses.

36. In 1957, Congress amended the Atomic Energy Act to implement its policy to foster private sector participation in the nuclear energy industry. These 1957 amendments became known as the Price Anderson Act. The uranium, thorium and other radioactive substances possessed, processed and stored by the Verizon defendants at the Sylvania facility are nuclear by-product materials, special nuclear materials and/or source materials. 42 U.S.C. §2014(e), (z), (aa). Any release of these by-product, special nuclear,

or source materials causing bodily injury, sickness, disease, death, loss or damage to property, or loss of use of property constitutes a "nuclear incident" under the terms of the Price Anderson Act. 42 U.S.C. §2014(q). Plaintiffs in this case contend that the Verizon Defendants operated the Sylvania facility in a negligent, grossly negligent, and reckless fashion, and have as a consequence caused the frequent release of by-product, special nuclear, and/or source materials into the surrounding communities, thereby causing a "nuclear incident" or series of "nuclear incidents" under the Price Anderson Act.

37. Plaintiffs further argue that these releases have exposed Plaintiffs and their property to highly dangerous materials. Plaintiffs have sustained serious injuries as a direct and proximate cause of these exposures. Plaintiffs have suffered bodily injury, sickness, and/or disease as a direct and proximate result of their exposures. Plaintiffs' cause of action therefore asserts legal liability based upon a "nuclear incident," or series of such incidents, and is consequently a "public liability action" within the terms of the Price Anderson Act. 42 U.S.C. §2014(w), §2014(hh).

38. The Price Anderson Act further provides that in "public liability actions" arising under the Act, the law of the state in which the "nuclear incident" occurred shall provide the substantive rules of decision unless such law is inconsistent with the Act. The causes of action enumerated in §§ 40 through 76 exist by virtue of the laws of the state of New York in which the "nuclear incident" occurred, and are therefore properly before this court as both federal causes of action arising under the Price Anderson Act and as state law claims ancillary and pendant to the federal claims. 42 U.S.C. §2014(hh), §2210.

39. Plaintiffs claim damages therefore in the amount of FIFTEEN MILLION AND 00/100 (\$15,000,000.00) DOLLARS.

Count Two

NEGLIGENCE

40. Plaintiffs repeat the allegations contained in Paragraphs 1 through 39 and incorporate them by reference as if fully set forth herein.

41. Defendants owed to Plaintiffs a duty of due care which could only be satisfied by the legal, safe, and proper generation, use, management, storage and disposal of the radioactive, toxic and hazardous substances in Defendants' possession. Defendants also had a specific duty to prevent the discharge or release of such substances which might harm the persons or economic interests of Plaintiffs. Defendants also had a specific duty to warn or notify Plaintiffs of the potential hazards of exposure to radioactive, toxic and hazardous substances and to warn or notify Plaintiffs of the fact that discharges or releases of these substances had occurred, and were likely to occur in the future.

42. Further, Defendants had a duty to comply with applicable state, federal, and local governmental laws, regulations, and guidelines applicable to persons generating, managing, storing, using, and disposing of radioactive, hazardous and toxic substances.

43. Defendants breached these duties by their negligent, grossly negligent, and reckless generation, management, storage, use, and disposal of radioactive, hazardous and toxic substances and their negligent, grossly negligent, and reckless conduct of operations at the Sylvania and/or adjoining facilities, including any remediation and decommissioning activities. Additionally, the Verizon Defendants breached their duty of care by permitting the plaintiffs to be exposed to an amount of radiation in excess of federally defined permissible radiation dose standards. Such conduct by Defendants was in non-compliance with applicable federal, state and local laws, regulations, and

guidelines. Defendants' grossly negligent, negligent, reckless, careless and illegal conduct resulted in the dangerous release of radioactive, hazardous and toxic substances into the communities surrounding the Sylvania facility. These actual and continued releases have subjected Plaintiffs to an unreasonable risk of harm, and to actual injuries to their persons and economic interests. Defendants also failed to warn Plaintiffs of the actual and threatened releases of such substances and of the reasonably foreseeable effects of such releases, an omission that was reckless, grossly negligent, and/or negligent. Finally, Defendants failed to act to prevent their releases from harming Plaintiffs.

44. The Verizon defendants knew or should have known about the hazards associated with nuclear operations. Additionally, the legislative history of the Price Anderson Act, which was passed with the active participation of private companies involved in the nuclear power industry, is rife with references to the extreme consequences that could be expected in the event of a nuclear accident. Indeed, the gravity of such consequences was a major contributing factor to the passage of the Price Anderson Act.

45. The defendants clearly knew or should have known that their generation, management, storage, use, disposal, releases, or discharges of radioactive, toxic and hazardous substances at the Sylvania or adjoining facilities would result in actual injuries and increased risks to the persons and economic interests of the public living near the facility.

46. The Non-Verizon defendants were negligent, careless and reckless in the generation, management, storage, use, disposal and/or discharge of chemicals and/or toxins and/or in failing to prevent and failing to warn of discharges from their property.

47. Defendants' negligence was a direct and proximate cause of injuries to Plaintiffs, causing both actual present harm and creating an increased risk of harm to their persons and economic interests. Plaintiffs are entitled to recover damages for such injuries.

48. Plaintiffs claim damages in the amount of FIFTEEN MILLION AND 00/100, (\$15,000,000.00) DOLLARS.

Count Three

NEGLIGENCE PER SE

49. Plaintiffs repeat the allegations contained in Paragraphs 1 through 48 and incorporate them by reference as if fully set forth herein.

50. Plaintiffs contend that throughout their history, the Sylvania facility was operated in non-compliance with applicable federal, state and local laws and regulations promulgated thereunder, and that the Defendants permitted the plaintiffs to be exposed to an amount of radiation in excess of federally defined permissible radiation dose standards. Applicable statutes include but are not limited to the Atomic Energy Act, 42 U.S.C. §2011 et. seq., and the regulations issued thereunder, the Price Anderson Act, 42 U.S.C. §2210 et seq., and regulations issued thereunder; the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9601, §9603, §9611(g), and regulations issued thereunder; the Toxic Substances and Control Act (TSCA), 15 U.S.C. §2601, §2607(e) and regulations issued thereunder; the Resource Conservation and Recovery Act (RCRA) 42 U.S.C. §6901, §6924(d), §6925 and regulations issued thereunder; the Emergency Planning and Community Right to Know Act (EPCRTKA) 42 U.S.C. §11001, §11023 and regulations issued thereunder; and applicable New York air and water quality protection and waste disposal laws.

51. The Non-Verizon defendants operated their respective facilities in violation of applicable law.

52. These violations of applicable state, federal and local laws, regulations and guidelines were a direct and proximate cause of injuries to Plaintiffs. The increased risk of harm and the actual present harm to their person and economic interests are precisely the types of injuries these applicable laws were designed to prevent. Violation of these statutes thereby constitutes per se negligence.

53. As a result thereof, plaintiffs claim damages in the amount of FIFTEEN MILLION AND 00/100 (\$15,000,000.00) DOLLARS.

Count Four

ABSOLUTE OR STRICT LIABILITY

54. Plaintiffs repeat the allegations contained in Paragraphs 1 through 53 and incorporate them by reference as if fully set forth herein.

55. The conduct of nuclear processing activities, and/or the use of industrial chemicals including any remediation and decommissioning activities, poses significant risk of harm to persons living and working in the vicinity of the operation. The consequences of nuclear accidents or incidents to health, property and the environment are extremely dire, and can be measured in the millions, if not billions of dollars. Nor is it possible to eliminate the risk by taking reasonable precautions. Finally, processing nuclear materials has never been a matter of common usage; indeed, prior to 1957, private operators were not permitted to engage in such activities at all. The conduct of nuclear processing activities, and/or the use of industrial chemicals at the Sylvania and/or adjoining facilities clearly constituted abnormally dangerous activities.

56. In addition, with full knowledge of the environmental and health hazards associated with the processing of nuclear fuel components and the use of industrial chemicals, Defendants and their predecessors chose to establish the Sylvania and/or adjoining facilities in the midst of residential communities in Hicksville, Westbury and Jericho, New York with facilities being located literally across the street from homes. Although Plaintiffs maintain the Defendants' activities were abnormally dangerous per se, the location of such activities in a well-populated area such as Hicksville, Westbury or Jericho, New York, would independently have rendered them abnormally dangerous.

57. As a direct and proximate result of the Defendants' collection, handling, processing, storage and disposal of radioactive, toxic and hazardous substances at the Sylvania and/or adjoining facilities, there have been releases of such substances into the environment, thereby injuring Plaintiffs, which injuries include actual present harm and increased risks of harm to their persons and economic interests. These injuries constitute the type of harm the possibility of which made the Defendants' activities abnormally dangerous.

58. Defendants are therefore strictly liable to Plaintiffs for all damages which have resulted and which will continue to result from the collection, handling, processing, storage and disposal of radioactive, toxic and hazardous substances at the Sylvania and/or adjoining facilities.

59. Plaintiffs claim damages in the sum of FIFTEEN MILLION AND 00/100 (\$15,000,000.00) DOLLARS.

Count Five

MISREPRESENTATION AND CONCEALMENT

60. Plaintiffs repeat the allegations contained in Paragraphs 1 through 59 and incorporate them by reference as if fully set forth herein.

61. Some or all of the Defendants, at various times, both negligently and/or intentionally failed to disclose to Plaintiffs material facts or, any facts, concerning the nature and the magnitude of the releases of radioactive, toxic and hazardous substances from the Sylvania nuclear processing facility and/or adjoining facilities despite the fact that the defendants knew for decades of the hazards of the substances they had released into the surrounding environments. Finally, Defendants have continued to make misrepresentations to members of the community regarding their ability to restore the land and water at or near the Sylvania facility such that those properties can safely be made available for unrestricted use.

62. Each of these misrepresentations and/or concealments were made by Defendants individually, jointly and in conspiracy with each other, and were made with the intention of creating a false impression in the minds of the Plaintiffs as to the true environmental status of the community and the true health risks accompanying Defendants' releases of toxic, hazardous and radioactive substances such that Plaintiffs would be lulled into complacency, and would refrain from seeking redress or pursuing other remedial action.

63. Plaintiffs reasonably believed and in good faith relied upon Defendants' misrepresentations and concealments in making decisions regarding seeking legal redress or pursuing remedial actions.

64. Many of the injuries to Plaintiffs arising out of the releases of radioactive, toxic and hazardous substances by Defendants into the environment have been compounded by the passage of time and Plaintiffs' reliance upon Defendants' misrepresentations and concealments. Plaintiffs' injuries include both actual present harm and increased risk of harm to the person and economic interests of Plaintiffs. All injuries were directly and proximately caused by Plaintiffs' reliance upon Defendants' false and misleading representations, omissions and concealments. Plaintiffs sustained damages including injuries, illnesses, and/or disabilities. Plaintiffs are entitled to recover damages for such injuries.

65. Plaintiffs did not discover the fraud alleged until recently and plaintiffs further allege that the statute of limitations to commence these actions is tolled as a result of the defendants' fraudulent concealment and misrepresentations.

66. Plaintiffs claim damages in the sum of FIFTEEN MILLION AND 00/100 (\$15,000,000.00) DOLLARS.

Count Six

CIVIL CONSPIRACY

67. Plaintiffs repeat the allegations contained in Paragraphs 1 through 66 and incorporate them by reference as if fully set forth herein.

68. Some or all of the Defendants, their officers and employees, and other persons and entities unknown to Plaintiffs, at various times, acted together with the common purpose of conducting operations at the Sylvania and nearby facilities in an unlawful manner, and with the further common purpose of unlawfully concealing operations at such facilities from the public and of concealing the fact that releases of toxic substances, radiation, and pollutants were occurring.

69. In furtherance of this conspiracy, Defendants have taken overt steps to conceal the nature of plant operations from the public and from regulators, and have failed in their legal duty to disclose the fact that releases of toxic pollutants and radiation have occurred. Such concealment is a violation of law, and a violation of Defendants' duty to Plaintiffs as members of the community.

70. In furtherance of this conspiracy, Defendants have also falsely and fraudulently represented the nature and extent of releases of toxic, hazardous and radioactive substances from the Sylvania and/or nearby facilities, have misrepresented the health and environmental risks associated with such releases and with the operations of Defendants' facilities, and have concealed information known to Defendants about the health risks and the status of knowledge regarding the dangerous properties of the toxic, hazardous and radioactive substances used, processed, generated and released from the facilities.

71. As a direct and proximate result of Defendants' conspiracy, Plaintiffs have suffered injuries to their persons and economic interests and are entitled to recover damages for such injuries.

72. Plaintiffs claim damages in the sum of FIFTEEN MILLION AND 00/100 (\$15,000,000.00) DOLLARS.

VII.

DAMAGES

73. Plaintiffs repeat the allegations contained in Paragraphs 1 through 72 and incorporate them by reference as if fully set forth herein.

74. As a direct and proximate result of Defendants' tortious conduct as alleged above, Plaintiffs have been injured by exposure to toxic and radioactive substances. Plaintiffs have been damaged in the following particulars and seek to recover therefore:

a. Plaintiffs have suffered and will continue to suffer great physical pain and mental anguish and will continue to suffer great pain and anguish throughout their lifetime;

b. Plaintiffs have incurred hospital and/or medical and/or pharmaceutical and/or other expenses and will continue to incur such expenses in the future due to the permanent nature of their injuries resulting from exposure to toxic and radioactive substances, from which injuries they now suffer and will continue to suffer in the future;

c. Plaintiffs suffer a physical impairment at this time and will continue to suffer this impairment in the future due to their injuries resulting from exposure to toxic and radioactive substances;

d. Plaintiffs suffer a permanent partial disability at this time and will become permanently and totally disabled in the future due to the progressive character of injuries resulting from exposure to toxic and radioactive substances;

e. Individuals have suffered a present increased risk of developing cancer and other serious diseases as a result of exposure to toxic and radioactive substances,

and will require medical detection and surveillance services, including medical testing, preventive screening and the commission of independent studies adequate to quantify the adverse health effects of Defendants' releases of radioactive, toxic and hazardous substances, and to allow Plaintiffs to take preventive action and to receive the early warning necessary to increase the efficacy of treatment of disease;

f. Plaintiffs have suffered a progressive loss of wages and earning capacity and will continue to suffer a loss of earning capacity and wages throughout their lifetimes;

g. Plaintiffs require or will require domestic help and nursing care due to their disabilities and have been or will be required to pay for such domestic help and nursing services;

h. Prior to the onset of their symptoms, Plaintiffs were extremely active and participated in numerous hobbies and activities, and as a result of their injuries, Plaintiffs have been and will be prevented from engaging in some of said activities which were normal to them prior to developing symptoms and injuries resulting from exposure to toxic and radioactive substances. Plaintiffs have been and will otherwise be prevented from participating in and enjoying the benefits of a full and complete life; and

i. Plaintiffs seek punitive damages because Defendants' conduct was grossly negligent and reckless in their exposure to the general public and Plaintiffs herein of toxic and radioactive materials in amounts that exceeded federally and state defined dosage limits in violation of applicable state, federal, and local

governmental laws, regulations, and guidelines applicable to persons generating, managing, storing, using, and disposing of radioactive, hazardous and toxic substances.

75. Defendants' liability is not limited pursuant to Section 1601 of the CPLR by reason of one or more of the exemptions of CPLR Section 1602.

76. To the extent that any plaintiff herein is required to, it is alleged that pursuant to CPLR 214-c, the technical, scientific or medical knowledge and information sufficient to ascertain the cause of their injury had not been discovered, or identified, or determined prior to the expiration of the period within which this action could otherwise have been brought and that the plaintiffs would have otherwise satisfied the requirements of 214-c subdivisions 2, 3 and 4.

VIII.

PRAAYER FOR RELIEF

77. WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

First Count	\$15,000,000.00
Second Count	\$15,000,000.00
Third Count	\$15,000,000.00
Fourth Count	\$15,000,000.00
Fifth Count	\$15,000,000.00
Sixth Count	\$15,000,000.00

and as to each of them, jointly and severally, for general damages, special damages, for punitive and exemplary damages, for their attorneys' fees and costs expended herein, for prejudgment interest where allowable by law and post judgment interest on the judgment at the rate allowed by law.

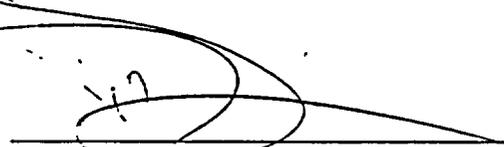
78. Plaintiffs seek such other relief as is just and equitable.

JURY TRIAL DEMAND

79. Plaintiffs demand that all issues of fact in this case be tried to a properly empanelled jury.

December 13, 2002
New York, New York

Sullivan Papain Block McGrath & Cannavo
P.C.
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BY: 

THOMAS J. DEAS (TJD 9226)

STATE OF NEW YORK, COUNTY OF

ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York, and

certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

say that. I am the attorney of record, or of counsel with the attorney(s) of record, for

. I have read the annexed

know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following.

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.

Dated: _____
(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF

ss:

being sworn says: I am

in the action herein, I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

the of

a corporation, one of the parties to the action; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on _____, 20 _____
(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF

ss:

being sworn says: I am not a party to the action, am over 18 years of

age and reside at

On _____, 20 _____, I served a true copy of the annexed in the following manner:

by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last-known address of the addressee(s) as indicated below:

by delivering the same personally to the persons at the address indicated below:

by transmitting the same to the attorney by electronic means to the telephone number or other station or other limitation designated by the attorney for that purpose. In doing so I received a signal from the equipment of the attorney indicating that the transmission was received, and mailed a copy of same to that attorney, in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal Service within the State of New York, addressed to the last-known address of the addressee(s) as indicated below:

by depositing the same with an overnight delivery service in a wrapper properly addressed. Said delivery was made prior to the latest time designated by the overnight delivery service for overnight delivery. The address and delivery service are indicated below:

Sworn to before me on _____, 20 _____

(Print signer's name below signature)

SULLIVAN PAPAIN BLOCK MCGRATH & CANNAVO P.C.

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Index No. CV02 6530

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELVIN SCHWINGER; SUSAN MAIERS WISEMAN; and CLAIRE HODKINSON,

Plaintiffs,

-against-

VERIZON NEW YORK, INC., individually and as successor to GTE OPERATIONS SUPPORT
INCORPORATED, et al.,

Defendants.

SUMMONS AND COMPLAINT

SULLIVAN PAPAIN BLOCK MCGRATH & CANNAVO P.C.
Attorneys for

120 BROADWAY
NEW YORK, NEW YORK 10271
(212) 732-9000

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated:

Signature.....

Print Signer's Name.....

Service of a copy of the within

is hereby admitted.

Dated:

.....
Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

NOTICE OF
ENTRY

that the within is a (certified) true copy of a
entered in the office of the clerk of the within named Court on

20

NOTICE OF
SETTLEMENT

that an Order of which the within is a true copy will be presented for settlement to the
Hon. one of the judges of the within named Court,
at on 20, at M.

Dated:

SULLIVAN PAPAIN BLOCK MCGRATH & CANNAVO P.C.
Attorneys for

120 BROADWAY
NEW YORK, NEW YORK 10271

To:

Attorney(s) for

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELVIN SCHWINGER *et al.*,

Plaintiffs,

v.

VERIZON, INC. *et al.*,

Defendants.

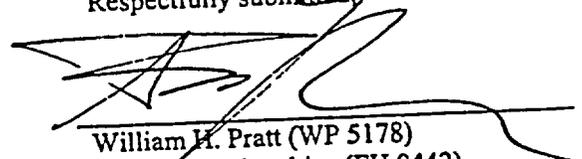
02 CV 6530 (LDW, ARL)

THE SYLVANIA DEFENDANTS'
NOTICE OF MOTION TO DISMISS THE AMENDED COMPLAINT

PLEASE TAKE NOTICE that, upon the accompanying memorandum and all other papers and proceedings in this action, Verizon Communications Inc., GTE Corporation, GTE Products of Connecticut Corporation and GTE Operations Support Incorporated (collectively, the "Sylvania Defendants") will move this Court before the Honorable Leonard D. Wexler at the United States Courthouse, 100 Federal Plaza, Central Islip, New York 11722, on a date and time to be scheduled by the Court, for an order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the Amended Complaint on the ground that it fails to state a claim upon which relief may be granted and for such other and further relief as may be just and proper.

Dated: January 27, 2003
New York, New York

Respectfully submitted,



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January 27, 2003

BY U.S. MAIL

Please See Attached Service List

Re: Schwinger et al. v. Verizon, Inc. et al., Case No. CV 02-6530
Astuto v. Verizon, Inc. et al., Case No. CV 02-6529

Dear Counsel:

We represent Verizon Communications Inc., GTE Corporation, GTE Products of Connecticut Corporation, and GTE Operations Support Incorporated (the "Sylvania Defendants"). Enclosed are the Sylvania Defendants' motions to dismiss the above-captioned actions, together with a memorandum of law and accompanying exhibits in support of this motion.

Sincerely,



Frank Holozubiec

FMH:rvh
Enclosures

cc: Chambers of The Honorable Leonard D. Wexler (by U.S. Mail, without enclosures)
Chambers of The Honorable Arlene R. Lindsay (by U.S. Mail, without enclosures)

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(516) 433-7683

File

This document consists of 3 pages.
No. 12 of 12 copies, Series 1

CONTRACT NO. AT(30-1)-1293

CONTRACT

CONTRACTOR AND ADDRESS: SILVANIA ELECTRIC PRODUCTS, INC.
1740 Broadway
New York, New York

CONTRACT FOR: RESEARCH AND DEVELOPMENT

TERM OF CONTRACT: December 10, 1951 to June 30, 1953

LIMIT OF GOVERNMENT LIABILITY: \$3,253,897.00

PAYMENT TO BE MADE BY: Division of Disbursement,
United States Treasury Department,
New York, New York.
Submit invoices to:
United States Atomic Energy Commission,
P. O. Box 30, Ansonia Station,
New York 23, New York

BASIS OF AWARD: NEGOTIATION

Priority Rating
In accordance with authority delegated to
the Atomic Energy Commission by the National
Production Authority, this contract is rated
DO-E-2, certified under NPA Regulation 2.

A TRUE COPY

M. M. Murray

[Signature]

Authorized Representative

K-108 II
I: 226
Accession 4NN 326-17-001
1954

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 Box 1
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Contract No. AT(30-1)-1293

THIS CONTRACT, entered into as of the 10th day of December, 1951, by and between the UNITED STATES OF AMERICA (hereinafter referred to as the "Government"), acting through the UNITED STATES ATOMIC ENERGY COMMISSION (hereinafter referred to as the "Commission"), and SYLVANIA ELECTRIC PRODUCTS, INC. (hereinafter referred to as the "Contractor"), a corporation organized and existing under the laws of the Commonwealth of Massachusetts, with its principal place of business in New York City, New York;

WITNESSETH THAT:

WHEREAS, by Letter Contract No. AT(30-1)-1293, dated December 10, 1951, the Government and the Contractor agreed, among other things, that the Contractor would perform for the Government the research and development work provided for in said Letter Contract; and

WHEREAS, the Government and the Contractor, as contemplated by said Letter Contract, have negotiated and arrived at this definitive agreement which merges with and supersedes said Letter Contract; and

WHEREAS, this contract is authorized by law, including the Atomic Energy Act of 1946;

NOW, THEREFORE, the parties hereto agree as follows:

ARTICLE I - SCOPE OF THE WORK

1. The Contractor shall conduct studies, experimental investigations and other research and development work for the Government, the details of which research and development work are set forth in the classified Appendix 'B' to this contract. A copy of said Appendix 'B' signed by the Contractor is on file in the offices of the Commission and said Appendix 'B' is incorporated herein by reference and made a part hereof.

2. The Contractor shall furnish all materials, equipment, facilities and premises, and all other properties and services requisite to the proper performance of the work under this contract, except to the extent that the Government may elect to furnish such properties or services.

ARTICLE II - SITE OF THE WORK

1. Principal Site

The principal site of the work of this contract shall be the land and plant of the Contractor on Cantiague Road in Hicksville, Long Island, including, but only from January 1, 1953 on, the one-story frame building at this location, leased at the date of commencement of the period of performance of the work of this contract, to the United States Department

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b. For the Convenience of the Government.

The Government, at its election, may for its convenience, (i) from time to time terminate in part performance of work under this contract, or (ii) at any time terminate in whole the performance of the work under this contract.

c. Notice of Termination.

Termination, under this paragraph, shall be effected by delivery to the Contractor of a written notice of termination, which notice (i) shall specify a date upon which said termination shall become effective, which date shall be at least sixty (60) days after the delivery of said notice; (ii) in the event of a termination in part, shall specify the portion or portions of the work so terminated and the period or periods during which said termination shall be effective; and (iii) shall specify whether said termination is for the default of the Contractor or for the convenience of the Government. Upon receipt of said notice of termination, the Contractor promptly, except as the notice may direct otherwise, shall (i) discontinue all terminated work as soon as is reasonably practicable, if the notice so directs, and in any event by the date specified in said notice of termination; (ii) cease all placing of orders for property or services in connection with the performance of the terminated work; (iii) proceed to the best of its ability to terminate all orders and subcontracts to the extent that they relate to the terminated work; (iv) assign to the Government in the manner and to the extent directed by the Commission, all the right, title and interest of the Contractor under the terminated portion of the orders and subcontracts so terminated; (v) settle, with the approval of the Commission, all subcontracts, obligations, commitments and claims related to the terminated work, the cost of which would be allowable in accordance with the provisions of this contract; (vi) continue performance of such part of the contract work, if any, as shall not have been terminated; and (vii) take such other action with respect to the terminated work as may be required under other Articles of this contract and, subject to the approval of the Commission, as may be otherwise appropriate, including but not limited to, action for the protection and preservation of Government property.

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d. Entry by Government after Default.

- (i) If performance of the work under this contract is terminated for the default of the Contractor, the Government (1) may exercise the option granted in Article VI, OPTION IN THE GOVERNMENT, to purchase the principal site of the work hereunder; (2) may exercise the right given in item (ii) of this subparagraph.
- (ii) Instead of exercising the option to purchase referred to in (i) above, the Government may elect, pursuant to this subsection, to occupy the property for a period not to exceed one year by paying the Contractor a monthly charge, in full satisfaction of all claims of the Contractor arising out of said entry and occupancy, including a claim for the fair rental value of said premises and facilities. Said monthly charge will be one-twelfth the yearly allowance for use and occupancy set forth in subparagraph j. of paragraph 3 of Article IV, CONSIDERATION.
- (iii) After termination for the default of the Contractor, and the exercise of either the option or right referred to in subparagraphs (i) and (ii) above, the Government may (a) enter upon and have exclusive occupancy of any principal site of the work described as such in paragraph 1 of Article II, SITE OF THE WORK, (b) take possession, for the period of such occupancy, of all materials, tools, machinery and appliances therein which may be owned by or are in the possession of the Contractor, (c) exercise during said occupancy all options, privileges and rights belonging to or exercisable by the Contractor in connection with such premises and facilities, and (d) complete or employ others to complete, the work of this contract therein. Said occupancy if done under (ii) above shall be for a period not to exceed one year.
- (iv) In addition, the Commission shall within the limits of its authority, indemnify and hold the Contractor harmless against any damages finally awarded in court actions or settlements made with the consent of the Commission, and against expenses incident to such court actions or settlements, where such actions and settlements are based on claims by third parties against the Contractor arising out of actions by the Government in use and occupancy of said premises and facilities pursuant to this subparagraph d.

e. Terms of Settlement.

Upon a termination of performance of all or part of the work under this contract, full and complete settlement of all claims of the Contractor with respect to the work of this contract so terminated shall be made as follows:

- (i) Assumption of Contractor's obligations. The Government may at the discretion of the Commission, assume and become liable for all obligations, commitments, and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with the terminated work, the cost of which would be allowable in accordance with the provisions of this contract; and the

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Contractor shall, as a condition of receiving the payments mentioned in this Article, execute and deliver all such papers and take all such steps as the Commission may require for the purpose of fully vesting in the Government all the rights and benefits of the Contractor under such obligations or commitments.

- (ii) Payment for Allowable Costs. The Government shall reimburse the Contractor or allow credit for all allowable costs incurred in the performance of the terminated work and not previously reimbursed or otherwise discharged.
- (iii) Payment for Close-Out Expense. The Government shall reimburse the Contractor (a) for such close-out expenses, (b) for such further expenditures as are made after the date of termination for the protection of the Government property, and (c) for such legal and accounting services in connection with settlement, as are required or approved by the Commission.
- (iv) Payment on Account of the Fixed Fee
- a. If the performance of the work under this contract is terminated in whole for the default of the Contractor, no further payment on account of the fixed fee set forth in subparagraph a. of paragraph 1 of Article IV, CONSIDERATION, shall be made.
 - b. If the performance of the work under this contract is terminated in whole for the convenience of the Government, the Contractor shall be paid that portion of the fixed fee which the work actually completed, as determined by the Commission, bears to the entire work under this contract less payments previously made on account of the fee.
 - c. If the performance of the work under this contract is terminated in part for the convenience of the Government, the Contractor and the Commission shall promptly negotiate to agree upon an equitable adjustment of the fixed fee set forth in subparagraph a. of paragraph 1 of Article IV, CONSIDERATION, and the agreement reached shall be evidenced by a written, executed supplemental agreement to this contract. If the Contractor and the Commission fail to so agree upon such fee adjustment, within a reasonable time after such partial termination, the failure to agree shall be disposed of in accordance with Article XIV, DISPUTES, hereof.

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3. Expiration. In the event of expiration of the period of work performance hereunder without prior termination hereof, the Contractor shall (i) discontinue the contract work at the end of the day of expiration and (ii) take such other action as may be required under other provisions of this contract and, subject to the approval or ratification of the Commission, as may be otherwise appropriate, including but not limited to, action for the protection and preservation of Government property.

4. Claims in Favor of the Government. The obligation of the Government to make any of the payments required by this Article shall be subject to any unsettled claims in connection with this contract which the Government may have against the Contractor. Nothing contained in this Article shall be construed to limit or affect any other remedies which the Government may have as a result of a default by the Contractor.

5. Settlement upon Termination or Expiration. Any other provisions of this contract to the contrary notwithstanding, the Contractor and the Commission may agree upon the whole or any part of the amount or amounts which the Contractor is to receive upon and in connection with (i) any termination pursuant to this Article or (ii) expiration of the term of this contract without prior termination thereof. Any agreement so reached shall be evidenced by a written supplemental agreement to this contract which shall be final and binding upon the parties with regard to their respective claims against each other except as therein otherwise expressly provided.

ARTICLE IV - CONSIDERATION

1. Compensation for Contractor's Services.

As full consideration for the performance by the Contractor of the work of this contract (including (i) profit on all items and for all work, and (ii) reimbursement for all costs and expenses listed hereunder as unallowable costs or otherwise not allowable under the terms of this contract) the Contractor shall receive from the Government:

- a. A fixed fee of One Hundred Twenty Thousand Dollars (\$120,000.00).
- b. Payment for allowable costs as hereinafter provided.

2. Basis for Determination of Allowable Costs.

The costs allowable under this contract shall be costs and expenses which are actually incurred by the Contractor in performing the work under this contract and which are necessary or incident to that performance. Allowable costs shall include, without limitation on the generality of the foregoing, the items described as allowable in paragraph 3 of this Article but shall not in any event include the items described as

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unallowable in paragraph 4 of this Article except to the extent indicated therein. Failure to mention any item of cost in this Article is not intended to imply that it is either allowable or unallowable.

3. Examples of Allowable Costs.

The following are examples of items, the cost of which is allowable under this contract to the extent indicated:

a. Bonds and insurance, including self-insurance, approved by the Commission, the cost of which is not excluded by other provisions of this contract.

b. Transportation and communication, including (i) reconsignment, switching, demurrage and diversion charges, (ii) loading, unloading, storage, crating and packing charges, (iii) local and long distance telephone charges, facsimile and teletype messages, telegrams, cablegrams, radiograms, postage, post office box rental, messenger charges and delivery services.

c. Materials, supplies, tools, machinery, equipment, fuel and utilities, including the cost of processing and testing thereof by others and inspection, expediting, storage, salvage and other usual expenses incident to the procurement and use thereof, subject to the approvals required under any other provisions of this contract.

(1) The Contractor may use in its performance of the work of this contract, items manufactured by it in the ordinary course of its commercial business, provided that the Commission grants approval to each such use and provided further that the Commission and the Contractor shall have agreed, prior to any such approval, in writing but not necessarily by execution of an amendment to this contract, upon a unit price or prices for such items. The unit price or prices so agreed upon may include profit.

(ii) The Contractor may withdraw from its general stores and use in its performance of the work of this contract items purchased by it before or during the period of performance of this contract for its general stores, provided that such withdrawal and use of said items shall be in accordance with the Contractor's statements of its daily procurement practices and procedures submitted to the Commission and approved by the Commission pursuant to subparagraph b of paragraph 1 of Article II, PROCUREMENT AND SUBCONTRACTS. The cost of any such item shall be determined in accordance with last-in, first-out inventory accounting principles.

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(iii) The Commission shall have the right to inspect any item provided by the Contractor for the work of this contract pursuant to sub-paragraphs (i) and (ii) above and to reject any or all of such items which the Commission determines to be defective, in which event there shall be no cost to the Government on account of such rejected items and the Contractor shall at its own non-allowable cost and expense, remove all such rejected items from any site of the work to which they may have been delivered. The failure of the Government to inspect and reject any such item prior to its use by the Contractor in the work of this contract in accordance with the provisions of sub-paragraphs (i) and (ii) above shall be deemed inspection and acceptance thereof, except as to latent defects, fraud and such gross negligence as constitutes fraud.

d. Patents, purchased designs and royalty payments, to the extent approved by the Commission.

e. Expert technical or professional assistance to the extent allowed by Article XXII, TECHNICAL AND PROFESSIONAL ASSISTANCE.

f. Taxes, fees and charges, levied by public authorities, which the Contractor is required by law to pay, except those which are imposed upon or arise by reason of or are measured by the Contractor's fee or which are excluded pursuant to other provisions of this contract. This item shall include interest costs and penalties incurred by the Contractor in compliance with Article XX, STATE AND LOCAL TAXES AND FEES, hereof.

g. In accordance with Appendix "A", or modifications thereto, labor (whether as wages, salaries, benefits, or other compensation, as prescribed by the Contractor's employment and employee welfare policies), recruiting of personnel, (including "help wanted" advertising), travel (including subsistence during travel), and the transportation of personnel and their household goods and effects. In case the full time of an employee of the Contractor is not applied to the work of this contract, the cost of his labor shall be included in this item only in proportion to the actual time so employed.

h. Expenses of litigation, including reasonable counsel fees, incurred in accordance with the provisions of this contract, and such other legal, accounting, and consulting fees as are approved by the Commission.

i. Alterations, additions, improvements and repairs to, and remodeling, reconstruction and ordinary maintenance of, facilities employed by the Contractor in performing the work of this contract, in accordance with Article XI, CONSTRUCTION, ALTERATION, AND REPAIR.

j. An allowance of Forty-One Thousand Seven Hundred Eighty Dollars (\$41,780.00) for the period from March 1, 1952 to December 31, 1952,

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and Fifty-Three Thousand Six Hundred Dollars (\$53,600.00) per year during the period thereafter of the Contractor's performance of the work of this contract at the Hicksville plant of the Contractor, prorated over said period. Said allowance is in lieu of any charge by the Contractor for the use and occupancy of said plant and is in lieu of costs and expenses actually incurred by the Contractor during said period for the following:

- (i) Depreciation of buildings on the Hicksville site of the work hereunder.
- (ii) Real estate taxes, including, among others, school, water, and sewage taxes and special assessments, on the land and buildings at said Hicksville site.
- (iii) Premiums for fire, smoke, storm, and hail insurance, and similar property insurance policies on the Contractor's Hicksville plant and on all property of the Contractor therein.
- (iv) Premiums for public liability insurance against damages to persons and properties of employees of the Contractor (except but not for Workmen's Compensation insurance) or of third persons, at the Contractor's Hicksville plant or resulting from the Contractor's operations therein.
- (v) Premiums for insurance against damages to motor vehicles, not Government-owned, used by the Contractor in connection with the work of this contract and against damages to persons and property resulting from operation by the Contractor and its employees of motor vehicles in connection with the work of this contract.

In the event the Hicksville plant is totally or partially made unusable for the performance of the work of this contract as a result of fire, explosion or other casualty, the Commission and the Contractor shall negotiate to agree upon an equitable downward adjustment of the allowance set forth in this subparagraph j. If the Commission and the Contractor fail to agree upon such adjustment within a reasonable time after such casualty, the failure to agree shall be disposed of in accordance with Article XIV, DISPUTES.

k. An allowance (in lieu of direct reimbursement) to cover the general and administrative expenses incurred by the Contractor's corporate office in New York City allocable to the work of this contract. The amount of this allowance shall be computed as a percentage, otherwise referred to herein as the G and A rate, of the costs of operation hereunder. For the purposes of this subparagraph costs of operation are defined as the costs, without duplication, incurred by the Contractor and allowable pursuant to subparagraphs a, b, c, e, g, l, n and o of this paragraph 3 but excluding costs of capital items of machinery and equipment procured for the work of this contract and including the costs of ordinary repairs and maintenance to any site of the work defined as a principle site of the work by Article II, SITE OF THE WORK.

- (i) A provisional G and A rate of three (3%) percent, subject to review and retroactive adjustment, is agreed upon at the commencement of this contract and the Government's

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payments to the Contractor shall be based initially upon said provisional rate. As soon after each June 30th during the term of this contract (or as soon after any intervening date of termination or expiration thereof) as is practicable, the Commission in consultation with the Contractor, shall review the actual expense to, and obligation incurred by, the Contractor during the contract period from the close of the previous period reviewed (or the date of commencement of the contract if there has been no previous period reviewed) to said June 30th (or intervening date of termination or expiration) attributable to the elements of costs covered by this allowance. Based upon such review, the Commission and the Contractor shall negotiate and agree upon a fixed rate for the period reviewed. Said fixed rate shall retroactively replace the provisional rate hitherto in effect for the period reviewed. Said fixed rate, or any other rate which the Commission and the Contractor may agree upon at said negotiation, shall, as a new provisional rate, (i) retroactively replace the provisional rate hitherto in effect from the close of the contract period reviewed to the date of agreement on said new rate, and (ii) prospectively be the new provisional rate until it is in turn replaced pursuant to the foregoing by a new provisional or fixed rate. In the event that a provisional rate is replaced by a lower or higher fixed or provisional rate, suitable retroactive adjustments in the payments shall be made promptly. Failure to agree upon a fixed rate pursuant to the foregoing shall be considered a dispute to be settled in accordance with the provisions of Article XIV, DISPUTES, hereof.

l. Costs of providing cafeteria, restaurant, or food commissary services to employees of the Contractor directly engaged in the performance of the work hereunder.

m. Expenses of moving and transporting the Contractor's and Government's property from any principal site of the work, as defined in paragraph 1 of Article II hereof, to any other site for the work, provided that the Commission orders or approves in advance the move, the new site and the method of transportation.

n. Close-out costs incurred by the Contractor after the expiration or termination of the period of performance of the work of this contract.

o. The cost to the Contractor of compliance with health and safety, security and property management standards and regulations of the Commission.

p. Losses and expenses, including losses and expenses resulting from claims of patent infringement, not compensated for by insurance or otherwise (including settlements made with the consent of the Commission),

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sustained by the Contractor in the performance of the work and certified in writing by the Commission to be just and reasonable, except losses and expenses expressly made unallowable under other provisions of this contract.

q. An allowance of Sixteen Thousand Six Hundred Dollars (\$16,600.00) for the procurement and accounting services performed by the Contractor's Central Engineering Department 50 Staff from the commencement of the term of this contract to June 30, 1952 in Contractor facilities other than the Contractor's Hicksville, Long Island Plant.

r. The direct cost to the Contractor of work performed under this contract with the approval of the Commission at the Bayside, Long Island, plant of the Contractor, plus indirect costs allocable to such work to the extent such indirect costs are agreed upon by the Commission and the Contractor.

s. Items of cost which are not expressly excluded by other provisions of this contract and which are specifically certified in writing by the Commission as allowable costs hereunder.

4. Example of Unallowable Costs: The following are examples of items, the cost of which is not allowable except as indicated:

a. Advertising, except "help-wanted" advertising or other advertising to the extent such other advertising is specifically authorized by the Commission.

b. Central and branch office expenses of the Contractor, except expenses of any principal site of the work described as such in paragraph 1 of Article II, SITE OF THE WORK, and except as expressly provided for elsewhere in this contract.

c. Commissions and bonuses (under whatever name) in connection with obtaining or negotiating for a Government contract.

d. Unless otherwise authorized by the Commission, costs of the character described in subdivision g. under examples of allowable costs, which are not in accordance with Appendix "A", or modifications thereto.

e. Provisions for contingent reserves.

f. Contributions, donations, dividend payments, interest on borrowings (however represented), bond discounts and expense and financial charges.

g. Entertainment expenses, except as provided in Appendix "A", or modifications thereto.

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h. Fines and penalties, unless incurred as a result of action by the Contractor in accordance with the express direction of the Commission or in accordance with the provisions of Article XX, STATE AND LOCAL TAXES AND FEES.

i. Capital additions and structural improvements to Contractor-owned or Contractor-leased facilities, except where such additions or improvements have been specifically approved by the Commission as being an aid to the performance of this contract, and only to the extent specifically agreed to by the Commission.

j. Losses from sales and exchanges of the Contractor's capital assets and losses on other contracts.

k. Membership in trade, business and professional organizations, except as specifically authorized by the Commission.

l. Subscriptions to periodicals or other publications, technical or otherwise, except as specifically authorized by the Commission.

m. Pensions, retirement, group health, accident and life insurance plans, except to the extent authorized under Appendix "A", or modifications thereto.

n. Storage of contract records after completion of contract operations, irrespective of contractual or statutory requirements regarding preservation of records, except as specifically allowed pursuant to paragraph 3 of Article VIII, hereof.

o. Taxes, fees and charges, levied by public agencies, which are imposed upon or arise by reason of or are measured by the Contractor's fixed fee.

p. Government-furnished property, except to the extent that cash payment therefor is required pursuant to procedures of the Commission applicable to transfers of such property to the Contractor from others (including other agencies of the Government) and the cost of insurance against loss, destruction or damage to Government-owned property.

q. Wages, salaries, or other compensation of the Contractor's corporate officers, except to the extent such wages, salaries or other compensation (including travel and subsistence) is paid (without duplication) pursuant to subparagraphs g. and k. of paragraph 2 of this Article.

r. Other items made unallowable by the provisions of this contract.

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5. Payment:

a. Payment of the Fixed Fee. Payment of ninety (90%) per cent of the fixed fee set forth in subparagraph a. of paragraph 1 of this Article shall be made by the Government monthly in amounts based on the percentage of the completion of the work hereunder, as determined from estimates submitted to and approved by the Commission.

b. The Government will make reimbursement payments for the allowable costs set forth in paragraph 3 of this Article monthly, or in the discretion of the Commission, at more frequent intervals.

c. Upon (i) the expiration of the period of performance of the work of the contract, (ii) completion of the work required by paragraph 3 of Article III, TERM, TERMINATION AND EXPIRATION, and (iii) the furnishing by the Contractor of a release in such form and with such exception as may be approved by the Commission of all claims against the Government under or arising out of this contract, accompanied by any accounting for Government-owned property required by Article V, GOVERNMENT PROPERTY, the Government shall promptly pay to the Contractor the unpaid balance of the consideration set forth in paragraph 1 of this Article (including any portion of the fixed fee withheld or not yet paid pursuant to subparagraph a. above) less deductions due under the terms of this contract and any sum required to settle any unsettled claim which the Government may have against the Contractor.

d. Claims for Payment. Claims for payment shall be accompanied by such supporting documents and justifications as the Commission shall prescribe.

e. Discounts. The Contractor shall take and afford the Government advantage of all available cash and trade discounts, rebates, allowances, credits, salvage, commissions and bonifications.

f. Revenues. Any revenues, apart from the fixed fee, accruing to the Contractor in connection with the work under this contract, shall be applied in reduction of allowable costs under this contract.

g. Direct Payment of Charges - Deductions. The Government reserves the right, upon ten (10) days written notice from the Commission to the Contractor, to pay directly to the persons concerned any charges for services, materials or freight which otherwise would be allowable under this contract. Any payment so made shall discharge the Government of all liability to the Contractor therefor.

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b. title to all property utilized in the work of this contract, provided by the Contractor from Contractor-owned stores or manufactured by the Contractor in the ordinary course of its commercial business, for which the Contractor is entitled to reimbursement under the provisions of paragraphs 2 and 3 of Article IV, CONSIDERATION, shall pass to the Government at the time of such utilization.

2. The Government reserves the right to furnish any property or services required for or useful in the performance of the work under this contract. Title to all property so furnished shall remain in the Government.

3. The Government shall retain title to all products, by-products, wastage, salvage, work-in-process, residues and scrap resulting from property to which the Government has or had title pursuant to paragraphs 1 and 2 above.

4. All items of Government-owned property referred to above are hereafter collectively referred to in this Article as "Government property". To the extent practicable, the Contractor shall cause all non-expendable items of Government property to be suitably marked with an identifying mark or symbol indicating that the items are the property of the Government. The Contractor shall maintain, at all times and in a manner satisfactory to the Commission, records showing the disposition and use of Government property. Such records shall be subject to Commission inspection at all reasonable times. It is understood that the Commission shall at all reasonable times have access to the premises wherein any items of Government property are located.

5. The Contractor shall promptly notify the Commission of any loss or destruction of or damage to Government property (but not of any consumption of materials or supplies in the performance of its undertakings hereunder). Except as otherwise specifically provided in this contract, the Contractor shall not be liable for loss or destruction of or damage to Government property (in the possession or custody of the Contractor in connection with this contract) unless such loss, destruction or damage is due to gross negligence or wilful misconduct attributable to the Contractor or its supervisory employees.

6. Items of Government property referred to above shall not be used by the Contractor except in the performance of its obligations under this contract.

7. In the event of loss or destruction of or damage to Government property, the Contractor shall take such steps to subserve the Government's interest as the Commission authorizes or approves. If the Contractor is

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liable for loss or destruction of or damage to any items of Government property, it shall promptly account therefor to the satisfaction of the Commission; if the Contractor is not liable therefor, and is indemnified, reimbursed, or otherwise compensated for such loss, destruction or damage (other than by the Government under this contract), the Contractor shall promptly account to the Government for an equitable share of such indemnification, reimbursement, or other compensation; in any event, the Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any such loss, destruction or damage, and, upon request of the Commission, shall furnish the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery.

8. The Contractor may, with the approval of the Commission, (i) transfer or otherwise dispose of items of Government property to such parties and upon such terms and conditions as so approved, or (ii) itself acquire title to items of property at prices mutually agreed upon by the Commission and the Contractor, without the necessity of execution of an amendment to this contract. The proceeds of any such transfer or disposition, and the agreed price of any such Contractor acquisition, shall be applied in reduction of any payments or reimbursement to be made by the Government to the Contractor under this contract or shall otherwise be paid in such manner as the Commission may direct.

9. The Contractor shall conform to all regulations and requirements of the Commission concerning the management, inventory control, storing and disposal of Government property. The Contractor agrees to prepare and submit to the Commission for review, within sixty (60) days after the execution of this contract, a written statement of the methods to be used and of the procedures to be followed by the Contractor in regard to management, inventory control, storing and disposal of Government property. The Contractor shall not use any method or procedure in this regard which the Commission has advised the Contractor is contrary to Commission policy or which is otherwise prohibited by this contract.

10. With respect to each item of Government property located at the Contractor's Hicksville, Long Island plant, not sold or otherwise disposed of by the Contractor or acquired by the Contractor pursuant to paragraph 8 above, the Government, within one hundred twenty days following the termination or expiration of the period of performance of this contract or any extensions thereof, if it has not exercised the option to purchase said plant as provided in Article VI, OPTION IN THE GOVERNMENT, shall abandon or remove it.

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(a) In the event the Government occupies said plant pursuant to subparagraph d (ii) of paragraph 1 of Article III, TERM, TERMINATION AND EXPIRATION, the rights in the Government to abandon or remove set forth in this paragraph shall be suspended during the period of such occupancy and the one hundred twenty day period during which the Government must either abandon or remove such property shall not commence to run until the end of such occupancy.

(b) Prior to determination by the Government to abandon or remove said item the Contractor agrees, if the Government so requests, to negotiate with the Government in good faith to purchase said item at a price mutually agreed upon, it being understood, however, that the Contractor shall not be required to negotiate any price in excess of the value to the Contractor of said item.

(c) In the event the Government removes any such item of Government property which is structurally incorporated in a building on the Hicksville site, either directly or by means of its foundations, accessory piping or instrumentation, the Government shall restore the pertinent portion of the Contractor's structure to substantially the condition immediately prior to the incorporation therein of the item of property except for reasonable wear and tear and except for damage by fire, explosion or other casualty. The Government agrees that in the event the Contractor requests, in lieu of such restoration, restoration to a condition other than that set forth in the preceding sentence, to restore in accordance with the Contractor's request if the Commission determines such alternative restoration will be in the interests of the Government.

(d) There shall be no charge to the Government by the Contractor for the storage of such property (i) for any period during which the Government may exercise the option set forth in Article VI hereof, (ii) for any period during which the Government may elect, in accordance with this paragraph, to abandon or remove such property, or (iii) during the period of the close-out of this contract.

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ARTICLE VI - OPTION IN THE GOVERNMENT

As part of the consideration for this contract the Government hereby is granted the option set forth in the following paragraph. This option may be exercised by the Government, by written notice to the Contractor of such exercise, at any time up to one hundred Twenty (120) days after the expiration or termination of this contract and, in the event of occupancy by the Government pursuant to subparagraph d(ii) of paragraph 2 of Article III, TERM, EXPIRATION AND TERMINATION, at any time during said occupancy.

The Government may, if it so elects, purchase, and the Contractor shall, if requested to do so by the Government, sell to the Government, (i) the land and buildings owned by the Contractor, as of the date of execution of this contract by the Contractor at Hicksville in the Township of Oyster Bay, New York, and all additions and improvements to said buildings and land subsequently acquired by the Contractor. In the event of purchase pursuant to the preceding sentence, the Government shall pay the Contractor the purchase price paid by the Contractor for said buildings and land plus the cost of acquiring said additions and improvements less, without duplication, any costs of acquiring said additions and improvements for which the Contractor is reimbursed otherwise under this contract and the depreciation of said buildings, additions and improvements. For the purposes of this paragraph, the purchase price of said land and buildings includes closing costs, and costs of necessary building and use permits and variances, to the extent that the Contractor is not reimbursed otherwise for such costs under this contract. Depreciation for the purposes of this paragraph is defined as the depreciation allowed or allowable to the Contractor for tax purposes in accordance with Internal Revenue Code Section 23(l).

ARTICLE VII - PATENTS

1. Whenever any invention or discovery is made or conceived by the Contractor or its employees in the course of any of the work under this contract, the Contractor shall furnish the Commission with complete information thereon; and the Commission shall have the sole power to determine whether or not and where a patent application shall be filed, and to determine the disposition of the title and rights under any application or patent that may result; provided, however, that the Contractor, in any event, shall retain at least a non-exclusive, irrevocable, royalty-free license under said invention,

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discovery, application, or patent, such license being limited to the manufacture, use, and sale for purposes other than use in the production or utilization of fissionable material or atomic energy. Subject to the license retained by the Contractor, as provided in this Article, the judgment of the Commission on these matters shall be accepted as final; and the Contractor for itself and for its employees, agrees that the inventor or inventors will execute all documents and do all things necessary or proper to carry out the judgment of the Commission.

2. No claim for pecuniary award or compensation under the provisions of the Atomic Energy Act of 1946 shall be asserted by the Contractor or its employees with respect to any invention or discovery made or conceived in the course of any of the work under this contract.

3. Except as otherwise authorized in writing by the Commission, the Contractor will obtain patent agreements to effectuate the purposes of paragraphs 1 and 2 of this Article from all persons who perform any part of the work under this contract, except such clerical and manual labor personnel as will not have access to technical data.

4. Except as otherwise authorized in writing by the Commission, the Contractor will insert in all subcontracts provisions making this Article applicable to the subcontractor and its employees.

5. The Contractor shall grant to the Government, to practise or have practised, an irrevocable, non-exclusive license in and to any inventions (whether patented or not), secret processes, technical information and techniques of production, research and plant operation, which are directly utilized by the Contractor in the performance of the work of this contract. Such license shall apply to the manufacture, use and disposition of any article and material and to the use of any method or process. Such license shall be limited to governmental purposes related to (i) production of fissionable material, (ii) utilization of fissionable material, and (iii) utilization of atomic energy; provided, however, that the foregoing shall not limit the Government's right to sell, or cause to be sold, all products or by-products not used by or for the Government which result or remain from the use of any invention, process, information or technique to which such license applies.

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ARTICLE VIII - RECORDS AND ACCOUNTS

1. The Contractor shall keep and maintain a separate and distinct set of records and books of account together with all related memoranda, supporting documents and correspondence, showing all allowable costs incurred, revenues earned, fixed fee accruals and the use and disposition of all Government-owned property coming into the possession of the Contractor under this contract. The Contractor shall accurately record its financial transactions hereunder in said records and books of account. The system of accounts employed by the Contractor shall be in accordance with generally accepted accounting principles and subject to the approval of the Commission.

2. Except to the extent, if any, otherwise approved by the Commission, all records, books of account, memoranda, supporting documents and correspondence referred to in paragraph 1 above

(i) shall be the property of the Government

(ii) shall be kept and maintained at the principal site of the work referred to in paragraph 1 of Article II, SITE OF THE WORK;

(iii) shall be subject to audit and inspection by the Commission at all reasonable times and the Contractor shall afford the Commission proper facilities for such inspection and audit; and

(iv) shall be delivered to the Government or otherwise disposed of by the Contractor either as the Commission may from time to time direct during the progress of the work or in any event as the Commission shall determine upon completion or termination of this contract and final audit of all accounts hereunder.

3. All records in the possession of the Contractor related to this contract, except those referred to in paragraph 1 above, and in Article XVI, SCIENTIFIC AND TECHNICAL DATA, shall be preserved by the Contractor without additional compensation therefor, for a period of five (5) years after final settlement of the contract or otherwise disposed of in such manner as may be agreed upon by the Government and the Contractor. The Government shall at all reasonable times have the right to examine, make copies of, and borrow said records, at no cost to the Government; provided, however, that

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except as otherwise agreed upon by the Government and the Contractor all such records which bear a security classification at the time of completion or termination of the work set forth in Article I, SCOPE OF THE WORK, or at the time of the expiration of this contract, shall become the property of the Government at such time and shall thereafter be delivered to the Government or otherwise disposed of by the Contractor as the Commission shall determine and provided further that neither this paragraph nor any other provision of this contract shall be deemed to require the Contractor at its unallowable cost to store or preserve records which bear a security classification.

ARTICLE IX - PROCUREMENT AND SUBCONTRACTS

1. Approvals

a. The Contractor shall not enter into any subcontract without the written approval of the Commission of its terms and conditions. For the purposes of this paragraph, a subcontract is defined as any contractual arrangement (whether or not in the form commonly referred to as a "purchase order") with a third party for the performance of a specific part of the work to be performed under this contract, which arrangement is specifically made for such performance and the cost of which is, apart from the provisions of this paragraph, an allowable cost under this contract, except, however, arrangements covering (i) the furnishing of a basic raw material, (ii) the furnishing of a standard commercial or catalog item, or (iii) the employer-employee relation.

b. The Commission reserves the right, from time to time, by written notice from the Commission to the Contractor (i) to make any or all other commitments or classes of commitments hereunder (other than the contractual arrangements referred to in a. above) subject to, and to require their submission for, Commission approval, and (ii) to make any or all methods, practices, and procedures used or proposed to be used in effecting all arrangements and commitments hereunder subject to, and to require their submission for, Commission approval. In this regard, the Contractor agrees to prepare and submit to the Commission for review, within thirty (30) days after the execution of this contract (or any extension thereof approved in writing by the Commission), written statements of the daily procurement practices and procedures to be used and of the objectives intended to be accomplished by such practices and procedures. The Contractor will not use any procurement procedures prohibited by this contract or which the Commission has advised the Contractor are contrary to Commission policy.

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c. The Contractor shall obtain the prior written approval of the Commission before (i) purchasing motor vehicles, airplanes, typewriters, printing equipment, helium or alcohol, (ii) leasing, purchasing, or otherwise acquiring real property, (iii) procuring any item or service on a cost, cost-plus-fee or 'time and materials' basis, (iv) purchasing any item which the Commission specifies is to be obtained from indicated Government sources, and (v) purchasing any item at a cost in excess of \$2,000.00, where payment for the cost of any action specified in (i) through (v) will be claimed hereunder.

2. Writing Terms: The Contractor shall reduce to writing, unless this provision is waived in writing by the Commission, every subcontract or other commitment in excess of One Hundred Dollars (\$100.00) made by it for the purpose of its undertakings hereunder, except contracts covering the employer-employee relation (but not excepting contracts with consultants); insert therein a provision that such commitment is assignable to the Government; insert therein all other provisions required by law or expressly required by the provisions of this contract; and make all such commitments in its own name and not bind or purport to bind the Government or the Commission thereunder.

3. Procurement from Government Sources: From time to time, by separate instrument or instruments, the Contractor may be duly authorized to act as agent for and on behalf of the Government or the Commission respecting (i) the making of procurements in and for performance under this contract from so-called Government sources such as Federal Supply Schedule commercial sources, Armed Services Petroleum Purchasing Agency, Federal Prison Industries, Inc. and Federal Supply Service, and (ii) the issuing of tax exemption certificates pertinent to such procurements. The action so authorized shall be deemed to be within the scope of the Contractor's allowable cost of work performance under this contract.

ARTICLE I, - CONDUCT OF THE WORK, INSPECTION AND REPORTS

1. In performing the work called for under this contract, the Contractor

- (i) shall utilize its best efforts, know-how and ability;
- (ii) shall utilize its best efforts to have the work executed in the most workmanlike manner by qualified, careful and efficient workers in strict conformity with the best standard practices (subject to the directions of the Commission);
- (iii) shall utilize its best efforts to provide sufficient technical, supervisory, administrative and other personnel to insure the prosecution of the work in accordance with pertinent production or other progress schedules;

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(iv) shall, if in the opinion of the Commission the Contractor falls behind any pertinent production or other progress schedule, use its best efforts to take such steps to improve its progress as the Commission may direct; and

(v) shall, if in the opinion of the Commission, the Contractor's personnel or other reimbursable costs are excessive for the proper performance of this contract, make such prospective reductions thereof as the Commission may direct.

2. The work of this contract is subject to (i) the general supervision of the Commission, and (ii) the Commission authorizations, approvals and directions otherwise provided for in this contract. The Contractor shall proceed in the performance of this contract and shall place emphasis (or relative emphasis) on the various phases of the work of said contract, as and to the extent requested by the Commission from time to time. The Commission shall have the right to inspect in such manner and at such times as it deems appropriate, all activities of the Contractor in, or related to the course of the work under this contract.

3. The Contractor shall keep the Commission fully advised of its progress hereunder and of the difficulties, if any, which it experiences and shall prepare and submit to the Commission, in such quantity and form as may be directed by the Commission

(i) monthly progress reports,

(ii) interim technical reports on completion of specific phases of the work,

(iii) production schedules, financial and cost reports, construction completion reports and such other special reports as may be requested by the Commission from time to time, and

(iv) a final report summarizing its activities, findings, and conclusions.

4. The Contractor shall appoint from its staff an over-all director of the work of this contract. The selection and continued assignment to said work of this director shall be subject to the approval of the Commission.

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ARTICLE XI - CONSTRUCTION, ALTERATION OR REPAIR WORK

1. The Contractor shall not perform or have performed under this contract any construction, alteration or repair work in excess of One Thousand Dollars (\$1,000.00), including painting and decorating, without the prior written approval of the Commission.

2. In the event that the Contractor, under this contract, performs or has performed, construction, alteration or repair work, including painting and decorating, which work is within the scope of the Davis-Bacon Act (Act of March 3, 1931, c.411, Sec. 1, 46 Stat. 1494, as amended; 40 U. S. Code 276 (a) et seq.), the following provisions shall apply to such work:

a. All mechanics and laborers employed or working upon the site of the work, or under the Housing Act of 1949 in the construction or development of the project, will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by the Anti-Kickback Regulations (29 C.F.R. Part 3)), the full amounts due at the time of payment computed at wage rates not less than those contained in the wage determination decision of the Secretary of Labor, to be furnished to the Contractor by the Commission and which will be attached to Appendix "A" and made a part thereof, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and such laborers and mechanics; and the wage determination decision shall be posted by the Contractor at the site of the work in a prominent place where it can be easily seen by the workers.

b. The Commission may withhold or cause to be withheld from the Contractor so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics employed by the Contractor or any subcontractor on the work the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic employed or working on the site of the work or under the Housing Act of 1949 in the construction or development of the project, all or part of the wages required by the contract, the Commission may, after written notice to the Contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

c. (1) Payroll records will be maintained during the course of the work and preserved for a period of three (3) years thereafter for all laborers and mechanics working at the site of the work, or under the Housing Act of 1949 in the construction or development of the project. Such records will contain the name and address of each such employee, his correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid.

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(2) The Contractor will submit weekly a certified copy of all payrolls to the United States Atomic Energy Commission if the agency is a party to the contract, but if the agency is not such a party, the Contractor will submit the certified payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to the Commission. The certification will affirm that the payrolls are correct and complete, that the wage rates contained therein are not less than those determined by the Secretary of Labor and that the classifications set forth for each laborer or mechanic conform with the work he performed. The Contractor will make his employment records available for inspection by authorized representatives of the Commission and the Department of Labor, and will permit such representatives to interview employees during working hours on the job.

d. Apprentices will be permitted to work only under a bona fide apprenticeship program registered with a State Apprenticeship Council which is recognized by the Federal Committee on Apprenticeship, U. S. Department of Labor; or if no such recognized Council exists in a State, under a program registered with the Bureau of Apprenticeship, U. S. Department of Labor.

e. The Contractor will comply with the regulations of the Secretary of Labor made pursuant to the Anti-Kickback Act of June 13, 1934, 48 Stat. 948; 62 Stat. 740; 63 Stat. 108; 18 U.S.C. 874, 40 U.S.C. 276 b, c, and any amendments or modifications thereof, will cause appropriate provisions to be inserted in subcontracts to insure compliance therewith by all subcontractors subject thereto, and will be responsible for the submission of affidavits required of subcontractors thereunder, except as the Secretary of Labor may specifically provide for reasonable limitations, variations, tolerances and exemptions from the requirements thereof.

f. The Contractor will insert in each of its subcontracts the provisions set forth in stipulations (a), (b), (c), (d), (e) and (g) hereof, and such other stipulations as the Commission may by appropriate instructions require.

g. A Breach of stipulations (a) through (f) may be grounds for termination of the contract.

ARTICLE XII - EIGHT-HOUR LAW

No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this paragraph of the contract. The wages of every laborer or mechanic employed by the Contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For.

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each violation of the requirements of this paragraph of the contract a penalty of five dollars shall be imposed upon the Contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this paragraph of the contract, and all penalties thus imposed shall be withheld for the use and benefit of the Government. Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of the Eight-Hour Laws as set forth in U. S. Code, Title 40, Sections 321, 324, 325, 325a, and 326, which relate to hours of labor and compensation for overtime.

ARTICLE XIII - DISCLOSURE OF INFORMATION

1. It is understood that unauthorized disclosure of any, or failure to safeguard all, material marked as "Security Information" that may come to the Contractor, or any person under its control, in connection with the work under this contract may subject the Contractor, its agents, and employees to criminal liability under the laws of the United States. See the Atomic Energy Act of 1946, 60 Stat. 755, as amended, Title 42, United States Code, Sec. 1801, et. seq. See also Title 18, United States Code, Secs. 791 to 798, both inclusive, and Executive Order No. 10,104, February 1, 1950, 15 F. R. 597.

2. The Contractor agrees to conform to all security regulations and requirements of the Commission. Except as the Commission may authorize, in accordance with the Atomic Energy Act of 1946, as amended, the Contractor shall not permit any individual to have access to restricted data until the designated investigating agency shall have made an investigation and report to the Commission on the character, associations, and loyalty of such individual, and the Commission shall have determined that permitting such person to have access to restricted data will not endanger the common defense and security. As used in this paragraph the term "designated investigating agency" means the United States Civil Service Commission or the Federal Bureau of Investigation, or both, as determined pursuant to the provisions of the Atomic Energy Act of 1946, as amended by the Act of April 5, 1952, Public Law 298, 82nd Congress, 66 Stat. 43. The term "restricted data" as used in this paragraph means all data concerning the manufacture or utilization of atomic weapons, the production of fissionable material, or the use of fissionable material in the production of power, but shall not include any data which the Commission from time to time determines may be published without adversely affecting the common defense and security.

3. Except as otherwise authorized in writing by the Commission, the Contractor shall insert in all agreements, made pursuant to the provisions of this contract which may involve security information, the provisions of paragraphs 1 and 2 of this Article.

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ARTICLE XIV - DISPUTES

Except as otherwise specifically provided in this contract, all disputes between the parties which may arise under, or in connection with, any part of this contract, prior to final payment, and which are not disposed of by mutual agreement, shall be decided by a representative of the Commission, duly authorized to supervise and administer performance of the undertakings hereunder, who shall reduce his decision to writing and mail a copy of said decision to the Contractor; said decision shall be final and conclusive on the parties hereto, subject to the right of the Contractor to appeal, as provided for in the sentence next following. Within thirty days from the mailing of said decision, the Contractor may appeal, in writing, to the Commission, whose written decision thereon, or that of its duly authorized representative, representatives, or Board (but not including the Commission representative mentioned in the first sentence of this Article), duly authorized to determine such an appeal, shall be final and conclusive on the parties hereto. If any such dispute arises during performance by the Contractor of its undertakings hereunder, the Contractor shall diligently proceed with the performance of its undertakings under this contract, pending the decision of such dispute.

ARTICLE XV - SECURITY ACTION

Upon notice from the Commission that such action is considered to be in the interests of the common defense and security, the Contractor shall (i) deny any employee or other person access to the site of any contract undertakings or to "restricted data" within the meaning of the Atomic Energy Act of 1946, or (ii) dismiss from its undertakings under this contract any employee or other person.

ARTICLE XVI - SCIENTIFIC AND TECHNICAL DATA

All compilations of scientific and technical data (including, but not limited to, reports, notes, drawings, designs, specifications and memoranda) furnished or prepared by the Contractor pursuant to, or developed in connection with, the Contractor's undertakings under this contract, shall be property of the Government and the Government shall have the right to use such material in any manner and for any purpose without any claim on the part of the Contractor for additional compensation therefor. All provisions of paragraphs 4, 5, 6, 7, 8 and 9 of Article V relating to Government property are applicable to such material.

ARTICLE XVII - SOURCE AND FISSIONABLE MATERIALS

The Contractor agrees to conform to all regulations and requirements of the Commission with respect to accounting for source and fissionable materials (defined in the Atomic Energy Act of 1946).

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ARTICLE XVIII - GUARD AND FIRE FIGHTING FORCES

In connection with its work under this contract, the Contractor shall provide such guard or fire fighting forces, with such uniforms and equipment, as the Commission may from time to time require or approve. The cost thereof shall be deemed to be allowable costs under paragraph 3 of Article IV hereof.

ARTICLE XIX - BONDS AND INSURANCE

1. Except as otherwise specifically provided, the Contractor shall exert all reasonable efforts to procure and maintain such bonds and insurance policies as are (i) required by law, or (ii) required by the Commission.

2. Except as otherwise directed by the Commission, in every instance where the premium on a bond or insurance policy is an allowable cost under the contract, the bond or insurance policy shall contain endorsements or other recitals (i) excluding, by appropriate language, any claim on the part of the insurer or obligor to be subrogated, on payment of a loss or otherwise, to any claim against the United States; and (ii) providing for at least thirty (30) days prior written notice by registered mail to the United States Atomic Energy Commission of bond or policy cancellation, as the case may be.

ARTICLE XX - STATE AND LOCAL TAXES AND FEES

The Contractor shall notify the Commission of any tax, fee, assessment, duty or other charge asserted in behalf of any State, county, municipality, or any officer, commission, body or subdivision thereof, (i) in connection with property which is or will be Government-owned property covered by Articles V, VIII, and XVI hereof, (ii) in connection with any transaction between the Contractor and the Government, or (iii) in connection with the payments by the Government for the Contractor's performance under this contract, and shall refrain from paying same unless authorized to do so by the Commission. To the extent requested by the Commission, the Contractor (i) shall take steps to cause any such taxes, fees, assessments, duties or other charges to be paid under protest, and (ii) shall cause to be assigned to the Government or its designees, any and all rights to the abatement, refund or other recoupment of such charges paid under protest.

ARTICLE XXI - NON-DISCRIMINATION IN EMPLOYMENT

In connection with the performance of this contract, the Contractor agrees not to discriminate against any employee or applicant for employment because of race, creed, color, or national origin; and further agrees to insert the foregoing provision in all subcontracts hereunder except subcontracts for standard commercial supplies or for raw materials.

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ARTICLE XXII - TECHNICAL AND PROFESSIONAL ASSISTANCE

When, in the judgment of the Contractor, the complexity and nature of the contract undertakings are such as to require supplemental expert technical or professional assistance, services or advice in connection with special phases of a technical character, the Contractor may, with the written approval of the Commission, engage or otherwise obtain such supplemental services. Compensation and reimbursement to any consultant engaged pursuant to this article shall be governed by the provisions of Appendix "A" attached hereto except as may otherwise be specifically stated in the contract with such consultant approved by the Commission.

ARTICLE XXIII - ASSIGNMENT

Neither this contract nor any interest therein or claim thereunder shall be assigned or transferred by the Contractor except with the written approval of the Commission.

ARTICLE XXIV - LABOR DISPUTES

Whenever an actual or potential labor dispute interferes or threatens interference with the work of this contract, the Contractor shall immediately inform the Commission of such dispute and of the relevant facts.

ARTICLE XXV - COVENANT AGAINST CONTINGENT FEES

1. The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

2. Unless otherwise authorized by the Commission in writing the Contractor shall cause provisions similar to paragraph 1 above to be inserted in all subcontracts and purchase orders entered into under this contract.

ARTICLE XXVI - CONVICT LABOR

In connection with the performance of this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor. This provision shall not be construed to prevent the Contractor or any

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subcontractor from obtaining any of the supplies or any component parts or ingredients to be furnished under this contract or any of the materials or supplies to be used in connection with the performance of this contract, directly or indirectly, from any Federal, state or territorial prison or prison industry, provided, that such articles, materials or supplies are not produced pursuant to any contract or other arrangements under which prison labor is hired or employed or used by any private person, firm or corporation.

ARTICLE XXVII - WALSH-HEALEY ACT

To the extent only that the Walsh-Healey Public Contracts Acts, as amended (41 United States Code 35-45) is applicable to this contract, the following provision shall apply:

There are hereby incorporated by reference, the representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

ARTICLE XXVIII - DOMESTIC ARTICLES

1. Unless the Commission shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, the Contractor, its subcontractors, and all materialmen or suppliers shall use, in the performance of the work, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, or supplies as have been manufactured in the United States substantially all from articles, materials, or supplies, mined, produced, or manufactured, as the case may be, in the United States. The provisions of this paragraph shall not apply if the articles, materials, or supplies of the class or kind to be used, or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of satisfactory quality.

2. Unless otherwise authorized by the Commission in writing, the Contractor shall cause provisions similar to paragraph 1. above to be inserted in all subcontracts and purchase orders entered into under this contract.

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ARTICLE XXIX - OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE XXX - RENEGOTIATION

1. This contract shall be deemed to contain all the provisions required by Section 104 of the Renegotiation Act of 1951 (Public Law 9, 82nd Congress).

2. The Contractor agrees to insert the provisions of this paragraph, including this subparagraph 2, in all subcontracts specified in Section 103 (g) of the Renegotiation Act of 1951; provided, that the Contractor shall not be required to insert the provisions of this paragraph in any subcontract excepted by or pursuant to Section 106 of the Renegotiation Act of 1951.

ARTICLE XXXI - SAFETY AND ACCIDENT PREVENTION

The Contractor shall initiate and take all reasonable steps and precautions to protect health and minimize danger from all hazards to life and property, shall make all reports and permit all inspections as required by the Commission, and shall conform to all health and safety regulations and requirements of the Commission.

ARTICLE XXXII - COMPLIANCE WITH LAWS

Except as otherwise directed by the Commission and subject to the provisions of Article XX, STATE AND LOCAL TAXES AND FEES, the Contractor shall procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State, territory, or political subdivision thereof, wherever the work is done, or of any other duly constituted public authority.

ARTICLE XXXIII - APPENDIX "A"

The Contractor shall abide by the provisions of Appendix "A" of this contract, as the same may be modified from time to time; provided, however, that in the event of conflict between the provisions of said Appendix "A" and the other provisions of this contract, the latter shall prevail.

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ARTICLE XXXIX - EXAMINATION OF RECORDS

1. The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract, have access to and the right to examine any directly pertinent books, documents, papers and records of the Contractor involving transactions related to this contract.

2. The Contractor further agrees to include in all its subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under such subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor involving transactions related to the subcontract. The term subcontract as used herein does not include (i) purchase orders not exceeding One Thousand Dollars (\$1,000.00), or (ii) contracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

3. Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

ARTICLE XXXV - CLAIMS AND LITIGATIONS

1. The Contractor shall give the Commission immediate notice of any claim against the Contractor or suit or action filed or commenced against the Contractor, arising out of or connected with the performance of this contract, irrespective of whether or not the cost or expense of such claim, suit or action, is to be borne wholly or in part by the Government hereunder and irrespective of whether the Contractor is insured against any risk which may be involved. The Contractor shall furnish immediately to the Commission copies of all pertinent papers received by the Contractor.

2. Insofar as the following shall not conflict with any policy or contract of insurance, and to the extent requested by the Commission, the Contractor, with respect to any claim, suit or action, the cost and expense of which is or would be an allowable cost as defined in paragraph 2 of Article IV, or the proceeds of which is or would be revenues covered by paragraph 5 f. of Article IV, (i) shall promptly do any and all things to effect an assignment and subrogation in favor of the Government of all the Contractor's rights and claims, except as against the Government, arising from or growing out of any such claim, suit or action, or (ii) shall promptly authorize representatives of the Government to settle, defend, or otherwise handle any such claim,

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suit or action and to represent the Contractor in, and take charge of, any litigation resulting therefrom, or (iii) shall diligently handle any such claim, suit or action or defend or initiate any litigation in connection with any such claim, suit or action and in so doing, shall consult with the Commission as to the steps to be taken and shall otherwise endeavor in good faith to subserve the interests of the Government.

3. Subject to the provisions of paragraph 2 above, the Contractor shall diligently handle any claim whatsoever arising out of the performance of this contract and shall promptly defend or initiate any litigation in connection with any such claim, consulting with the Commission as to the steps to be taken.

4. With respect to any claim, matter or litigation arising out of the performance of this contract, the handling of which is undertaken by an insurance carrier or by a representative or representatives of the Government, the Contractor shall furnish all reasonable assistance and cooperation that may be requested by the Commission.

5. "Litigation", for the purposes of this Article, is defined to include proceedings before administrative agencies.

ARTICLE XXXVI - LETTER CONTRACT NO. AT(30-1)-1293

Letter Contract No. AT(30-1)-1293, entered into as of December 10, 1951, hereby is merged with and superseded by this contract.

ARTICLE XXXVII - CONTRACT APPROVAL

This contract is subject to the approval of the Director of the Division of Production of the United States Atomic Energy Commission and shall not be binding unless so approved.

ARTICLE XXXVIII - DEFINITIONS

1. As used in this contract, the terms "United States Atomic Energy Commission", "Atomic Energy Commission", and "Commission" shall mean the United States Atomic Energy Commission or its duly authorized representative or representatives.

2. All references in this contract to Commission or Government approvals, authorizations, directions or notices contemplate and require written action.

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IN WITNESS WHEREOF, the parties hereto have executed this contract as of the day and year first above written.

UNITED STATES OF AMERICA

By: UNITED STATES ATOMIC ENERGY COMMISSION

/s/ H. H. Fitt

Manager
New York Operations Office

Witnesses:

/s/ W. E. Kingston

P. O. Box 88, Bayside, N.Y.
(Address)

/s/ W. F. Rueser

1740 Broadway, N.Y.C.
(Address)

SYLVANIA ELECTRIC PRODUCTS, INC.

By: /s/ J. B. Merrill

Title: Vice President

I, J. B. Lowry, certify that I am the Secretary of the corporation named as Contractor herein; that J. B. Merrill who signed this contract on behalf of the Contractor was then Vice President of said corporation; that said contract was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

IN WITNESS WHEREOF, I have hereunto affixed my hand and the seal of said corporation.

/s/ J. B. Lowry
Secretary

(Corporate Seal)
X

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The above contract, AT(30-1)-1293, with Sylvania Electric Products, Inc., is hereby approved.

/s/ R. W. Cook
Director, Division of Production
United States Atomic Energy Commission

Date: 8-10, 1953

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