HUNTON & WILLIAMS
707 EAST MAIN STREET P.O. BOX 1535
RICHMOND, VIRGINIA 23212

TELEPHONE 804-788-8200
TELEX 684425I

2000 PENNSYLVANIA AVENUE, N.W.
P. O. BOX 19230
WASHINGTON, D. C. 20036
TELEPHONE 202-955-1500

FIRST VIRGINIA BANK TOWER
P. O. BOX 3889
NORFOLK, VIRGINIA 23514
TELEPHONE 804-625-5501
TELEX 755628

3050 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030
TELEPHONE 703-352-2200

100 PARK AVENUE
NEW YORK, NEW YORK 10017
TELEPHONE 212-309-1000
TELEX 424549 HUNT UI

ONE HANNOVER SQUARE
P. O. BOX 109
RALEIGH, NORTH CAROLINA 27602
TELEPHONE 919-899-3000

FIRST TENNESSEE BANK BUILDING
P. O. BOX 951
KNOXVILLE, TENNESSEE 37901
TELEPHONE 615-637-4311

February 3, 1986

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DIRECT DIAL NO. 804 788- 8466

Mr. Ralph Caruso
Shoreham Project Manager
United States Nuclear Regulatory
Commission Staff
7920 Norfolk Avenue
Bethesda, Maryland 20014

Long Island Lighting Company v. Transamerica Delaval, Inc.

Dear Ralph:

Enclosed are copies of Long Island Lighting Company's Response to Motions to Dismiss and Stay Discovery. The affidavits and appendices filed with the Response are not enclosed. They are described in the Response. If you want copies of them, however, please let me know.

Sincerely yours,

Robert M. Rolfe

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Enclosures

50-322

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1/1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Long Island Lighting Company, a New York Public Service Corporation, Plaintiff, v. Transamerica Delaval, Inc., a Delaware Corporation, Defendant.	Civil Action No. 85 Civ. 6892 (GLG)

RESPONSE OF LONG ISLAND LIGHTING COMPANY
TO MOTIONS TO DISMISS AND TO STAY DISCOVERY

Hunton & Williams
707 East Main Street
P. O. Box 1535
Richmond, VA 23212

1 Hannover Square
Fayetteville Street Mall
P. O. Box 109
Raleigh, NC 26701

100 Park Avenue
New York, NY 10171

Attorneys For
Long Island Lighting Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Page

Page

Administrative Cases

Federal Statutes, Regulations and Rules

Page

Federal Rules Of Civil Procedure

State Statutes

Miscellaneous Authorities

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LONG ISLAND LIGHTING COMPANY, a New York Public Service Corporation,	:	Civil Action No. 85 CIV 6892 (GLG)
Plaintiff,	:	
v.	:	
TRANSAMERICA DELAVAL, INC., a Delaware Corporation,	:	
Defendant.	:	

RESPONSE OF LONG ISLAND LIGHTING COMPANY
TO MOTIONS TO DISMISS AND TO STAY DISCOVERY

PRELIMINARY STATEMENT

This action arises from the spectacular failure of three emergency diesel generators at the Shoreham Nuclear Power Station (Shoreham). Such emergency diesel generators are required by the Nuclear Regulatory Commission (NRC) to power systems necessary for safe shutdown of the plant in certain instances. They are vital safety equipment and must function reliably when needed to avoid a serious nuclear accident. Because such failures resulted from numerous instances of intentional wrongdoing, other torts and breaches of contract by Transamerica Delaval Inc. (TDI), the supplier of the emergency diesels, Long Island Lighting Company (LILCO) instituted this action.

Knowing the highly regulated nature of the nuclear

industry and the vital safety function of emergency power sources, TDI contracted to provide three emergency diesels and related services to Shoreham. Before shipment of the diesels to Shoreham, however, TDI discovered serious defects in them. It learned that the crankshafts were undersized, would likely fail under predicted torsional stresses and did not meet applicable contract, code and NRC requirements. TDI nevertheless shipped the diesels without any warning of this serious defect. While the diesels were in storage at Shoreham and before their installation, TDI learned of numerous other potential problems including, but not limited to, the possibility of casting defects which could and did cause the blocks on the emergency diesels to crack.

Though it knew of these actual and potential defects, TDI never advised LILCO of them. To the contrary, TDI repeatedly misrepresented the quality and condition of the diesels and concealed material information about their potential failures. Despite NRC, common law and contract duties to provide such information, TDI intentionally failed to do so. Despite repeated dealings with LILCO in the testing, installation, inspection and start-up of the diesels, TDI remained silent or provided deliberately misleading information. Indeed, TDI's deception was part of a larger scheme to withhold safety information from its nuclear

customers in order to escape difficulties with the NRC and potential liability to the nuclear customers of TDI's products.

Inevitably, the Shoreham emergency diesels failed. In addition to scores of smaller problems, in August 1983 the massive crankshaft of one diesel broke in two pieces; the other two crankshafts cracked. Alarming block cracking was encountered and one of the blocks had to be replaced. As a result of these failures at a time critical to the licensing of Shoreham, LILCO incurred enormous damages to analyze the cause of the failures, to attempt to repair the diesels, to replace them with other emergency power sources, to retest the diesels and to license all of its potential power sources, as well as other damages. Accordingly, LILCO has alleged TDI's fraud, violation of RICO, failure to warn, negligent provision of contractual services, negligence in design, manufacture, inspection and testing, strict liability and numerous breaches of contract.

In response, TDI has moved to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Yet, TDI does not show that "it appears beyond doubt that [LILCO] can prove no set of facts in support of [its] claims which would entitle [it] to relief." Conley v. Gibson, 355 U.S. 41, 45-6 (1957). Instead, TDI far exceeds the permissible scope of Rule 12(b)(6). TDI ignores and

mischaracterizes allegations in the Complaint. It improperly relies on facts beyond the Complaint. TDI even miscites applicable authority. Based on the Complaint - the only consideration properly before the Court - TDI's Rule 12(b)(6) motion should be denied.

LILCO does not invite the Court to look beyond the Complaint. Yet, this Response shows that even an attempt to convert TDI's motion to one for summary judgment under Rule 56 would be procedurally improper and still result in denial of the motion because numerous material factual disputes exist. A Rule 12(b)(6) motion may be converted to a motion for summary judgment only if Rule 56 is followed. Rule 56, in turn, requires reliance on admissible evidence in the record. Yet, there is no record here beside the Complaint. TDI has not produced proper affidavits allowing the Court to consider matters not pleaded.1/

1/ In an attempt to escape the pleadings and the Federal Rules of Civil Procedure, TDI has resorted to an improper Affidavit by one of its attorneys. The Millstein Affidavit contains no admissible evidence, cannot support a motion for summary judgment and is not probative of any matter now before the Court. It should be disregarded.

Rule 56(e) requires that "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Yet the Affidavit pervasively contains opinion and argument rather than facts. Moreover, Millstein's Affidavit evidences

(Continued)

Even the improper and insufficient Millstein Affidavit fails to demonstrate the existence of undisputed facts. Instead, that affidavit and the Memorandum of Law in Support of Defendant's Motion to Dismiss (TDI Brief) reflect the very attitude that spawned this litigation. Both fail to advise the Court of significant facts and legal authority.

For example, TDI argues that LILCO's contract claims are not timely and provides the Court with selected contract documents. Yet neither the Millstein Affidavit nor the TDI Brief mentions explicit contract language agreeing to extend

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(Continued From Previous Page)

no personal knowledge of any of the facts contained in it. Instead, he bases much of his affidavit on newspaper articles. Indeed, if Millstein had personal knowledge about these matters and was competent to testify, he should not be appearing in the case as counsel. New York Code of Professional Responsiblity, DR 5-101(B). Nor are the documents Millstein proffers admissible. The information he has gleaned from newspaper articles is clearly hearsay. The limited contract documents are on their face incomplete.

"Attorneys' affidavits are governed by the same rules that apply to other affidavits under Rule 56." 10A C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, § 2738 at 495 (1983). As New York's courts have long recognized "[i]t is . . . well settled that an opposing affidavit by an attorney without personal knowledge of the facts has absolutely no probative value and should be disregarded . . . Indeed, it is insufficient as a matter of law." Spearmon v. Times Square Stores Corp., 96 A.D.2d 552, 465 N.Y.S.2d 230, 232 (2d Dept. 1983). See, e.g., Universal Film Exchanges, Inc. v. Walter Reade, Inc., 37 F.R.D. 4, 6 (S.D.N.Y. 1965); Zuckerman v. City of New York, 49 N.Y.2d 557, 563, 427 N.Y.S.2d 595, 598, 404 N.E.2d 718 (1980).

applicable warranties to one year after commercial operation of Shoreham, an event not yet achieved. For example, TDI argues that LILCO is collaterally estopped by certain findings of the New York Public Service Commission (PSC). Yet, TDI fails to mention a directly applicable New York case in which PSC ratemaking decisions were held to have no collateral estoppel effect. Other examples abound and undermine every aspect of TDI's motion.

As discussed below, the Complaint states eleven good causes of action and TDI's motions to dismiss and to stay discovery should be denied. The Court should allow this action to proceed expeditiously and order TDI to provide the discovery already requested by LILCO.

STATEMENT OF FACTS

TDI selectively relies on facts beyond the Complaint, yet neglects to mention many that are critical. Consequently, LILCO provides a more accurate and comprehensive recitation of the facts. First, LILCO summarizes the Complaint which contains the only facts properly before the Court. Then LILCO discusses additional facts to counter TDI'S misleading discussion of matters beyond the Complaint.

A. The Complaint

Emergency diesel generators or some comparable source of backup AC power are required by the NRC for nuclear power plants. Complaint ¶ 6. Such generators must be sufficient to power systems which cool the nuclear core and maintain the reactor's containment in the event of postulated accidents or anticipated operational occurrences. Complaint ¶ 6. Thus, Shoreham was required to have such emergency diesel generators to protect public health and safety.

Through a bid process, LILCO entered into a contract with TDI to supply emergency diesel generators and related services sufficient to meet applicable NRC requirements. Complaint ¶¶ 9, 10. The contract was not contained in one document, but in a series, including an invitation to bid, a proposal and numerous letters and telexes culminating in a purchase order on March 20, 1974 incorporating the previous documents. Complaint ¶¶ 8, 9. The contract required TDI to design, manufacture, supply and provide services with respect to three emergency diesels. Complaint ¶ 10. Among the required design criteria were those imposed by the NRC's Regulatory Guide 1.9, which mandated that the diesels comply with the Institute of Electrical and Electronic Engineers (IEEE) Trial Use Standard 387. It, in turn, incorporated the Standards of the Diesel Engine Manufacturers Association

(DEMA). Complaint ¶ 7. The contract expressly admonished that "extreme reliablity is . . . the main requirement" for the diesels. Complaint ¶ 11.

LILCO subsequently paid TDI more than $2,110,000 and TDI delivered the diesels to Shoreham. Complaint ¶ 15. In the course of installation, inspection and testing, numerous defects were discovered, including leaking cylinder heads, defective jacket water pumps, leaking fuel oil injection lines, repeated turbocharger thrust bearing failures, inadequate piston skirt to piston crown attachments, broken rockerarm shaft bolts, cracked subcover assemblies, defective cylinder head studs, defectively designed air start valve capscrews, defective intermediate pushrods and defective turbocharger supports. Complaint ¶ 17. The most arresting failure occurred, however, on August 12, 1983, when the crankshaft in Emergency Diesel Generator 102 fractured during testing required after the replacement of defective cylinder heads. Complaint ¶ 18. Following that failure, cracks were discovered in the crankshafts of Emergency Diesel Generators 101 and 103.

After the crankshaft failures, NRC concerns compelled LILCO to undertake a comprehensive "Design Review Quality Revalidation Program" (DRQR) to disassemble the emergency diesels, inspect, analyze, repair and redesign them where necessary, and then to reassemble and retest the diesels, all

to prove their reliability. Complaint ¶ 20. During the course of this DRQR, LILCO uncovered even more latent defects in the emergency diesels. These included cracked connecting rod bearings, defective cylinder head bolts, cracks in the modified piston skirt boss area, defective intermediate push rods, additional defects in the jacket water pump, defective main push rods, cracks in the cylinder blocks, a defective governor drive coupling, repeated turbocharger thrust bearing failures, a damaged engine base, cracked wrist pin bushings, cylinder liner scuffing, severely worn piston rings and improperly specified engine oil. Complaint ¶ 21. Eventually, as a result of the expensive and extensive DRQR, an Atomic Safety and Licensing Board of the NRC approved the diesels for use for a qualified load of 3300 KW. Complaint ¶ 22.2/

Much to LILCO's surprise, its investigation as a result of the crankshaft failure revealed that many of the emergency diesels' defects were or should have been known to TDI for many years, but were never disclosed. Among the many instances of fraudulent concealment, the Complaint focuses on three principal examples.

2/ As evidenced by the limited contract documents provided the Court by TDI, the emergency diesels were supposed to have a normal continuous rating of 3500 KW. TDI Appdx. A-107.

First, TDI learned prior to delivery of the diesel generators to Shoreham that it had used erroneous data in designing the crankshafts. Complaint ¶ 27. Although TDI had designed and manufactured crankshafts 13" x 11" in diameter, Complaint ¶ 27, TDI became aware before shipping the diesels to Shoreham that application of correct data would have required larger crankshafts. Complaint ¶ 28. Indeed, before the emergency diesels were delivered to Shoreham, TDI had already changed its data for calculations to test the adequacy of crankshaft designs on other diesels it was manufacturing. Complaint ¶ 29. Prior to delivery of the emergency diesels to Shoreham, TDI had already altered the crankshaft design for comparable diesel generators to incorporate 13" x 12" crankshafts. Complaint ¶ 30. Despite this knowledge, TDI repeatedly assured LILCO that the Shoreham diesels met the requirements of the specifications and were suitable for their intended purposes. Complaint ¶ 31. TDI represented that the torsional stresses on the crankshafts complied with DEMA and the IEEE 387 standards, when they did not. Complaint ¶ 32. Knowing that these emergency diesels could fail if called upon, TDI even represented to Stone & Webster, LILCO's architect-engineer for Shoreham, that the torsional stresses on the crankshafts in the diesels complied with the American Bureau of Shipping (ABS) standards, though on February 2, 1976, ABS

advised TDI that the 13" x 11" crankshaft was inadequate. TDI never disclosed this communication. Complaint ¶ 33.

TDI continued its deception when it reported to LILCO that the diesels had successfully passed all of their qualification tests. Complaint ¶ 34. Further, on May 9, 1977, TDI certified that the diesels met the requirements of the contract and reaffirmed this certification on March 4, 1981. Complaint ¶ 35.

In sum, TDI used the wrong analysis to predict the stresses on the crankshaft; TDI discovered the proper analysis and discovered that the crankshafts in the Shoreham diesels were inadequate; TDI made those discoveries before delivery of the emergency diesels to Shoreham; yet TDI delivered the diesels to Shoreham without disclosing the flaws inherent in the engines. Despite the NRC's requirements imposed in 1978 that nuclear vendors disclose potential defects in their equipment, TDI remained silent until the inevitable crankshaft failures in August 1983. All of this happened despite TDI's continued dealings with LILCO to install, inspect, assist in testing and assist in other repairs of the emergency diesels. Complaint ¶ 55.

Second, during manufacture, cracks developed in the cam gallery area of the emergency diesels' blocks. Rather than document or disclose the cracks to LILCO, TDI welded over them.

Complaint ¶ 42. Both the contract and the NRC's regulations required that any repairs to the diesels be documented and disclosed to LILCO. Complaint ¶ 40. They were not. LILCO subsequently discovered the cam gallery area was cracked and that the blocks had been weld repaired. Complaint ¶ 39. Again, in response to LILCO's several inquiries about the cause of the cam gallery cracking, TDI repeatedly professed not to know of the cause and did not advise LILCO of the welds. Complaint ¶ 43.

Third, and equally blatant, TDI concealed knowledge of potential cracking in the top of the blocks of the diesel generators. The block of Emergency Diesel Generator 103 suffered severe cracking, at least partially as a result of excessive amounts of degenerate Widmanstaetten graphite, and ultimately had to be replaced. Complaint ¶¶ 44, 47. TDI knew that its castings might contain excessive amounts of degenerate Widmanstaetten graphite. Such degenerate material resulted from TDI's casting process and had been discovered by TDI in a number of its other engines. Complaint ¶ 45. Yet, TDI withheld this knowledge from LILCO.

These concealments and deliberate misrepresentations by TDI were not merely the result of negligence or oversight. Instead, TDI had a policy of withholding information from its nuclear customers because it feared litigation. TDI instructed

its employees not to advise its nuclear customers of failures or potential defects discovered in TDI engines in non-nuclear applications. Further, TDI intentionally withheld from its nuclear customers publications and other notices of potential defects sent to TDI's non-nuclear customers. Complaint ¶ 48.

As a result of TDI's deception, LILCO suffered substantial damages. Rather than discovering the defects at a time when they could be repaired well before completion of the plant and contested licensing proceedings, TDI's concealment and fraud postponed discovery of the defects until the emergency diesels failed in the public glare at a time critical to the licensing of Shoreham before the NRC and to the defense of the plant's costs before the PSC. Consequently, LILCO had to repair and retest the emergency diesels and relicense them before a highly skeptical NRC and in the face of relentless attacks by Shoreham's licensing opponents; LILCO had to purchase and test alternative emergency power sources for both low and full power; LILCO had to defend protracted proceedings before the New York PSC; and LILCO bore significant other burdens. See Complaint ¶ 25.

On the basis of these facts, the Complaint makes the following claims:

Count One: TDI negligently, grossly negligently, recklessly and wilfully and wantonly failed to warn of the emergency diesels' defects;

Count Two: TDI negligently failed to perform contractually required services by failing to advise LILCO of the defects after TDI's testing and while TDI had continuing responsibility for inspecting and advising concerning start-up and installation;

Count Three: TDI fraudulently misrepresented and concealed information concerning the emergency diesels;

Count Four: TDI's repetitive fraud on LILCO and others in the nuclear industry violated RICO;

Count Five: TDI breached its contract;

Count Six: TDI breached its express warranty of design, workmanship and suitability for the intended use as standby emergency power in a nuclear power plant;

Count Seven: TDI breached its promise to repair or replace the defective emergency diesels as contained in its express warranty of design, workmanship and suitability;

Count Eight: TDI breached its express performance warranty;

Count Nine: TDI breached its promise to repair or replace contained in its express performance warranty;

Count Ten: TDI is strictly liable for the emergency diesels' defects; and

Count Eleven: TDI negligently and grossly negligently designed, manufactured, inspected and tested the emergency diesels.

B. Additional Facts

1. Contract Terms Not Disclosed By TDI

Though TDI's Appendix A purports to contain "Relevant Contact [sic] Documents," it does not. Instead, TDI has selectively produced and argued about only its unsupplemented initial proposal and the purchase order. See TDI Br. at 10-11. As alleged in Complaint ¶ 9 and shown by the Purchase Order included in TDI's limited Appendix A (A-107), the LILCO-TDI contract included the Invitation to Bid, Specification SH1-89, TDI's proposal dated January 25, 1974, supplemental letters dated February 11, 1974, February 13, 1974, February 25, 1974, March 5, 1974, and March 8, 1974 and telexes dated March 13 and April 4, 1974. If the Court considers matters beyond the Complaint, the neglected documents are crucial for they supply warranties of future performance and promises to remedy that are ignored by TDI's statute of limitations and consequential damages arguments.

In contrast to the warranty provisions discussed by TDI, Specification SHI-89, and ultimately the contract, contained the following pertinent provisions:

WARRANTY

* * *

Warranty must extend at least one year after commercial operation of the unit.

Warranties extending longer than this one year are encouraged and will be taken into account in the bid evaluation.

Design, Workmanship And Materials

Warranty

The Seller warrants that the equipment and all parts thereof shall be free from defects in design, workmanship and material and shall be suitable for their intended purpose.

Remedy

Should any failure to fulfill this warranty appear within one year after demonstration of warranted performance in place, Seller shall, upon written notice by the Purchaser of a defect, repair or replace the defective work. The decision as to whether to repair or replace the defective work shall be made by Seller.

This warranty shall be extended for one year from completion of original repair or reinstallation of those components actually repaired or replaced.

Performance

Warranty

After all required tests have been made, the Seller shall warrant that the equipment will achieve the warranted performance stated in the specification

> when operating at the design conditions listed in the specification. The Purchaser, at his option, may conduct tests to be witnessed by the Seller to prove compliance with the guarantee. In the event of failure to meet any guaranteed performance, the cost of the test shall be borne by the Seller.
>
> Remedy
>
> In the event that the equipment fails to achieve the warranted performance in place, then, to the extent that the deficiency or failure to achieve the warranted performance is attributable to equipment supplied by Seller, Seller shall make such adjustments or modifications to enable the equipment to achieve the warranted performance. The cost of these adjustments or modifications shall be for the Seller's account. After such adjustments or modifications, should the equipment fail to achieve warranted performance, an equitable settlement shall be made, which may without limitation include an adjustment of the purchase order price.

Specification, pp. 5-6, LILCO Appdx. G-10-11.

Since the warranty proposed by TDI was more limited in scope and time than that required by Specification SH1-89, TDI and LILCO had a series of communications about the warranty. In a March 5, 1974 letter, TDI ultimately agreed to "comply with extended warranty at no additional cost." LILCO Appdx. G-217. TDI again confirmed its agreement in a meeting held the next day with representatives of Stone & Webster. As reflected by TDI's own minutes of the meeting:

1. Warranty Extension - DELAVAL agreed to comply with warranty requirement of the spec provided our storage requirements were met and the units were inspected by our service personnel prior to start-up. This was agreeable to Stone & Webster.

March 8, 1974 letter from TDI to LILCO with attachments, LILCO Appdx. G-226.

TDI's agreement to the extended warranty was also partially reflected in the purchase order which, in addition to incorporating the specification's terms, provided as follows:

> The Seller warrants that the equipment and all parts thereof shall be free from defects in design, workmanship and materials and performance within one year from the date of initial operation of the plant (which date shall be mutually agreed upon by the parties in writing) provided Seller's storage requirements are met by LILCO and the units are inspected by Seller's service personnel prior to start up. This warranty inspection service will be provided by Seller at no additional cost to LILCO.

TDI Appdx. A-110.

Subsequent internal memos confirm TDI's understanding of the scope of its undertaking. A June 18, 1974 TDI memorandum states that "[t]he date of operation is considered the date which the Nuclear Plant goes on stream." LILCO Appdx. G-233. And a June 25, 1974 TDI memorandum states that "we have accepted the Warranty for a period of one year after the plant goes into operation." LILCO Appdx. G-234. As TDI argues vigorously, the plant has not yet achieved commercial operation. Accordingly, TDI's warranties remain in effect.

2. Additional Evidence Of Fraud

Even without the benefit of discovery, LILCO has uncovered much evidence of TDI's fraud. Because TDI has gone outside the pleadings and mischaracterized this as nothing more than a common contract dispute, LILCO describes below some of this additional evidence of TDI's intentional and reckless tortious activity.3/

TDI knew that its calculations to predict the torsional stresses in the crankshafts were flawed. Museler Aff. ¶ 11. TDI knew of its defective engineering analyses at least as early as 1975, before the emergency diesels were delivered to Shoreham. In fact, TDI's torsional vibration expert learned in 1975 that the stress levels on the crankshafts were so high as to render the crankshafts inadequate. King Aff. ¶ 7. TDI's vibration expert expressed this concern to TDI's manager of engineering and TDI's general manager and urged that the emergency diesels not be shipped until larger crankshafts were installed. King Aff. ¶ 8. His concerns were rebuffed and TDI shipped the engines knowing they were defective. Yet, TDI never advised LILCO of the defect. Instead, TDI later certified that the diesels had successfully

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3/ Filed with this response are affidavits of William J. Museler, formerly LILCO's Director of the Office of Nuclear; Geoffrey D. King, formerly a TDI service engineer, head of TDI's Service Department, and TDI's Manager of Product Engineering; and Marsha L. Lyons, formerly a TDI quality assurance technician and a quality analyst.

passed all qualification tests, including a torsiograph test, and that the emergency diesels met all contract specifications. Museler Aff. ¶ 15. Further, TDI never told LILCO that ABS had advised that the 13" x 11" crankshaft was inadequate, that TDI had changed its data inputs for later torsional analyses of the same model engine or that TDI had begun using a larger crankshaft in all post-Shoreham diesels of the same model. Museler Aff. ¶¶ 18, 20.

TDI had repeated opportunitites to disclose the defects prior to 1983 during its continuous dealings with LILCO. Those dealings included provision of storage requirements for the emergency diesels, complete inspection of the emergency diesels prior to start-up and repeated efforts -- at LILCO's expense -- to remedy numerous other defects in the emergency diesels which had arisen prior to August, 1983 when the crankshaft failure suddenly occurred. In fact, TDI representatives were present at Shorenam for years and played an active role in installation and testing of the emergency diesels. Museler Aff. ¶ 25. LILCO did not learn of the change in TDI's design analysis until late 1983 when its engineering consultants noticed a discrepancy between the data inputs used in TDI's 1975 torsional analysis and those used in analyzing the 1983 replacement crankshafts. Museler Aff. ¶ 27. Even after the crankshaft failures in August, 1983, TDI deceived LILCO about the reason. King Aff. ¶ 10. Not until

a December 1983 response to an NRC inquiry did TDI admit that it had changed its data inputs twice before the emergency diesels were shipped to Shoreham. Museler Aff. ¶ 26.

TDI similarly withheld information about cracking in the blocks. It covered shrinkage cracks in the cam gallery area by weld repairs and epoxy paint making the cracks and repairs undetectable by the naked eye. Museler Aff. ¶ 31. TDI not only failed to disclose these cracks and repairs, but it advised LILCO in 1983 that there had been no such repairs. Id.

LILCO ultimately had to replace one of the blocks because of severe cracking resulting from the presence of Widmanstaetten graphite. Museler Aff. ¶ 32. When LILCO questioned TDI representatives about TDI's knowledge of and experience with block cracking, TDI falsely responded that it knew nothing about those types of cracks and had not seen them before. Museler Aff. ¶ 33. This lack of information caused LILCO to spend large amounts to discover the cause of the cracking. Id. Yet, TDI was aware of the presence of Widmanstaetten graphite in its castings at least as early as 1979. King Aff. ¶ 4. A January 29, 1979 letter from Professor John Wallace of Case Western Reserve University advised TDI that its use of unstripped automobile engines could lead to casting problems resulting in the presence of the Widmanstaetten Graphite. King Aff. ¶ 4. Wallace's study had, in fact, resulted from TDI's experience with

cracking in blocks and other heavy castings. Id. None of this was ever disclosed to LILCO.

TDI's fraudulent concealment was not limited to LILCO. TDI pursued a course of systematically concealing important information from its nuclear customers. It maintained two lists of product improvements and two sets of service information memoranda. King Aff. ¶ 5. The complete list was given only to non-nuclear customers. Id. TDI's nuclear customers were provided only incomplete versions because TDI was fearful that knowledge of additional problems might cause TDI financial and regulatory trouble. Id. Additionally, TDI's Quality Assurance Manager would allow parts to be shipped knowing that they had not been inspected or did not meet specifications. Lyons Aff. ¶ 4. Quality assurance and quality control documents were even blindly stamped though no inspections of the components had occurred. Lyons ¶ 5.

ARGUMENT

TDI summarily raises numerous arguments, but fails to cite many applicable cases or mention governing principles at odds with its superficial assertions. Because the sufficiency of LILCO's allegations are apparent from the Complaint, LILCO does not attempt to recast TDI's motion by affirmatively demonstrating that each element of each cause of action is properly pleaded.

Instead, LILCO responds point-by-point in the order employed by TDI.4/

I. LILCO'S LIMITED DELAY CLAIM IS NOT BARRED BY ITS UNSUCCESSFULLY ASSERTED POSITION ON A DIFFERENT ISSUE IN THE PSC'S RATEMAKING PROCEEDINGS

A. LILCO's Delay Claim Differs From The Issue Before The PSC

Among its damages, LILCO seeks the "increased costs and expenses to construct and operate Shoreham caused by the delays resulting from the defects in the Diesel Generators." Complaint ¶ 25(e). TDI spends almost one-third of its brief arguing that LILCO's statements during the PSC proceeding preclude LILCO from requesting any delay damages in this action. Yet, TDI has ignored basic distinctions between the type of expenditures at issue before the PSC and those alleged in this action.

In the PSC proceeding LILCO sought to include in its rate base all AFUDC (Allowance for Funds Used During Construction) accrued on its investment in Shoreham plant.5/ AFUDC continues

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4/ TDI bears the heavy burden of convincing the Court that there is no conceivable way for LILCO to recover in this action. See Conley v. Gibson, 355 U.S. 41, 45-6 (1957). It is surprising, therefore, that TDI has chosen the path of superficial argument. If TDI has intentionally awaited its rebuttal opportunity to present its primary arguments or raise new matters, LILCO requests the opportunity to respond again.

5/ AFUDC is a form of non-cash earning that a utility accrues on its books during construction of a generating plant. Defined simply, AFUDC represents interest on the money a utility invests in a plant. Through AFUDC, a utility is able to protect the time value of the money invested in the plant.

to accrue on the investment in a plant until the plant goes into commercial operation (usually at or near full power). Once commercial operation occurs, the direct investment in the plant plus the accrued AFUDC become the "booked cost" of the plant, from which customer rates are derived. Commercial operation is, therefore, the event that determines the total cost of the plant for rate base purposes. The PSC Staff and various intervenors alleged that all AFUDC accrued after April 1, 1984 should be excluded from LILCO's rate base. They contended that Shoreham would have achieved commercial operation by April 1984 had the diesel generators not failed. LILCO responded that the failure of the diesel generators had not delayed commercial operation at all because LILCO did not yet have an NRC-approved offsite emergency plan as required by 10 CFR § 50.47 due to the refusal of state and local governments to cooperate in developing such a plan.

In contrast, the damages sought in this action do not relate to delay of Shoreham's commercial operation. Paragraph 25(e) of the Complaint includes damages caused by delay in aspects of the plant other than commercial operation. For example, low power testing of Shoreham was unquestionably delayed by unavailability of the TDI emergency diesel generators. See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 634 (1983) (Shoreham ready for

low power testing except for questions about reliability of emergency diesel generators); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343, 1348-51 (1984).6/ Additional construction and operating costs pertinent to delay of low power operation will include, among other things, the costs of technical advisors and consultants who remained at LILCO longer than otherwise would have been necessary if the TDI diesels, as supplied, had been licensable, and construction costs incurred to install additional backup power equipment to replace the TDI emergency diesels during low power testing.

These costs did not result from any delay of commercial operation incurred to date, but from the delay in getting the emergency diesels licensed. Yet, delay of commercial operation was the issue before the PSC. Long Island Lighting Co. (Phase II Proceeding), Case 27563, Opinion and Order Determining Prudent Costs, No. 85-23, slip op. (New York Public Service Commission, December 16, 1985) (PSC Opinion). Statements made by LILCO before the PSC referred only to the delay of commercial operation. As the PSC recognized:

6/ NRC regulations permit the licensing of a nuclear plant for low power testing at up to 5% of rated power without an approved offsite emergency plan. 10 CFR §§ 50.47(d), 50.57(c).

> According to the company, the plant's commercial operation date has been postponed not because of the diesel failure, but due to a lack of an acceptable emergency evacuation plan.

PSC Opinion at 123 (emphasis added). Virtually every statement quoted by TDI recognizes this distinction by referring expressly to delay of commercial operation. TDI Br. at 17-19.

There is simply nothing in the record to support TDI's unwarranted assumption that LILCO here seeks damages it repudiated in a prior proceeding. Accordingly, TDI's exegesis on judicial estoppel is nothing but an attempt to divert the Court's attention from TDI's serious misdeeds. Nevertheless, because TDI's judicial estoppel argument typifies its disregard and misuse of applicable authority, LILCO briefly responds to TDI's legal argument.

B. Judicial Estoppel Does Not Preclude LILCO From Claiming Delay Damages

"[F]ederal law controls the application of judicial estoppel since it relates to protection of the integrity of the federal judicial process."7/ Allen v. Zurich Insurance Co.,

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7/ Thus, TDI's citation of New York cases in support of its judicial estoppel argument is erroneous. Even so, the doctrine of judicial estoppel as applied by the New York state courts includes as essential elements mutuality of parties, success in asserting the prior position and detrimental reliance, none of which are satisfied by TDI's argument. See Environmental Concern, Inc. v. Larchwood Constr. Co., 101

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667 F.2d 1162, 1167 n.4 (4th Cir. 1982); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 4477 at 787 (1981). Those federal courts recognizing the doctrine of judicial estoppel insist that it is inapplicable unless the two positions under consideration are unequivocally inconsistent. E.g., Sperling v. United States, 692 F.2d 223 (2d Cir. 1982) (Van Graafeiland, J., concurring), cert. denied, 462 U.S. 1131 (1983); Allen v. Zurich Insurance Co., 667 F.2d at 1166-67. Yet, LILCO's position in this action with regard to delay damages is totally consistent with its position previously taken in the PSC proceeding. As explained above, the damages LILCO seeks here are unrelated to commercial operation which was the issue in the PSC case.

But even assuming arguendo that LILCO's previous position before the PSC was inconsistent with its claim here, LILCO's claim still would not be barred by judicial estoppel. The doctrine, which has never been definitively recognized in the Second Circuit,8/ requires successful prosecution of the

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A.D.2d 591, 476 N.Y.S.2d 175 (2d Dept. 1984) (success in maintaining prior position required); Chemical Bank v. Aetna Ins. Co., 99 Misc.2d. 803, 417 N.Y.S.2d 382 (1979) (mutuality of parties and detrimental reliance required).

8/ TDI fails to advise the Court that the Second Circuit has avoided recognizing the doctrine of judicial estoppel. See

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position in the previous proceeding.9/ To date, LILCO has not

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Waterside Ocean Navigation Co. v. International Navigation Ltd., 737 F.2d 150 (2d Cir. 1984); United States v. Bedford Assoc., 713 F.2d 895 (2d Cir. 1983). Only Judge Van Graafeiland's concurring opinion in Sperling v. United States recognizes and applies the doctrine to preclude the appellant from asserting a position inconsistent with that successfully argued before the same court in an earlier proceeding. 692 F.2d at 227-29. This Court in Universal City Studios, Inc. v. Nintendo Co., 578 F. Supp. 911 (S.D.N.Y.), aff'd, 746 F.2d 112 (2d Cir. 1983), observed that "[t]here is considerable uncertainty as to the source and strength of the doctrine" of judicial estoppel. Id. at 921 n.3.

9/ This Court recognized the "success requirement" in Universal City Studios, Inc. v. Nintendo Co.:

> Leaving aside the question of the vitality of this doctrine in this Circuit or elsewhere, the doctrine would not apply here in any case because the courts that have applied the doctrine have required that "success in the prior proceeding is clearly an essential element of judicial estoppel . . ."

578 F. Supp. at 920-921 (footnote omitted) (quoting Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C. Cir. 1980)). Again, TDI does not mention the "success" criterion, though one of the two New York federal cases it cites clearly enunciates the requirement. Roth v. McAllister Bros., 316 F.2d 143, 145 (2d Cir. 1963) (a party "having succeeded in maintaining that position" in a prior proceeding may not thereafter assume a contrary position).

The Roth court actually applied collateral estoppel, but did discuss the related doctrine of judicial estoppel. Similarly, in Ronson Corp. v. Liquifin Aktiengesellschaft Liquigas, S.p.A., 375 F. Supp. 628 (S.D.N.Y. 1974), appeal dismissed, 508 F.2d 399 (2d Cir. 1974), the other New York federal case cited by TDI, it is difficult to determine whether the holding is based on collateral estoppel or estoppel against

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enjoyed such success in the highly politicized PSC proceeding.

Finally, judicial estoppel does not apply where the prior proceeding is neither judicial nor quasi-judicial in nature. Contrary to TDI's assertion, Edwards v. Aetna Life Insurance Co., 690 F.2d 595 (6th Cir. 1982) does not hold that judicial estoppel applies where the prior position was asserted in an administrative proceeding. The court expressly declined to make such a holding. Id. at 598 n.3. Actually, the Edwards court refused to apply judicial estoppel because the Veteran's Administration's award of benefits resulted from an administrative settlement, not a judicial or quasi-judicial acceptance of plaintiff's original position. Similarly, the PSC proceeding was neither judicial nor quasi-judicial in nature.10/ Therefore, judicial estoppel would not preclude

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inconsistent positions. Both opinions predate the cases questioning the validity of the doctrine of judicial estoppel in the Second Circuit.

TDI relies principally on Southern Cal. Edison Co. v. Westinghouse Elec. Corp., No. CV-83-1985/6, slip op. (C.D. Cal. July 17, 1984), where the district court refused to follow the Ninth Circuit's direction in Arizona v. Shamrock Foods Co., 729 F.2d 1208 (9th Cir. 1984), cert. denied, 105 S.Ct. 980 (1985). The Ninth Circuit, in discussing requirements for applying judicial estoppel in Arizona, listed the success requirement. Id. at 1215.

10/ The PSC was engaged in the process of ratemaking. Ratemaking is a legislative function of the PSC. Consumer Protection Bd. v. Public Service Comm'n, 97 A.D.2d 320, 471 N.Y.S.2d 332 (3d Dept. 1983). See Section II.A below.

LILCO from asserting positions inconsistent with those asserted before the PSC.

C. LILCO's PSC Testimony Is Not Conclusive On The Issue Of Delay Damages

TDI argues that "[e]ven if LILCO were not precluded by the doctrine of judicial estoppel from asserting that Delaval is liable for delay damages, LILCO's admissions are conclusive on this issue." TDI Br. at 24. As discussed above, LILCO's delay claim here is different from the issue before the PSC. There is nothing in the record to suggest (1) that LILCO's delay claim in this action pertains to Shoreham's commercial operation, or (2) that LILCO has made admissions concerning any other delay-related damages.

D. The ASLB Findings Do Not Collaterally Estop LILCO's Delay Claim

As discussed above, the fact that Shoreham has not received a full power license because of emergency planning issues has nothing to do with delays claimed in this action. TDI surely cannot claim that the ubiquitous defects in the Shoreham diesels led to no delay of low power testing. See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 634 (1983).

II. LILCO'S CLAIMS ARE TIMELY

TDI next contends that LILCO's claims are untimely. TDI's various statute of limitations arguments suffer three general deficiencies, however. First, as throughout TDI's motion, the arguments are procedurally premature. Various dates on which TDI bases its argument do not appear in the Complaint and there is no competent affidavit supplying them. Thus, the issues simply cannot be decided pursuant to Rules 12(b)(6) or 56.

Second, TDI's intentional deceit as alleged in the Complaint estops TDI from pleading the statutes of limitations on all of LILCO's claims. See, e.g., Perry v. A. H. Robins Co., 560 F.Supp 834, 835-36 (N.D.N.Y. 1983); Jordan v. Ford Motor Co., 73 A.D.2d 422, 426 N.Y.S.2d 359, 360-61 (4th Dept. 1980). Given TDI's intentional conduct concealing the numerous breaches of contract and torts alleged in the Complaint, the statutes of limitations on all causes of action are tolled until a reasonable time after discovery. In short, courts will not let an intentionally deceitful defendant profit by its wrongdoing. Id. See also Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 232-34 (1959).

TDI acknowledges this principle, but seeks to avoid it by characterizing this case as a simple contract dispute. For the reasons discussed throughout this Response, TDI's

intentional, grossly negligent and reckless conduct concerning equipment vital to public safety constitutes far more than breach of contract. TDI's shocking conduct is not only an answer to its statute of limitations arguments, but also the basis for independent causes of action for fraud, RICO, failure to warn and others alleged in the Complaint.

TDI also seeks to escape by arguing that LILCO is precluded by the PSC's findings from arguing that it did not know of the defects. As discussed in Section IIA below, collateral estoppel cannot apply here because (1) the PSC's proceedings were not judicial or quasi-judicial, and (2) there is no identity of issues. In fact, the PSC expressly indicated that its findings should have no preclusive effect in this action. PSC Opinion at 100-101. Consequently, TDI's wrongdoing should estop it from reliance on the statute of limitations on all claims in the Complaint.11/

11/ To summarize, LILCO did not learn of the crankshaft failure until August 1983. Complaint ¶ 23. Obviously, sometime thereafter LILCO learned of the reason for the failure. The nature of block problems was not discovered until 1984. Museler Aff. ¶ 31. LILCO acted promptly after the crankshaft failures to inspect and analyze the emergency diesels and the numerous failures. It then negotiated a standstill agreement with TDI running from July 1, 1984 through June 30, 1985. Museler Aff. ¶46. Within a reasonable time, LILCO filed this action on August 30, 1985. To the extent TDI would argue otherwise, a factual question is presented which must await discovery and submission of a proper record.

Finally, LILCO does not rely solely on equitable estoppel to prohibit TDI from pleading the statutes of limitations. Each of the challenged claims independently is timely for the reasons discussed in Sections IIB through IIE below.

A. The PSC Decision Does Not Preclude Equitable Estoppel Of TDI From Reliance On Statutes Of Limitations

The PSC's purpose was generally to determine what amount of Shoreham's costs was prudently incurred by LILCO and, therefore, should be included in LILCO's rate base upon commercial operation. PSC Opinion at 1-2. With respect to the emergency diesels, the PSC investigated whether prudent management of the Shoreham project would have disclosed the faulty crankshaft design. PSC Opinion at 93. The PSC concluded that LILCO did not prudently manage the project because: (1) the TDI engines were an unproven commodity with no track record; (2) Stone & Webster and LILCO failed to monitor carefully and supervise TDI's testing of the diesels before their purchase; and (3) neither LILCO nor Stone & Webster sufficiently monitored TDI to assure that the diesels complied with contract and NRC requirements. PSC Opinion at 92-93.

The PSC did not consider whether TDI committed fraud. Nor was there any finding that LILCO knew of any defects in the crankshafts at any time before their August 1983 failure. Instead, the PSC faulted LILCO for delegating too much responsiblity to its architect/engineer, Stone & Webster, and for failing to oversee Stone & Webster's work sufficiently. See PSC Opinion at 95. Thus, the PSC found that LILCO's stockholders should bear costs associated with the diesels instead of its ratepayers. It decided nothing about TDI's liability to LILCO.

TDI argues that it should not be estopped from reliance on statutes of limitations because the PSC found that Stone & Webster should have discovered the crankshaft design defect by mid-1977. TDI Br. at 29. In a non-sequitur, TDI contends that LILCO should therefore be precluded from asserting here that TDI fraudulently concealed defects in the blocks and other components, as well as the crankshafts, both before and after 1977, and that TDI induced LILCO to believe that the emergency diesels were not defective. See TDI Br. at 30. Although TDI terms the applicability of collateral estoppel "elementary," TDI is wrong. A review of New York law indicates that the application of collateral estoppel here would be improper and contrary to express precedent.12/

12/ A federal court must apply state law in determining the collateral estoppel effect of state court or agency decisions.

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1. The PSC's Legislative Proceedings Have No Preclusive Effect

Collateral estoppel applies in the administrative context only when, unlike here, the agency acts in its judicial or quasi-judicial capacity. The New York Court of Appeals has stated that collateral estoppel is only "applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies, when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law." Ryan v. New York Telephone Co., 62 N.Y.2d 494, 499, 478 N.Y.S.2d 823, 825-26, 467 N.E.2d 487 (1984) (citations omitted). See also United States v. Utah Construction & Mining Co., 384 U.S. 394, 420-22 (1966). The doctrine is inapplicable where an agency renders a determination pursuant to its legislative authority.

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28 U.S.C. § 1738 (1982). Kremer v. Chemical Constr., 456 U.S. 461, 466 (1982), reh'g denied, 458 U.S. 1133 (1982); Kent v. New York City Dept. of Sanitation, 549 F. Supp. 570, 572 (S.D.N.Y. 1982), aff'd, 722 F.2d 728 (2d Cir.1983), cert. denied, 464 U.S. 941 (1983). Thus, this Court must give preclusive effect to the PSC's decision only if the New York state courts would accord it preclusive effect. Ottley v. Sheepshead Nursing Home, 607 F. Supp. 952, 955 (S.D.N.Y. 1985).

TDI's collateral estoppel argument is neatly answered in Consumer Protection Board v. Public Service Commission, 97 A.D.2d 320, 471 N.Y.S.2d 332 (3d Dept. 1983). There the issue before the PSC was whether costs of a cancelled nuclear plant and other projects were prudently incurred and should be included in a utility's rate base. A prior PSC decision considered inclusion of AFUDC for the same projects in another utility's rate base. The New York court held that the prior decision was made pursuant to the PSC's legislative ratemaking function, rather than its judicial function. Thus the court refused to afford it or any of its supporting findings preclusive effect:

> While the doctrine of collateral estoppel has been held to apply to administrative agency determinations, it is only applicable where the agency is acting in a judicial or quasi-judicial capacity. The process of ratemaking has been held to be a legislative, rather than judicial, activity. Rochester [the utility] argues that, in the instant case, the PSC was not setting rates but was making a legal determination based upon a set of facts. However, even if Rochester is correct, there is no question that in Opinion No. 79-12 the PSC was doing nothing but setting Rochester's electric rates. Thus, that decision cannot be afforded collateral estoppel effect.

Id. at 335 (emphasis added) (citations omitted).[13/] See also In

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13/ TDI fails to mention this dispositive decision. Instead, it recites in a footnote a test under federal law for

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re New York Telephone Co. v. Public Service Commission, 64 A.D.2d 232, 410 N.Y.S.2d 124, 127 (3d Dept. 1978), mot. for lv. to app. den., 46 N.Y.2d 710, 414 N.Y.S.2d 1028, 387 N.E.2d 1221 (1979).

Similarly, the PSC proceeding involving LILCO was part of the ratemaking process. The express purpose of Phase II of the proceeding was to

> investigate the prudence of total Shoreham costs and determine whether and to what extent those costs should be recognized in rate base.

PSC Order of July 9, 1979. This inquiry was "a fundamental part of [the PSC's] responsibility to set just and reasonable rates." PSC Opinion at 4. Accordingly, the PSC's decision resulted from its legislative function and should not be afforded collateral estoppel effect.14/

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evaluating whether a federal administrative proceeding involved factfinding and procedural safeguards. TDI Br. at 31 n.16. TDI cites International Tel. and Tel. Corp. v. American Tel. and Tel. Co., 444 F. Supp. 1148 (S.D.N.Y. 1980). In assessing the applicability of collateral estoppel, this Court in ITT did not apply New York law. See id. at 1156. In addition, this Court refused to apply collateral estoppel to the findings of the Federal Communication Commission in a situation very similar to this case. This Court need not engage in such analysis, however, given the definitive holding in Consumer Protection Board.

14/ In fact, the PSC itself does not have to accord preclusive effect to its own prior decisions:

> An administrative agency concerned with

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2. Even If Judicial, The PSC Decision Did Not Determine Issues Dispositive Here

Collateral estoppel does not apply here for yet another reason: the PSC did not determine issues precluding the equitable estoppel of TDI from pleading the statute of limitations or otherwise precluding LILCO's claims. The proponent of preclusion must establish that the issue sought to be precluded is identical to the issue decided in the prior proceeding. Capital Telephone Co. v. Pattersonville Telephone Co., 56 N.Y.2d 11, 17-18, 451 N.Y.S.2d 11, 13-14, 436 N.E.2d 461 (1982). TDI cannot satisfy this burden.

The issues in this action differ in several respects from those in the PSC proceeding. The question before the PSC was whether diesel-related costs at Shoreham were prudently incurred. The PSC even recognized the dissimilarity of that inquiry from issues likely to be involved in any litigation between TDI and LILCO:

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> furtherance of the public interest is not bound to rigid adherence to precedent. It may switch rather than fight the lessons of experience.

In re American Cyanamid Co. v. Public Service Comm'n, 73 A.D.2d 985, 423 N.Y.S.2d 561, 563 (3d Dept. 1980) (quoting New Castle County Airport Comm. v. Civil Aeronautics Bd., 371 F.2d 733, 735 (D.C. Cir. 1966), cert. denied, 387 U.S. 930 (1967).

> A finding that LILCO was imprudent does not absolve either Stone & Webster or Delaval in other forums from responsibility for the 1983 diesel failure, because the issue in this proceeding is whether a flaw which constituted a design defect could have been discovered earlier if the procurement process had been managed responsibly. Our finding of imprudence based on the record in this case would not preclude a court from determining that Delaval and Stone & Webster failed to meet their legal obligations to LILCO.

PSC Opinion at 100-101.

In disallowing certain diesel-related costs from LILCO's rate base, the PSC found that Stone & Webster should have discovered that the crankshafts at Shoreham were undersized because of information it received while consulting at Gulf States Utilities' River Bend project, after the Shoreham emergency diesels had been delivered. PSC Opinion at 94; Recommended Decision at 121-22. Thus the PSC was persuaded that Stone & Webster gained constructive knowledge, while employed by another utility, that TDI had effected a crankshaft design change on other engines. For purposes of prudence analysis, the PSC held LILCO responsible for overseeing Stone & Webster's efforts and, accordingly, charged LILCO with Stone & Webster's knowledge from all sources. Whatever the effect of Stone & Webster's purported knowledge for prudence purposes, the fact that Stone & Webster later gained such knowledge at the River Bend project would be irrelevant in this action

unless TDI proves that Stone & Webster actually conveyed that knowledge to LILCO. Knowledge gained by Stone & Webster outside the scope of its agency with LILCO cannot be imputed to LILCO. See Farr v. Newman, 14 N.Y.2d 183, 250 N.Y.S.2d 272, 199 N.E.2d 369 (1964); Benjamin Center v. Hampton Affiliates, Inc., No. 381, slip op. at 2 (N.Y.Ct.App. Oct. 22, 1985).

Additionally, the PSC found that LILCO should have asked more questions and overseen Stone & Webster's work in greater detail and that Stone & Webster should have discovered the design error. PSC Opinion at 92-101. LILCO's culpability, according to the PSC, was its failure to manage the project prudently. There was no finding that LILCO had available to it information indicating the existence of a design defect. In short, as between LILCO and the ratepayers, the PSC found that LILCO's imprudent management should cause LILCO to bear the costs. The PSC made no finding that LILCO was negligent with respect to any duty owed TDI, or that TDI should escape responsibility for its wrongs.

Yet, even such negligence would not be a defense to TDI's fraud in this case. One guilty of fraud cannot claim his victim's negligence as a defense. Indeed, a defrauded party owes his defrauder no duty of due care to discover the fraud. Corva v. United States Automobile Association, 108 A.D.2d 631, 485 N.Y.S.2d 264, 266 (1st Dept. 1985) (unreasonable reliance

is not equivalent to contributory negligence); Angerosa v. White Co., 248 A.D. 425, 290 N.Y.S. 204, 211 (4th Dept. 1936), aff'd 275 N.Y. 524, 11 N.E.2d 325 (1937) ("contributory negligence is not a defense to an action in fraud. There is no comparison between negligence and willful misconduct."). Since the PSC made no finding of any actual knowledge by LILCO, even a finding of negligence would not bar LILCO's fraud claim.

Similarly, even a finding of negligence by LILCO would not bar application of equitable estoppel where TDI's conduct induced the negligence. The PSC refused to consider the effect of TDI's misrepresentations and concealments:

> LILCO also claims that the design error was solely the fault of Delaval, which knowingly misrepresented that there was no torsional stress problem. However, as noted, LILCO had the responsiblity as owner and licensee to ensure that the emergency diesel generators met Shoreham's performance specifications and satisfied NRC requirements.
>
> . . .
>
> Thus, because LILCO failed to monitor Stone & Webster or to learn about or to assume that the diesel stress problem was resolved, any concealment of that problem by Delaval would not absolve LILCO of its responsibility to the ratepayers in this matter.

PSC Opinion at 95-96. To allow TDI to profit by its fraudulent conduct because of the PSC's findings which refused to consider that conduct would defeat the very purpose of the doctrine of equitable estoppel.

Further, there were no PSC findings about TDI's later misrepresentations and concealments that induced LILCO, after Stone & Webster's supposed knowledge in 1977, to believe there were no defects in the Shoreham crankshafts. For example, TDI recertified the emergency diesels' compliance with all applicable requirements in 1981. Complaint ¶ 35. TDI also performed various inspections and other services in connection with installation and start-up, Complaint ¶¶ 8, 55, yet remained conspicuously silent about defects which doomed the emergency diesels to certain failure. Thus, even if Stone & Webster or LILCO had known of the crankshaft design error in 1977, TDI's subsequent inducement to ignore such purported knowledge would equitably estop it from pleading the statutes of limitations.

Finally, at most the PSC's findings pertained to crankshaft design. LILCO's claims here are not so limited. As alleged in the Complaint, TDI's fraud extended to numerous types of extensive block cracking as well as the concealment of other defects.

In sum, there is no identity of issues precluding LILCO's claim that TDI is equitably estopped from pleading the statutes of limitation.15/ As detailed in the following

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15/ TDI argues that LILCO was aware of the preclusive effect of PSC determinations because "in its Brief on Exceptions in

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sections, even absent equitable estoppel, LILCO's claims are timely.

B. LILCO's Contract And Breach Of Warranty Claims Are Timely

Count Five alleges TDI's breach of contract; Counts Six and Eight allege breaches of express warranties; and Counts Seven and Nine allege breaches of TDI's promises to repair or replace the defective emergency diesels. Neglecting key contract documents and the allegations of the Complaint, TDI asserts that the Uniform Commercial Code's four-year limitations period bars each of these claims.

As encouraged by Federal Rule of Civil Procedure 8, LILCO's contract and warranty claims concisely allege the existence of the contract and relevant warranties and the dates of the emergency diesels' multiple failures. TDI, however, relies on counsel's improper affiance of a 1976 delivery date

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Shoreham PSC proceedings, LILCO requested that the PSC make no findings at that time with regard to the diesel generators, because LILCO would be bound by those findings in a later proceeding between LILCO and Delaval." TDI Br. at 32. Overzealous in its advocacy, TDI has misquoted LILCO. LILCO had requested that the Commission refrain from ruling on the diesel issues until after conclusion of litigation by LILCO against TDI because findings of the Commission "based on an incomplete record and erroneous assumptions concerning S&W ability to detect the design defect might have an adverse impact on the interests of LILCO and hence, its ratepayers in the lawsuit." Brief on Exceptions of the Long Island Lighting Company at 134-35 (emphasis added); see LILCO Appdx. I.

for the emergency diesels,16/ and argues that LILCO's claims were barred in 1980. TDI's motion to dismiss Counts Five through Nine should be denied as premature and improper in its reliance on matters outside the Complaint. Nevertheless, there are at least three additional reasons why these causes of action did not accrue in 1976 and why the counts are, therefore, timely.

1. TDI's Warranties Of Future Performance Were Not Breached Until The Diesels Failed

Even if delivery occurred in 1976, LILCO's claims are not barred because the emergency diesels were protected by warranties of future performance. Section 2-725(2) of the New York Uniform Commercial Code provides in pertinent part that

> [a] breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

N.Y.U.C.C. § 2-725(2) (McKinney 1964). By omitting the parties' agreement to an extended warranty, TDI disingenuously asserts that there is no warranty of future performance. TDI Br. at 34 n.19.

16/ Millstein's Affidavit demonstrates no personal knowledge of the delivery date.

Both the Complaint and the additional contract documents demonstrate that TDI's warranties explicitly extend to future performance. There can be no question that the express warranties alleged in Counts Six and Eight of the Complaint "extend at least one year after commercial operation" of the plant. LILCO Appdx. G-10. See also TDI Appdx. A-110, LILCO Appdx. G-233, -234.17/ If the parties intended the applicable limitation period on any warranty claim to begin with the tender of delivery, there would have been no need for an extension of the warranty until one year after commercial operation of the plant. To the contrary, unless this constitutes a warranty of future performance, the language is superfluous.18/

17/ TDI acknowledges an extension of the warranty in a footnote, but attaches no importance to it. TDI Br. at 10 n.7. In fact, TDI misleadingly says that the warranty was extended "to a date to be mutually agreed upon" by the parties. Id. TDI does not mention that the date to be agreed upon was the date of commercial operation and that the warranty extends one year past that date.

18/ In addition to the extended warranties, TDI also promised certain non-exclusive remedies with their own time limitations. Each of the warranties in Counts Six and Eight separately specifies a remedy and each remedial provision warranty has its own independent time limit. See Section II.B.3 below. For example, the remedy specified after the warranty of design, workmanship and materials provides that TDI shall repair or replace a defect occurring within one year after demonstration of warranted performance in place. TDI's replacement or repair obligation is pegged to operation of the diesels; its general warranty obligation is pegged to the plant's commercial operation.

In addition to the explicit contract language that extends the warranty to future performance, the nature of the transaction itself creates a warranty of future performance. New York courts have often recognized that the nature of the product can imply performance over an extended period of time. For example, in Mittasch v. Seal Lock Burial Vault, Inc., 42 A.D.2d 573, 344 N.Y.S.2d 101 (2d Dept. 1973), a burial vault was warranted to give satisfactory services at all times. When it was later discovered to have leaked water and become vermin infested, the court recognized that a warranty of future performance was created both by the contract language and the nature of the product.19/ Similarly, TDI sold diesels for use in emergencies over the life of a nuclear power plant. Complaint ¶¶ 6,10,11. TDI was told that the diesels would be used sparingly, but that extreme reliability was a paramount concern. Complaint ¶ 11. Future performance was, therefore, the essence of the contract.

Again, in Rochester Welding Supply Corp. v. Burroughs Corp., 78 A.D.2d 983, 433 N.Y.S.2d 888 (4th Dept. 1980), purchase of a computer was subject to final approval of program documentation. When the computer was delivered, it was not

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19/ See also Parzek v. New England Log Homes, Inc., 92 A.D.2d 954, 460 N.Y.S.2d 698 (3d Dept. 1983) (warranty that logs in wood home were treated to protect against insect infestation contemplated future performance by very nature of threat).

operational. Ultimately, it could not be programmed, but more than four years elapsed between the initial delivery and filing suit. The contract warranty of successful programming was a warranty of future performance whose breach could not have been discovered upon delivery of the computers. Thus, the cause of action accrued upon discovery that programming was impossible.

Similarly, the LILCO-TDI contract contemplated performance at a future time and discovery of the breach had to await such future performance. The parties knew the diesels would be stored after delivery for some time prior to start-up. LILCO Appdx. G-226, -233. Storage pursuant to TDI's instruction was a condition precedent to the warranties, as was TDI's pre-start-up inspection. TDI Appdx. A-110. Like the defective computers in Rochester Welding, the defects in the emergency diesels could not have been discovered until the diesels were operated, well after initial delivery. See also Wiltshire v. A.H. Robins Co., 88 A.D.2d 1097, 453 N.Y.S.2d 72, 74 (3d Dept. 1982) (warranty of future performance arises when breach cannot necessarily be ascertained upon tender and delivery of the device).

Given these warranties of future performance, the limitations period commenced when the defects were discovered or should have been discovered. Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d 737, 743 n.11 (2d Cir. 1979), aff'd

after remand, 651 F.2d 132 (2d Cir. 1981); Gemini Typographers, Inc. v. Mergenthaler Linotype Co., 48 A.D.2d 637, 368 N.Y.S.2d 210, 211-12 (1st Dept. 1975). The crankshaft failures did not occur and, hence, were not discovered until August 1983. Complaint ¶ 23. Other failures were not discovered until even later. Id. The four-year limitations period, therefore, did not begin to run until August 1983 and these counts are timely.

2. There Was No Tender Of Delivery Until The Emergency Diesels Were Installed And Tested

Even absent a warranty of future performance, the four-year limitations period did not expire. Under the UCC, a cause of action accrues upon tender of delivery. N.Y.U.C.C. § 2-725(2) (McKinney 1964). The Complaint does not allege when tender of delivery occurred. It does, however, allege that installation occurred under TDI's supervision and that TDI had responsibilities with respect to start-up and testing of the diesels. Complaint ¶ 55. If, over LILCO's objection, the Court considers matters beyond the Complaint, additional facts also show that tender of delivery did not occur until installation and testing.

Tender of delivery occurs when the seller puts conforming goods at the buyer's disposition. N.Y.U.C.C. § 2-503(1) (McKinney 1964). Here TDI retained substantial responsibility for the diesels beyond their initial physical delivery to

Shoreham. As seen from the purchase order included with TDI's filing, TDI agreed to provide storage requirements for the diesels and was to inspect the diesels prior to start-up. TDI Appendix A-110. In fact, commencement of the warranties was contingent upon proper storage and the pre-start-up inspection. Thus, for purposes of interpreting the warranties, TDI cannot be said to have relinquished the diesels to LILCO until it conducted the inspection. That was in 1981. Museler Aff. ¶ 44. Since the warranties did not take effect before this inspection, it would be impossible for a cause of action for breach of these warranties to have accrued previously. Moreover, TDI had a duty to furnish information and advise LILCO "in attaining a properly installed, commissioned and tested installation." Specification SHI-89, lines 2393-2395, LILCO Appdx. G-52.

Mere physical delivery often does not constitute tender of delivery. For example, in City of New York v. Pullman Inc., 662 F.2d 910, 918-19 (2d Cir. 1981), cert. denied, 454 U.S. 1164 (1982), ten subway cars out of 754 were delivered for on-line testing in advance of the remainder of the order. That delivery was held not to constitute tender of delivery triggering the limitations period. The court observed that the parties contemplated on-line inspection and testing of the cars and there could be no tender of conforming goods before such inspection and testing. Likewise, LILCO and TDI contemplated the storage, TDI's

later inspection, and TDI's participation in the testing of the emergency diesels. Until TDI's inspection occurred, the warranty did not commence. And, until installation, inspection and testing were complete, there was no tender of conforming goods. See also Unitron Graphics, Inc. v. Mergenthaler Linotype Co., 75 A.D.2d 783, 428 N.Y.S.2d 243, 244 (1st Dept. 1980). At the very least, a factual question exists as to when tender occurred.

3. Breach Of TDI's Promise To Repair Or Replace Did Not Occur Until TDI Repudiated

In addition to the breaches of warranty pleaded in Counts Six and Eight, LILCO has alleged that TDI repudiated and breached its express promises to remedy breaches of the two express warranties. Complaint ¶ 77. Separate remedial promises were made by TDI with respect to each warranty. Complaint ¶¶ 85, 94. The claims in Counts Seven and Nine are not for the breaches of warranty themselves, but for TDI's refusal to acknowledge and remedy them.

Breach of such a promise constitutes a separate cause of action. Even where the cause of action for breach of warranty may have expired, a cause of action for failure to comply with the promised remedy may continue to exist. See, e.g., Shapiro v. Long Island Lighting Co., 71 A.D.2d 671, 418 N.Y.S.2d 948 (2d Dept. 1979) (breach of warranty claim for defective water heater had expired, but plaintiff could still sue for failure to remedy

or replace as promised). See also Waters v. Massey-Ferguson, Inc., No. 84-1882, slip op. at 8 (4th Cir. Oct. 28, 1985) (failure to deliver conforming goods and failure to correct nonconformity as promised constitute two breaches of the contract). Accrual of such a cause of action does not occur until the failure to remedy. Here TDI's failure to remedy could not have occurred until after LILCO's discovery of the defects in 1983.

C. LILCO's Negligence And Strict Liability Claims Are Timely

1. Count Two Asserts A Claim For Negligent Failure To Perform Contractual Services

Contrary to TDI's contention, LILCO does not assert three essentially identical causes of action for negligence or strict liability. Count Two alleges that the emergency diesels ultimately failed when and as they did because of TDI's negligent performance of technical and engineering services in connection with the design, start-up and testing of the diesel generators. Complaint ¶ 55. TDI failed to advise of, warn about and assist LILCO to discover the defects which were or should have been known to TDI at the time.

Though these allegations are sufficient to withstand a Rule 12(b)(6) motion, TDI raises matters beyond the Complaint that indicate the nature and extent of TDI's undertakings. As discussed above, at a minimum, TDI had an obligation to provide a

"warranty inspection service" prior to start-up. TDI Appdx. A-110. Pursuant to Specification SH1-89, TDI had the duty (1) to design the diesels perform torsional analyses in the design of the crankshaft, perform qualification testing and report any repairs to LILCO, TDI Appdx. A-4, -5, LILCO Appdx G-1, -53 to -54 (incorporated through Purchase Order at TDI Appdx. A-107); (2) to submit welding procedures for approval, LILCO Appdx. G-15; (3) to furnish services of erection and start-up advisors, LILCO Appdx. G-52; (4) to "furnish all possible information and advice to assist the Purchaser and/or the engineers in attaining a properly installed, commissioned and tested installation," Specification SH1-89, lines 2393-2395, LILCO Appdx. G-52; and (5) to furnish quality assurance programs and equipment qualification information, Specification SH1-89,lines 2407, 2447, LILCO Appdx. G-52, -53. Moreover, the contract provided that "this application is not a standard unit and requires complete engineering." TDI Appdx. A-5. In short, TDI undertook to provide numerous services in design, testing, inspection and assisting with the installation and testing of the diesels. Count Two alleges that TDI negligently failed to perform these services by failing to advise of defects, to report test results, to advise that applicable codes were not met, to report field experience, to advise of prior repairs on the engines and to perform proper inspections.

This Court recognized this cause of action pleaded in Consolidated Edison Co. v. Westinghouse Electric Corp., 567 F. Supp. 358 (S.D.N.Y. 1983), a suit in which TDI's present counsel participated. This Court stated:

> Con Ed's claim that Westinghouse undertook to perform inspections and compile test data with respect to the steam generators, and delayed informing Con Ed of the problems revealed by those data, can fairly be characterized as alleging negligence in the performance of services. In light of New York's well-established recognition of such a cause of action, even where only economic loss is sought to be recovered, we conclude that these allegations state an actionable claim under New York law.

Id. at 366. See Sears, Roebuck & Co. v. Enco Associates, Inc., 43 N.Y.2d 389, 401 N.Y.S.2d 767, 768-69, 372 N.E.2d 555 (1977) (recognizing applicability of six-year limitation period to claim for negligent performance of contractually required services). Additionally, this Court held that the six-year contract statute of limitations applies to this cause of action. 567 F. Supp. at 366-67.

Since the claim sounds in negligence, the cause of action does not accrue until injury is suffered. See Section II.C.2 below. In Count Two, the injury is not the supply of defective diesels, but the failure of the diesels resulting from TDI's negligent failure to warn of their dangerous latent defects and to report the findings of engineering studies,

tests, quality assurance efforts and inspections throughout the continuous course of dealings between the parties. This injury did not occur until the components broke in 1983 and later. Accordingly, Count Two is timely.

2. The Strict Liability And Negligence Claims In Counts Ten And Eleven Accrued When The Diesels Failed

Count Ten alleges strict liability and Count Eleven alleges negligence, gross negligence or reckless disregard for public safety, both resulting from TDI's design, manufacture and supply of diesels which were unreasonably defective and dangerous.20/ Contrary to TDI's contention, a six-year limitations period applies to claims for failure to exercise due care in the performance of a contract. Video Corp. of America v. Frederick Flatto Associates, 58 N.Y.2d 1026, 462 N.Y.S.2d 439, 448 N.E.2d 1350 (1983); 1983 Supplementary Practice Commentary, N.Y.C.P.L.R. §§ 213:2, 214:4 (McKinney Supp. 1986).

Although the limitations period begins to run on both counts when the injury occurs, TDI incorrectly argues that the injury occurred when the emergency diesels were delivered with their latent defects. TDI Br. at 35-37. The New York courts

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20/ Despite TDI's argument, LILCO's negligence and strict liablity causes of action do not simply rehash its contract and warranty claims. Here, TDI's conduct and LILCO's damage ought to be addressed in tort. See Section V below.

have repeatedly held that property damage from defective goods occurs upon the first property deterioration, not when the defective goods are delivered. Thus, a cause of action for property damage accrued when a radio tower collapsed, not when it was sold. Great American Indemnity Co. v. Lapp Insulator Co., 282 A.D. 545, 125 N.Y.S.2d 147, 148 (4th Dept. 1953). Similarly, where a purchaser of a roof sued the seller as a result of water seepage, the injury occurred when deterioration of the roof was first manifested, "i.e., when damage to the building caused by water seepage was [first] discovered," not when the roof was sold and installed. Queensbury Union Free School District v. Jim Walter Corp., 82 A.D.2d 204, 442 N.Y.S.2d 650, 651 (3rd Dept. 1981), appeal dismissed, 55 N.Y.2d 745, 447 N.Y.S.2d 157, 431 N.E.2d 642 (1981). And, a strict liability claim accrued when styrofoam insulation first caused splits in a roof membrane as discovered by repairmen, not when the insulation was sold five and six years earlier. New York Seven-Up Bottling Co. v. Dow Chemical Co., 96 A.D.2d 1051, 466 N.Y.S.2d 478 (2d Dept. 1983), aff'd, 61 N.Y.2d 828, 473 N.Y.S.2d 973, 462 N.E.2d 150 (1984).

Not surprisingly, TDI relies principally on a long string of inapposite personal injury cases dealing with introduction of deleterious substances into the human body. See TDI Br. at 36-37.21/ In those cases, the New York courts

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21/ TDI also relies on Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d 737, 744 (2d Cir. 1979). There the

(Continued)

have consistently rejected a discovery rule, holding that the body is injured as soon as the foreign substance is introduced. As the New York Court of Appeals has recognized, that rule does not apply even to the failure of a mechanical device implanted in the body. Martin v. Edwards Laboratories, 60 N.Y.2d 417, 425, 469 N.Y.S.2d 923, 928-29, 457 N.E.2d 1150 (1983) (unlike cases where deleterious substances dissolve in the human body and cause harm, when the action involves implantation of a device which fails, but does not dissolve, the injury occurs upon failure, not implantation). Also, the Schwartz opinion cited by TDI, though a personal injury case, recognizes that the statute of limitations does not begin to run until some actual deterioration occurs. Schwartz v. Heyden Newport Chemical Corp., 12 N.Y.2d 212, 216-17, 237 N.Y.S.2d 714, 717, 188 N.E.2d 142 (1963), modified, 12 N.Y.2d 1073, 239 N.Y.S.2d 896, 190 N.E.2d 253 (1963), cert. denied, 374 U.S. 808 (1963).

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Second Circuit found a negligence claim to have accrued when a computer system initially failed, not when it was delivered. This interpretation of New York law is precisely on point and demonstrates why LILCO's injury did not occur until the crankshafts broke and the later failures occurred.

Accordingly, LILCO's injury was suffered when the diesels' components broke in 1983 and later. The Complaint alleges that the emergency diesels did not fail until then and their defects could not have been discovered sooner. Therefore, the negligence and strict liability claims are not time barred.

D. LILCO'S Fraud And Failure To Warn Claims Are Timely

1. LILCO's Failure To Warn Claim Accrued When The Diesels Failed

Count One alleges that TDI negligently, wilfully and intentionally failed to warn LILCO of defects in the emergency diesel generators. LILCO's cause of action for failure to warn did not accrue until LILCO suffered injury as a result of the failure. That occurred in 1983 when the crankshafts broke and thereafter as other defects were uncovered. See Lindsay v. Ortho Pharmaceutical Corp., 481 F. Supp. 314, 343 (E.D.N.Y. 1979), rev'd on other grounds, 637 F.2d 87 (2d Cir. 1980) (cause of action for inadequate warning accrued upon injury, not when the inadequate warning was given consumer). Indeed, the essence of this count is that LILCO could not have known of the defects in advance of their failure. Count One, therefore, complies with New York's three-year negligence statute of limitations.

2. The Fraud Claim Accrued As Late As 1983 And Was Not Discovered Until Then

Count Three alleges fraud. More specifically, it alleges a continuing scheme by TDI from 1974 through at least 1983 involving repeated misrepresentations and concealments. As TDI acknowledges, the statute of limitations for fraud expires six years after commission of the fraud or two years after actual or constructive discovery of the fraud. N.Y.C.P.L.R. §§ 203(f), 213(8) (McKinney Supp. 1986).

TDI's affirmative misrepresentations occurred in 1974, 1975, 1976, 1977 and again in 1981 when it reinspected the emergency diesels and reaffirmed their worthiness. TDI's concealments occurred repeatedly from 1974 through 1983. The damages to LILCO from each of the fraudulent concealments and misrepresentations were essentially identical: LILCO was precluded from discovering the defects and repairing or replacing the diesels until they actually failed. Thus, another six years began with the 1981 affirmative misrepresentation that the diesels complied with the specifications and were worthy for operation, and with each subsequent concealment. Similarly, under the discovery rule, LILCO's cause of action did not arise until 1983 when the crankshafts broke causing LILCO's engineering analysis which led to discovery of the fraud. By either standard, LILCO's fraud action is timely.

TDI does not propose a different analysis. Instead, it argues that LILCO is collaterally estopped by the PSC's findings to claim it was defrauded after 1977. For the reasons discussed in Section II.A above, LILCO is not collaterally estopped by the PSC's legislative findings that, at most, prudent management and oversight of Stone & Webster's activity would have led to questions about the crankshaft design. Moreover, even TDI only argues that the PSC found that LILCO should have discovered the crankshafts' design defect, not the fraud, in 1977. And, the PSC made no finding relating to the block cracking.

TDI also argues that Count Three is no more than a breach of contract action in fraud garb. As a result, TDI argues, the UCC's four-year limitation period applies. Even if TDI's premise were correct, LILCO's contract claims are not time-barred. See Section II.B above. But, TDI's premise is incorrect; LILCO's fraud claim is independent of its contract claims. See Section IV below. As the courts of New York have recognized:

> The fundamental difference between tort and contract lies in the nature of the interests protected. Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or the intention of the parties.

Victorson v. Bock Laundry Machine Co., 37 N.Y.2d 395, 373 N.Y.S.2d 39, 41, 335 N.E.2d 275 (1975) (quoting Prosser, Torts [4th ed.] § 92, p. 613). TDI's wrongdoing here goes beyond its mere failure to provide diesels conforming to its contract, though it certainly failed to do that. TDI has deliberately or recklessly endangered the people of New York by knowingly providing defective equipment critical to the safety of a nuclear power plant. This is conduct which the law does not countenance; the potential harm is not simply economic.22/ Indeed, TDI has violated NRC regulations imposing an obligation to report defects. 10 CFR Part 21. But for the extensive testing and subsequent analysis performed by LILCO, the results of TDI's intentional wrongdoing could have been catastrophic. TDI cannot escape responsibility for its conduct by dismissing the fraud claim as simply another way of seeking contract damages.

22/ TDI's reliance on Triangle Underwriters, Inc. v. Honeywell, Inc. is again misplaced. That case involved a defective computer system used in an insurance business, not a product vital to public health and safety. In contrast to the NRC's regulations imposing duties on TDI, there were no regulations governing the seller's conduct with respect to defects in the computers. The Second Circuit acknowledged that fraud extraneous to the contract would support an independent fraud claim, but it found no such extraneous fraud alleged to have occurred after the contract was executed. The buyer had alleged a "continuous treatment" theory and made only a "blanket reference" to material misrepresentations, concealments and misstatements of fact. 604 F.2d at 746. In contrast, LILCO has alleged particular instances of fraudulent conduct by TDI.

E. LILCO'S RICO Claim Is Timely

Count Four alleges that TDI's repeated fraud violated § 1962(a) and 1962(c) of RICO. TDI wrongly asserts that Count Four is barred by application of C.P.L.R. § 214(2).23/ Whether applying the two-year discovery rule in C.P.L.R. § 213(8) or the three-year discovery rule derived from the combination of C.P.L.R. § 214(2) and federal law concerning the accrual of causes of action, the limitations period would not begin until LILCO knew or should have known of the deception causing injury. See Bowling v. Founders Title Co., 773 F.2d 1175, 1178 (11th Cir. 1985) (claim barred when plaintiffs learned they had been deceived too long before action filed); N.Y.C.P.L.R. § 213(8) (McKinney 1972). The Complaint alleges that LILCO did not discover the diesels' defects until August 1983 and thereafter, and could not have discovered them earlier. Complaint ¶ 23. Discovery of the fraud must have come later.

23/ Contrary to TDI's assertion, this Court has rejected the notion that the three-year New York limitation period for liabilities "created or imposed by statute," N.Y.C.P.L.R. § 214(2), applies uniformly to all RICO claims. Instead, N.Y.C.P.L.R. § 214(2) contains a specific exception for fraud. As a result, New York's six-year/two-year statute of limitations governing an action based on fraud, C.P.L.R. § 213(8), should apply to a RICO claim alleging acts of mail and wire fraud. Fustok v. Conticommodity Serv., Inc., 618 F. Supp. 1076, 1080-81 (S.D.N.Y. 1985). TDI miscites Durante Bros. & Sons v. Flushing Nat'l Bank, 755 F.2d 239 (2d Cir.), cert. denied, 105 S.Ct. 3530 (1985). That case did not involve a RICO claim predicated on underlying acts of fraud.

Thus, the limitations period could not have begun until August 1983 at the earliest. The parties had a standstill agreement for one-year between July 1 1984 and June 30, 1985. This action was filed on August 30, 1985, within two years of discovering the predicate acts of fraud.

As discussed above, the PSC's findings are not dispositive. Again, in addition to the lack of issue preclusion resulting from the PSC's legislative ratemaking, the RICO issues here are clearly different. The PSC made no finding about when LILCO knew or should have known that it had been defrauded or about the effect of numerous post-1977 misrepresentations and concealments. Nor did the PSC discuss the blocks. TDI addresses none of these differences.

For all of these reasons, the motion to dismiss Count Four ought to be denied.

III. LILCO HAS STATED A RICO CAUSE OF ACTION

Overlooking allegations of repeated mail and wire fraud, TDI argues that Count Four fails to state a cause of action under RICO. According to TDI, "[i]t is difficult to imagine circumstances which would ever give rise to both a breach of warranty or products liability suit and a RICO suit." TDI Br. at 43 n.28. This wishful assertion ignores the facts in this case. The Complaint particularly alleges a pattern of concealments and misrepresentations calculated to prevent LILCO

and others from discovering numerous known or suspected defects in complex machirery necessary for the protection of public health and safety. It requires no imagination to see that the repeated fraudulent representations and concealments to LILCO, to the American Bureau of Shipping and other owners of nuclear power plants manifest a pervasive fraudulent scheme conducted by TDI and is precisely the type of fraud-for-profit business that RICO is intended to remedy and deter.24/ Thus, none of

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24/ TDI wrongly characterizes RICO as a statute which outlaws only racketeering activity "engaged in by mobsters." TDI Br. at 42. This narrow view of RICO was unequivocally rejected by the Supreme Court in Sedima, S.P.R.L. v. Imrex Co., 105 S.Ct. 3275 (1985).

> Section 1962 . . . makes it unlawful for any person -- not just mobsters -- to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity. §§ 1962(a)-(c).

Id. at 3285 (emphasis added). Moreover,

> Congress wanted to reach both "legitimate" and "illegimate" enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that [RICO] is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued.

Id. at 3287 (citation omitted).

TDI's arguments warrant dismissal of all or any part of LILCO's RICO claim.

A. The Complaint Alleges A Clear, Identifiable "Pattern Of Racketeering" And Gives Adequate Notice Of The Facts Supporting The RICO Claim

1. The Complaint Alleges A Pattern Of Racketeering Activity

Although LILCO's Complaint describes a continuous, pervasive pattern of racketeering consisting of much more than two isolated acts, TDI characterizes its conduct as a "single, unitary fraudulent scheme" evidenced by only isolated acts. TDI Br. at 46. TDI attempts to parlay this mischaracterization of LILCO's Complaint into an argument that LILCO's RICO count fails to allege a "pattern of racketeering." TDI apparently has lost sight of both the Complaint and the liberal standard for evaluating it under Rule 12(b)(6). See Conley v. Gibson, 355 U.S. 41, 45-6 (1957).

LILCO has alleged a pervasive scheme to defraud that far exceeded a fraudulent scheme to sell emergency diesels to LILCO. See TDI Br. at 46. TDI's scheme extended over at least 9 years, long after the sale, included withholding of vital safety information required by law to be disclosed, and involved fraudulent misrepresentations made not only to LILCO, but to the American Bureau of Shipping and other nuclear customers as well. Complaint ¶¶ 4-25, 27-50, 58-74. The

fraudulent scheme alleged by LILCO constitutes a pattern of racketeering sufficient to satisfy any test thus far announced. Accordingly, LILCO's cause of action should not be dismissed.25/

Contrary to TDI's assertion, Sedima did not instruct the "federal courts to apply a stringent pattern requirement to narrow the increasing divergence between what Congress intended and the 'extraordinary uses to which civil RICO has been put.'" TDI Br. at 45. The Supreme Court's dictum in Sedima only stated that lower courts had failed to develop a meaningful concept of pattern. 105 S.Ct. at 3287. It did not assert that two acts of racketeering activity will almost never constitute the requisite pattern. Id. at 3285 n.14. Moreover, by suggesting that lower courts develop a more meaningful concept of "pattern" by requiring continuity plus relationship, the Court did not indicate that pre-Sedima cases dealing with the pattern requirement were decided incorrectly. Id. In fact, the Second Circuit and this Court had begun to develop a meaningful concept of pattern well before the Sedima decision. That concept comports with the Supreme Court's Sedima guidance.

25/ As discussed below, TDI wrongly argues that the RICO count is insufficiently particular to satisfy Rule 9(b). Such requirement of additional particularity applies, at most, to the underlying acts of fraud, not to the "pattern" requirement.

This Court first defined a "pattern of racketeering" in United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973), aff'd, 527 F.2d 237 (2d Cir. 1975). In Stofsky, officials and employees of a fur garment manufacturing union were charged with criminal RICO violations predicated on a series of violations of the Taft-Hartley Law. Id. at 614. When the union defendants moved to dismiss the RICO count for failure to allege a "pattern of racketeering," the Court acknowledged a need to limit the "pattern concept" and stated that "the word 'pattern' should be construed as requiring more than accidental or unrelated instances of proscribed behavior." Id. at 613.

The Stofsky court was guided by 18 U.S.C. § 3575 of the Organized Crime Control Act of 1970, a later provision of the same bill that enacted RICO. Sedima, likewise suggested that the language of § 3575(e) may be useful to interpret RICO's "pattern" requirement. Sedima, 105 S.Ct. at 3285 n.14. Section 3575(e) defines "pattern of criminal conduct" as follows:

> [C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

18 U.S.C. § 3575(e) (1982). After considering the definition of "pattern" in § 3575(e), the Stofsky Court stated:

> [T]he entire statutory scheme indicates that if these acts were isolated and unrelated they do not add up to the kind of activity Congress meant to describe when it used the word "pattern." This Court therefore construes the word "pattern" as including a requirement that the racketeering acts must have been connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts.

409 F.Supp at 614.26/

Thus, the predicate acts must be related and part of a common scheme. This Court has twice rejected the argument advanced by TDI that separate acts of mail and wire fraud arising out of a common nucleus of facts (or "a single, unitary scheme") do not form a "pattern of racketeering." In United States v. Chovanec, 467 F. Supp. 41 (S.D.N.Y. 1979), the Court rejected the defendant's contention that six incidents of wire

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26/ See also United States v. Field, 432 F. Supp. 55, 60 (S.D.N.Y. 1977), aff'd, 578 F.2d 1371 (2d Cir. 1978) cert. dismissed, 439 U.S. 801 (1978) ("[A]ssuming arguendo that two isolated acts of racketeering activity within ten years of each other is per se insufficient to constitute a pattern . . . Field is in a poor position to obtain a dismissal of the indictment on this ground. He is charged here with fourteen separate acts within a four year period under circumstances which, if proved at trial, would seem to constitute a clear pattern of conduct."); United States v. Weisman, 624 F.2d 1118, 1122 (2d Cir. 1980), cert. denied, 449 U.S. 871 (1980) ("While we agree with appellant Weisman that RICO was not intended to apply to sporadic and unrelated criminal acts . . . the enterprise itself supplies a significant unifying link between the various predicate acts specified in Section 1961(1) that may constitute a 'pattern of racketeering activity.'")

fraud on one victim over a four-week period did not comprise a pattern of racketeering activity. Relying on Stofsky, the Court stated:

> [I]t is precisely the fact that the same victim is alleged that may serve as the connecting link in predicate acts to establish a "pattern." It appears that defendant "would require a showing of separate and unrelated schemes, as a precondition for finding two indictable 'acts'. . . that would constitute a 'pattern of racketeering activity' under [RICO]." United States v. Witherspoon, 581 F.2d 595, 601 n.2 (7th Cir. 1978). The Court declines to adopt an interpretation of the statute as urged by defendant which is not only contrary to the plain language of the statute, but which might render it unconstitutional.

Id. at 44.

Similarly, in Beth Israel Medical Center v. Smith, 576 F. Supp. 1061 (S.D.N.Y. 1983), this Court rejected the contention that separate acts of mail and wire fraud did not form a "pattern of racketeering" because they arose out of a common nucleus of facts:

> First, the plain language of the statute refers to "any act which is indictable" under the mail or wire fraud statutes, without a qualification that each act must occur in a different factual situation. Second, it would contradict the requirement of a "pattern of racketeering activity" to hold that the acts making up the pattern must take place in unconnected factual circumstances.

Id. at 1066.

Again, in a post-Sedima decision directly responsive to TDI's argument, this Court stated:

> Although it is true that "two isolated acts of racketeering do not constitute a pattern," Sedima, S.P.R.L. v. Imrex Co., ____ U.S. ____, 105 S.Ct. 3275, 3285 n.14 (1985), when two acts which relate to each other and arise out of the same scheme are alleged, the requirement of pleading a "pattern of racketeering activity" has been met.

Conan Properties, Inc. v. Mattel, Inc., 619 F. Supp. 1167, 1170 (S.D.N.Y. 1985). Thus, TDI's "single scheme" argument simply does not reflect the applicable law.

Accordingly, it is no accident that TDI fails to cite a single case from this Court or by the Second Circuit on the "pattern" requirement. Instead, TDI relies on several cases from other jurisdictions. Even they do not support its argument.

In Kredietbank, N.V. v. Joyce Morris, Inc., No.84-1903, slip. op. (D.N.J. Oct. 11, 1985), the court concluded that the mere submission of two false affidavits in connection with a single matter under litigation would not, without more, constitute a pattern of racketeering activity. The court noted, however, that "[i]n contrast, the fact that an enterprise makes it a practice to submit false affidavits in lawsuits in general in which it is involved might well indicate

a pattern of unlawful activity." Id. Paragraph 48 of LILCO's Complaint alleges that TDI made it a practice to make fraudulent representations to other nuclear owners as well as TDI.

In Allington v. Carpenter, 619 F. Supp. 474 (C.D. Cal. 1985), before the court even discussed the "pattern of racketeering activity," it held that the plaintiffs had failed to allege that any of the defendants acted with an intent to defraud or that they had participated in the alleged scheme in any way at all. Id. at 476.27/ In Morgan v. Bank of Waukegan, 615 F. Supp. 836 (N.D. Ill. 1985), the complaint was so deficient that the court found it "hard to decipher precisely what [t]he cause of action was when sought to be placed in the RICO matrix." Id. at 838. As a result, Morgan did not even analyze the concept of "pattern of racketeering," but merely stated that the complaint did not satisfy the "pattern of racketeering activity" requirement. Similarly, the court in Rojas v. First Bank National Association, 613 F. Supp. 968 (E.D.N.Y. 1985) did not dismiss the complaint for failure to allege a sufficient pattern, but because the complaint alleged

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27/ Only then did the Allington court state that three alleged acts of wire fraud within a few weeks of each other did not demonstrate a sufficient threat of continuity to constitute a pattern of racketeering activity. In any event, LILCO's Complaint alleges a persistently fraudulent method of doing business demonstrating a serious threat of future recurrence.

no facts to support any finding of fraud. Id. at 971.28/

Additionally, Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828 (N.D. Ill. 1985) has been rejected by a later decision from the same court. In Trak Microcomputer Corp. v. Wearne Brothers, No. 84-C-7970, slip. op. (N.D. Ill. Oct. 25, 1985), the court asserted:

> [T]his court does not agree with the suggestion [in Inryco] that a "pattern of racketeering activity" cannot be established with respect to a single fraudulent scheme.
>
> . . .
>
> The act does not suggest that a "pattern of racketeering activity" means a pattern of fraudulent schemes; it merely requires a pattern of "racketeering activity." Sedima does not compel a contrary interpretation. Nothing in the language of Sedima suggests that in order to find a "pattern of racketeering activity" a pattern of fraudulent schemes must be pled. Rather, Sedima only requires that the racketeering activity be continuous and related.

Id.29/ Consequently, Professional Assets Management, Inc. v.

28/ Accordingly, the Rojas court did not even analyze the "pattern" requirement. It merely stated in a dictum footnote that "[e]ven if plaintiff had proved the acts charged in the complaint, he would still not have demonstrated a 'pattern' of racketeering activity," id. at 971 n.1, because the complaint only outlined isolated acts arising out of two discrete transactions. Id.

29/ Inryco also runs afoul of Sedima. The Inryco court justified its interpretation of RICO by the "normal canon of

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Penn Square Bank, N.A., 616 F. Supp. 1418 (W.D. Okla. 1985) is also suspect because of its reliance on Inryco. More important, the alleged fraud in Assets Management related to a single audit report, a pale comparison to TDI's fraudulent scheme against LILCO affecting 3 emergency diesels and other entities over 6 years.

In sum, LILCO's Complaint alleges an expansive nine-year scheme to defraud by TDI, in which the RICO predicate acts are all related to the same industry-wide scheme with the intent of deceiving LILCO, the American Bureau of Shipping, TDI's other nuclear customers and, by implication, the NRC. TDI specifically defrauded LILCO about the defective crankshafts, block top cracking and cam gallery cracks. The fraudulent scheme should be a classic example of "continuity plus relationship which combines to produce a pattern." Sedima, 105 S.Ct. at 3285 (quoting S.Rep. No. 91-617, p. 158 (1969) (emphasis in original).

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narrowly construing penal statutes." 615 F.Supp at 832. Yet the Supreme Court has instructed that civil RICO is a remedial statute, not a penal statute, and "is to be read broadly." Sedima, 105 S.Ct. at 3286.

2. The Complaint Pleads The Predicate Acts With Sufficient Particularity

TDI claims that LILCO has failed to plead the RICO predicate offenses of mail and wire fraud with sufficient particularity, in violation of Rule 9(b) of the Federal Rules of Civil Procedure. TDI Br. at 44 n.29. Perhaps sensing the futility of the argument, TDI relegates it to a footnote.

Although Rule 9 requires that the circumstances constituting fraud be stated with particularity, it does not abrogate Rule 8 which requires only that a plaintiff give notice of the nature of his claim by "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 9 merely specifies what is required to give notice to a defendant when fraud is alleged. Credit & Finance Corp. v. Warner & Swasey Co., 638 F.2d 563, 566-67 (2d Cir. 1981) (only fair notice to the defendant of the plaintiff's claim and the grounds upon which it rests is required).

A RICO complaint satisfies Rule 9(b) if it specifies the nature and operation of the scheme in which the defendant is alleged to have participated. Beth Israel Medical Center v. Smith, 576 F. Supp. at 1070-71. See Trak Microcomputer Corp. v. Wearne Brothers, No. 84 C-7970, slip op. (N.D.Ill. Oct. 25, 1985) (Rule 9(b) requires allegations of fraud to be sufficiently particular to notify defendants of the conduct

complained of and enable them to prepare a defense, but does not require plaintiff to plead evidentiary matters); Haroco, Inc. v. American National Bank & Trust Co. of Chicago, 747 F.2d 384, 405 (7th Cir. 1984), aff'd on other grounds, 105 S.Ct. 3291 (1985) (complaint satisfied Rule 9(b) because it "specified the transactions, the content of the allegedly false representations, and the identities of those involved . . . [which] put defendants on fair notice of the time and place of the alleged false representation"); Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 791 (3d Cir. 1984), cert. denied, 105 S.Ct. 1179 (1985) (while allegations of date, place or time fulfill the functions of Rule 9(b), "nothing in the rule requires them [in a RICO complaint]. Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.").

LILCO's Complaint gives a detailed description of the fraudulent scheme conducted by TDI. Complaint ¶¶ 4-25, 27-50, 58-74. In fact, LILCO's Complaint is even more specific than the Complaint upheld by this Court in Beth Israel which did not specify particular communications that violated the mail and wire fraud statutes. 576 F. Supp. at 1071. Despite this, the Beth Israel Court refused to dismiss because "[i]n light of the complaint's allegations, it [was] certainly reasonable to infer

that mail and/or telephone communications were used in the furtherance of the defendant's scheme . . .." Id. LILCO's Complaint does not require this Court to infer that TDI used the mail and wires in its fraudulent scheme. It describes at least five specific predicate acts of mail or wire fraud. Complaint ¶¶ 31-35, 69.

Although TDI cites several cases in which RICO Complaints were dismissed for failure to satisfy Rule 9(b), TDI never states any particular reasons why LILCO's Complaint fails to comply with Rule 9(b). TDI Br. at 44 n.29. TDI merely cites its cases, and then states "[a]s discussed in detail below, plaintiff has totally failed to meet the 9(b) requirements for pleading a fraud claim. See IV. B., supra." Id. Yet, Section IV. B. of TDI's Brief never discusses this assertion in detail; it merely states that "LILCO fails to set forth the misrepresentations referred to in Compl. ¶ 13 with particularity ." TDI Br. at 57-58. TDI ignores the specific misrepresentations alleged in ¶¶ 31-35 of the Complaint.30/

30/ TDI's Section IV. B. also relies on Todd v. Oppenheimer & Co., 78 F.R.D. 415, 420-21 (S.D.N.Y. 1978) and Gross v. Diversified Mortgage Investors, 431 F. Supp. 1080, 1087 (S.D.N.Y. 1977), aff'd mem., 636 F.2d 1201 (2d Cir. 1980). Todd acknowledges that Rule 9(b) must be reconciled with the notice pleading requirement of Rule 8. 78 F.R.D. at 419. Both cases recognize that the three purposes of the specificity requirement are (1) to inhibit the filing of complaints as a pretext for discovery of unknown wrongs; (2) to protect potential defendants

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In sum, LILCO gives ample notice of its claim. It specifies the nature of the fraudulent predicate acts. It specifies when the fraud occurred and what was said or concealed. Accordingly, Rules 8 and 9(b) are satisfied.

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from harm to their reputations from groundless allegations of fraud; and (3) to ensure that allegations of fraud are concrete and particularized enough to give notice to the defendants of the fraud alleged. 431 F. Supp. at 1087, 78 F.R.D. at 419-20. LILCO's detailed Complaint satisfies all these concerns: (1) the wrongdoing of TDI is known -- though its full extent remains uncovered -- and there is no pretext; (2) both the allegations in the Complaint and the Affidavits filed with this Response remove any hint that the allegations are groundless; and (3) TDI has certainly been apprised of the claim.

Similarly inapposite are the other cases cited by TDI where RICO counts were dismissed for lack of specificity. See Moss v. Morgan Stanley Inc., 719 F.2d 5, 17-19 (2d Cir. 1983), cert. denied, 104 S.Ct. 1280 (1984) (plaintiff failed to allege that defendant defrauded him in violation of the securities fraud laws); Mauriber v. Shearson/American Express, Inc., 546 F. Supp. 391, 394 (S.D.N.Y. 1982) (complaint failed to "specify which defendant told which lie and under what circumstances"); Hellenic Lines, Ltd. v. O'Hearn, 523 F. Supp. 244, 249 (S.D.N.Y. 1981) (plaintiff asserted that it had been presented with "false and fraudulent invoices," but failed to specify any particular invoices that were fraudulent); Hudson v. LaRouche, 579 F. Supp. 623, 629 (S.D.N.Y. 1983) (RICO count failed to allege the involvement of any of the defendants in the fraudulent acts and also failed to describe in any way the fraudulent representations made); Serig v. South Cook County Serv. Corp., 581 F. Supp. 575,579-80 (N.D.Ill. 1984) (plaintiff did not allege sufficient facts from which a fraudulent scheme could be inferred, did not state a violation of the mail fraud statute under state or federal law, and failed to allege what the enterprise was and how the enterprise's activities were engaged in or affected interstate commerce).

B. TDI, Through Its Officers And Agents, Conducted The Fraudulent Scheme That Injured LILCO

1. A Corporate "Enterprise" Can Be Sued As The "Person" If The Corporation Conducts Its Affairs Through A Pattern Of Racketeering Activity

As one alternative, ¶ 71 of the Complaint alleges that "TDI conducted and participated in the conduct of its own affairs through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c)."31/ TDI contends that the RICO count should be dismissed because it is alleged to be the "person" who has conducted a pattern of racketeering activity as well as the "enterprise" whose affairs were conducted through a pattern of racketeering. TDI Br. at 50.

While it would be inappropriate to allege that a corporation is both the culpable defendant and the enterprise where the corporation is merely a passive instrument or victim of the racketeering activity, it is entirely appropriate to do so in this situation where TDI itself is the perpetrator of the fraudulent scheme. See Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 Notre Dame L. Rev. 237, 323 (1982) ("[T]he remedial purpose of the statute would

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31/ In the alternative, the Complaint alleges that TDI conducted the affairs of Transamerica Corporation. See Section III.B.2 below. Thus, Count Four is sufficient regardless of the outcome of this argument.

be enhanced by such an attribution where the individual or entity was playing the role of 'perpetrator.'") TDI's fraudulent scheme was so pervasive and continued over such a long period of time that TDI was, in fact, conducting its own affairs through a pattern of racketeering activity. The scheme alleged was so extensive that it demonstrates a corporate knowledge of the scheme and corporate intent to defraud.

In United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), cert. denied, 459 U.S. 1183 (1983), the Eleventh Circuit held that a corporation could simultaneously be named as a defendant and the enterprise under § 1962(c). It noted the Supreme Court's willingness to read the statute broadly and expand the scope of its application. Id. at 988. See also Sedima, 105 S.Ct. at 3286. The court stressed that its decision was supported not only by RICO itself, but also by principles of basic corporation law.

> Although a corporation is a distinct legal entity, "[i]n rare, special circumstances, . . . courts will 'pierce the corporate veil' . . . ." FMC Finance Corp. v. Murphree, 632 F.2d 413, 421 (5th Cir. 1980). We do not intend to analyze this issue under corporate doctrines, but by analogy [this corporation] can be dissected and viewed in a different light for each of the roles it assumes in this case. As a defendant, it can maintain its separate legal status as an ongoing business venture. By piercing through this sterile exterior, however, it can be revealed as an association of employees, officers, and agents working as a unit to effectuate a common purpose -- to defraud

> the government. Viewed in this manner, it takes the form of a "group of individuals associated in fact," or in the words of the [Supreme] Court, "a group of persons associated together for a common purpose of engaging in a course of conduct." 452 U.S. at 583, 101 S. Ct. at 2528. Evidence of its ongoing nature, and "that the various associates function as a continuing unit" satisfies the enterprise element of RICO. Id. [This corporation's] problem lies in the fact that its corporate structure admits the characteristics essential to the formation of an association in fact -- a fact which renders its argument concerning the elimination of the enterprise element nugatory.

678 F.2d at 989.

TDI fits Hartley's description of a corporation that can and should be both defendant and enterprise in a § 1962(c) claim. The extensive fraudulent scheme alleged in LILCO's Complaint reveals TDI to be an association of employees, officers and agents working as a unit to effectuate a common purpose -- to defraud LILCO and other purchasers of TDI diesel engines. Therefore, LILCO's Complaint properly casts TDI as both the enterprise and the defendant in its claim under § 1962(c).

The Second Circuit's holding in Bennett v. United States Trust Co. of N.Y., 770 F.2d 308 (2d Cir. 1985) does not bar this allegation. Although the Court there held that separate entities must be alleged as the enterprise and the defendant in a § 1962(c) claim, its reasoning is not totally

preclusive. After observing that the Act's language envisions two entities, the court explained:

> [R]equiring a distinction between the enterprise and the person comports with legislative intent and policy. Such a distinction focuses the section on the culpable party and recognizes that the enterprise itself is often a passive instrument or victim of the racketeering activity.

770 F.2d at 315.

TDI, however, was not a passive instrument or victim of the fraudulent scheme against LILCO. LILCO's allegation that TDI conducted its own affairs through a pattern of racketeering in violation of § 1962(c) is consistent with legislative intent and policy, as well as the rationale of the Second Circuit's holding in Bennett.32/

32/ TDI also cites several other cases without discussing the holdings of those cases. In three of the cases, the court merely stated that § 1962(c) requires separate entities as the defendant and the enterprise as a foregone conclusion, but did not analyze the issue. Rae v. Union Bank, 725 F.2d 478 (9th Cir. 1984); Bennett v. Berg, 710 F.2d 1361 (8th Cir. 1983), cert. denied, 104 S.Ct. 527 (1983); Kaufman v. Chase Manhattan Bank, N.A., 581 F. Supp. 350 (S.D.N.Y. 1984). Indeed, in Bennett v. Berg, the extent of the court's treatment of the issue was a footnote which read in its entirety "With respect to Count II, the panel concluded that plaintiffs have failed to allege an enterprise apart from John Knox Village, the only defendant named in Count II." 710 F.2d at 1364 n.4.

It is interesting to note that in Hudson v. LaRouche, 579 F. Supp. 623 (S.D.N.Y. 1983), one of the cases cited by TDI (TDI Br. at 51), the court did "[fault the] complaint for failure to distinguish enterprises from the individual defendants." 579 F.

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2. Alternatively, Transamerica Corporation Is The Enterprise

Even if the Court does not hold that TDI could be both the "person" and the "enterprise" under § 1962(c), the Complaint nevertheless is sufficient. Paragraph 72 alleges alternatively that TDI conducted and participated in the conduct of the affairs of its parent corporation, Transamerica, through a pattern of racketeering activity. TDI's characterization of this allegation as a "transparent attempt to plead around the Bennett Rule," TDI Br. at 51 n.35, once again disregards the procedural standards applicable to its motion and the applicable substantive precedent.

Though no Second Circuit cases directly address the point, the Seventh Circuit has rejected the position taken by TDI. In Haroco, Inc. v. American National Bank & Trust Co. of

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Supp. at 628. Despite this, however, the court did not dismiss the plaintiff's complaint because, if read liberally, it appeared to allege an enterprise separate from the defendants. Id. LILCO's Complaint, if read liberally, alleges that TDI and its parent corporation, Transamerica Inc. were an enterprise separate from TDI.

TDI also cites Bulk Oil (ZUG) A.G. v. Sun Co., 583 F.Supp 1134 (S.D.N.Y. 1983), aff'd, 742 F.2d 1431 (2d. Cir. 1984) but fails to explain that the court did not dismiss the complaint for alleging an identical person and enterprise, but rather because, "[m]ore significantly . . . the complaint [did] not state a claim of injury from violation of section 1962(c) no matter who is considered the person or the enterprise." Id. at 1145.

Chicago, 747 F.2d 384 (7th Cir. 1984), aff'd on other grounds, 105 S.Ct. 3291 (1985), the defendants argued that mere allegation of a parent-subsidiary relationship was not sufficient under § 1962(c). The court disagreed, stating:

> However, the complaint alleges that ANB is a wholly owned subsidiary of Heller International, and we think it virtually self-evident that a subsidiary acts on behalf of, and thus conducts the affairs of, its parent corporation. We doubt that more detailed allegations on the subject would serve any useful purpose and we see no reason to require them.

Id. at 402-03 (footnote omitted).

Improvidently citing United States v. Scotto, 641 F.2d 47 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981), TDI suggests that Transamerica, the parent corporation, cannot be the enterprise unless it can be shown that it participated in the wrongdoing. TDI Br. at 51.33/ In Scotto, the defendant argued that the predicate acts must concern or relate to the operation or management of the enterprise and affect the affairs of the enterprise in its essential function. The Second Circuit squarely rejected this argument:

33/ The other two cases cited by TDI in support do not deal with this issue. Both Bennett v. Berg, 710 F.2d 1361, 1364 (8th Cir. 1983), and United States v. Mandel, 591 F.2d 1347, 1375 (4th Cir. 1978), cert. denied, 445 U.S. 961 (1980), merely hold that § 1962(c) requires some involvement of the defendant in the conduct of the enterprise.

> Section 1962(c) nowhere requires proof regarding the advancement of the [enterprise's] affairs by the defendant's activities, or proof that the [enterprise] itself is corrupt, or proof that the [enterprise] authorized the defendant to do whatever acts form the basis for the charge. It requires only that the . . . defendant's acts were committed in the conduct of the [enterprise's] affairs.

641 F.2d at 54 (quoting United States v. Field, 432 F. Supp. at 58). See also United States v. Stofsky, 409 F. Supp. 609, 613 (S.D.N.Y 1973) (RICO does not require that the predicate acts be in furtherance of the enterprise).

Accordingly, LILCO's § 1962(c) claim sufficiently alleges that TDI conducted the affairs of Transamerica through a pattern of racketeering and, for this alternative reason should not be dismissed.

C. The Complaint Identifies The Enterprise In Which TDI Invested Racketeering Profits

Paragraph 70 of LILCO's Complaint alleges that

> TDI received income, either directly or indirectly, from a pattern of racketeering activity in which TDI participated as a principal and used and invested part of such income and the proceeds of such income in operating an enterprise engaged in, and whose activities affect, interstate commerce in violation of 18 U.S.C. § 1962(a).

Yet, TDI wrongly claims that LILCO's § 1962(a) claim is legally deficient because it does not identify an enterprise in

which TDI invested racketeering profits. TDI Br. at 52. Only two enterprises are alleged in Count Four, TDI and Transamerica. The allegation of either is sufficient to support a cause of action under § 1962(a). Thus, the Complaint complies with the notice pleading requirements of Rule 8 of the Federal Rules of Civil Procedure.34/

TDI maintains that "[i]f Delaval is claimed to be the enterprise, the Bennett rule is violated; if Transamerica is claimed to be the enterprise, the Scotto rule . . . is violated." TDI Br. at 53. Again, TDI ignores precedent. TDI can be both the defendant and the enterprise under § 1962(a) without violating the "Bennett rule". As this Court noted in Lumbard v. Maglia, Inc., 621 F. Supp. 1529, 1534, (S.D.N.Y. 1985), Bennett only discussed whether the enterprise and defendant could be the same entity under § 1962(c), not § 1962(a). See also Conan Properties, Inc. v. Mattel, Inc., 619 F. Supp. 1167 (S.D.N.Y. 1985) (plaintiff adequately pleaded

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34/ TDI cites only one case, Guerrero v. Katzen, 571 F. Supp. 714 (D.D.C. 1983) and once again misstates its holding. TDI states that in Guerrero, "[t]he RICO counts were dismissed since the failure to identify an enterprise went to the heart of a violation of § 1962(a)." TDI Br. at 52-3. While the complaint in Guerrero failed to allege the "enterprise," it, more fundamentally, "allege[d] nothing about the investment of the proceeds of racketeering activity in an enterprise." 571 F. Supp. at 721. Additionally, the court dismissed for failure to allege "racketeering enterprise" injury, id. at 720, a requirement specifically rejected by Sedima.

a cause of action under § 1962(a) by alleging that the defendant invested the proceeds of a pattern of racketeering activity in its own operations).35/

LILCO's § 1962(a) claim is also sufficient because it alleges that the proceeds of racketeering activity were invested in Transamerica. As is explained above, there is no "Scotto rule" requiring that Transamerica, as the enterprise, have any involvement in the racketeering activity.36/

IV. LILCO HAS A SEPARATE CLAIM FOR COMMON LAW FRAUD

Count Three alleges that LILCO was fraudulently induced to enter the contract with TDI, to accept delivery of, install and operate the emergency diesel generators, and to forestall testing, examination and analysis of the emergency diesels until a time when the discovery of the defects greatly

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35/ The Seventh Circuit has followed this reasoning also:

> Subsection (a) does not contain any of the language in subsection (c) which suggests that the liable person and the enterprise must be separate. Under subsection (a), therefore, the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations.

Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d at 402.

36/ As a practical matter, the scope of Transamerica's involvement is unknown, but the subject of pending discovery. LILCO has noticed the deposition of Transamerica, but has deferred the deposition pending resolution of TDI's motion to stay discovery.

increased LILCO's costs in constructing and licensing Shoreham. Complaint ¶ 62. TDI's fraud prevented LILCO from discovering and correcting the defects and seeking appropriate remedies at an earlier time. Complaint ¶ 63. The fraud contravened TDI's common law duties, the professional responsibilities of engineers employed by TDI and express reporting duties imposed by the NRC. See 10 CFR Part 21.

Ignoring the Complaint's allegations of repeated and continuous deception concerning this vital safety equipment, TDI argues that LILCO fails to state a separately cognizable fraud claim because "New York law does not recognize a cause of action for 'fraudulent breach of contract.'" TDI Br. at 54.[37] TDI characterizes LILCO's allegations of fraud as "Delaval's purported failure to properly perform the contract," and asserts that the allegations of fraud "do not state a claim

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37/ TDI also argues that the Complaint fails with particularity to set out a claim of fraud in the inducement to contract. The Complaint sets forth many specific instances of fraudulent misrepresentations and concealments which occurred after the contract was issued, but, in part, before delivery of the emergency diesels. Some of these related to design defects known to TDI, others to known or suspected casting defects. Since LILCO's discovery requests to TDI have not been substantively answered, LILCO believes, but does not know the particulars, that (1) TDI never intended to perform the necessary design checks, quality assurance and quality control functions necessary to produce the emergency diesels as required by the NRC, and (2) TDI further misrepresented the industry's experience with various components on TDI diesel engines and TDI's in-place mechanism to accumulate, evaluate, disseminate and apply information concerning such industry experience.

separate from the alleged breach of contract." Id. at 55. TDI also argues that it has no liability for consequential damages. TDI Br. at 67-69. Essentially, therefore, TDI argues that its contract is a license to defraud LILCO and imperil those who might be affected by a nuclear accident. Contrary to TDI's contention, the applicable law does not permit a contracting party to commit fraud with impunity.

TDI incorrectly contends that Brick v. Cohn-Hall-Marx Co., 276 N.Y. 259, 11 N.E.2d 902 (1937) and progeny flatly disallow a claim of fraud in the same action with a claim for breach of contract. TDI's argument fails for at least two reasons. The holding in Brick only applies when plaintiffs artificially seek to extend a contract limitations period by casting a contract claim in fraud clothing. Shaitelman v. Phoenix Mutual Life Insurance Co., 517 F. Supp. 21, 23 (S.D.N.Y. 1980). As discussed throughout this Response, LILCO has stated distinct contract and fraud claims. Perhaps most important, TDI's fraud was extraneous to the contract because TDI breached independent, non-contractual duties owed to LILCO.

A. Brick Applies Only To Prevent Circumvention Of The Statute Of Limitations

Brick does not instruct that claims for fraud and breach of contract cannot arise from the same underlying facts. New York courts have often recognized separately stated fraud claims arising out of the same transactions that occasion claims for breach of contract. See, e.g., Shaitelman v. Phoenix Mutual Life Insurance Co., 517 F. Supp. 21 (S.D.N.Y. 1980); H. Novinson & Co. v. City of New York, 53 A.D.2d 831, 385 N.Y.S.2d 317 (1st Dept. 1976); Stell Manufacturing Corp. v. Century Industries, 15 A.D.2d 87, 221 N.Y.S.2d 528 (1st Dept. 1961). Brick only prevents a party from attempting to cast a stale contract claim in terms of fraudulent breach of contract to take advantage of a longer statute of limitations.

In Stell Manufacturing, money was wrongfully withheld through wrongful double debiting pursuant to a factoring agreement, thereby causing plaintiffs to make an assignment of assets for the benefit of creditors. The court rejected defendants' argument that Brick precluded the action, stating instead that Brick merely related to statute of limitations issues, not the right of a plaintiff to maintain a claim for fraud:

> In the case before us no question of the statute of limitations is involved. Even if this be deemed an action in contract, admittedly the action is timely. Nor do we think Brick v Cohn-Hall-Marx Co., supra, should be construed as holding

> that where a contract is the source of a relationship between parties, torts committed in the course of and made possible by such relationship should be protected from independent attack, and the limit of recovery be restricted to damages for the breach of such contract. This would seem an unnecessary extension of the views there expressed and, in effect, provide a shield or umbrella of protection for a wrongdoer.
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> . . .
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> If there was a knowing and intentional fraudulent misrepresentation, intended to induce reliance, which was justifiably relied on, thereby causing damage to plaintiffs, plaintiffs should be allowed to plead and prove their case.

221 N.Y.S.2d at 530-31.

In H. Novinson & Co., the City counterclaimed for fraud in the inducement of payments for work not performed. Though the recipients admitted improper billing and acknowledged that the City had made the payments in question, the trial court dismissed the fraud counterclaim because of Brick. The Appellate Division reversed, stating:

> In Brick . . . the issue was whether the statute of limitations for fraud or for contract should be imposed where plaintiff claimed fraudulent misrepresentation of sales upon which, pursuant to contract, royalties were to be calculated. The Court held the contract period of limitations (which had expired) applied because the plaintiff had no claim in the absence of the contract. Here, while the relationship had its genesis in contract, the right to recover and counterclaim does not depend upon contract enforcement. Furthermore,

> the requests for damages seeking forfeiture and punitive relief do not render the claim insufficient. Punitive and exemplary damages are allowed when the fraud is aimed at the public generally.

385 N.Y.S.2d at 318 (citations omitted).

And, in Shaitelman v. Phoenix Mutual Life Insurance Co., this Court considered an action for breach of contract, fraudulent misrepresentation, and wrongful discharge by two insurance salesmen against their former employer. Plaintiffs alleged that the employer fraudulently induced them to continue in its employ by knowing and false misrepresentations about their compensation. This Court rejected the employer's argument that the fraud claim was simply a restatement of the breach of contract claims and allowed plaintiffs to maintain their claims for fraudulent misrepresentation, as well as their claims for breach of contract. The Court noted an action for fraudulent misrepresentation, independently pleaded, can constitute a cause of action in addition to, or as an alternative to, an action for breach of contract. The Court distinguished Brick, saying:

> The string of cases relied upon by the defendant for the proposition that New York Courts will disallow an alternative pleading of fraud in an action for breach of contract are inapposite. In a number of those cases the plaintiff brought an action for fraud rather than for breach of contract or alleged a fraudulent breach of contract in order to circumvent the shorter statute of limitations which

> attaches in an action for breach of contract. Brick v. Cohn-Hall-Marx Co., 276 N.Y. 259, 11 N.E.2d 902 (1937); Triangle Underwriters, Inc. v. Honeywell Inc., 457 F. Supp. 765, 770 (E.D.N.Y. 1978). Still others of the cases relied upon by defendant pertain to situations where no independent claim of fraud was set forth in the pleadings. Rather, the plaintiffs in those actions pleaded fraudulent breach of contract or breach of contract with fraudulent intent

Id. at 23 (citations omitted).38/

In sum, the limited holding of Brick and progeny, even if still viable, has no application here. The limitations period for LILCO's several contract and warranty claims has not expired. See Sections II.A, II.B above. Therefore, LILCO has no need to attempt to circumvent the contract limitations period by pleading fraud. Instead, LILCO has pleaded an independent fraud claim to remedy egregious fraud extraneous to the contract.39/

38/ Indeed, it is questionable whether even Brick's limited holding is still good law. The premise underlying Brick was that plaintiff's claim for fraud was time barred because the "essence of the action" was breach of contract and the contract statute of limitations had expired. But this "essence of the action" rule has no application in contemporary civil practice and has been abandoned by the New York courts in cases alleging injury to commercial interests. See Video Corp. of America v. Fred Brick Flatto Assoc., 58 N.Y.2d 1026, 462 N.Y.S.2d 439, 448 N.E.2d 1350 (1983); Baratta v. Kozlowski, 94 A.D.2d 454, 464 N.Y.S.2d 803 (2d Dept. 1983); Klock v. Lehman Bros. Kuhn Loeb, 584 F. Supp. 210 (S.D.N.Y. 1984).

39/ The New York Court of Appeals has not expounded on the breadth of Brick's application and the Appellate Division cases

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B. TDI's Fraud Was Extraneous To The Contract

Even Brick expressly recognizes the actionability of fraud extraneous to the contract, i.e., arising from independent duties owed by the defendant. See Shaitelman v. Phoenix Mutual Life Insurance Co., 517 F. Supp. 21, 23 (S.D.N.Y. 1980) (fraud can be based on an independent duty which springs from a contract relationship). TDI's fraud violated several independent duties owed LILCO.

First, TDI had a common law duty to warn LILCO of potential defects in the emergency diesel generators that might pose a danger to the public health and safety. See, e.g., Cover v. Cohen, 61 N.Y.2d 261, 274-75, 473 N.Y.S.2d 378, 385, 461 N.E.2d 864 (1984) (manufacturer has continuing duty to warn of dangers in use of a product that came to his attention

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are in conflict. Of the cases cited at pp. 54-55 of TDI's Brief, Miller v. Columbia Records, 70 Misc.2d 517, 415 N.Y.S.2d 869, 871 (1st Dept. 1979); Miller v. Volk & Huxley, Inc., 44 A.D.2d 810, 355 N.Y.S.2d 605, 606-07 (1st Dept. 1974), Freyne v. Xerox Corp., 98 A.D.2d 965, 470 N.Y.S.2d 187, 188 (4th Dept. 1983), and Sherkate Sahami Khass Rapol v. Jahn & Son, 531 F. Supp. 1048, 1061 (S.D.N.Y. 1982), aff'd, 701 F.2d 1049 (2d Cir. 1983), applied Brick when there was no statute of limitations question. None of those cases discussed whether Brick is restricted to limitations questions, however, so this Court should assume that issue was simply not considered and the courts, consequently, applied Brick incorrectly. The Brick issue in Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d 737, 748 (2d Cir. 1979) arose in a statute of limitations context.

after manufacture or sale); Schumacher v. Richards Shear Co., 59 N.Y.2d 239, 246-47, 464 N.Y.S.2d 437, 441, 451 N.E. 2d 195 (1983) (enunciating general duty to warn where there is a special relationship, "frequently economic"). See also Kerr v. Koemm, 557 F. Supp. 283, 286 (S.D.N.Y. 1983); Restatement (Second) of Torts § 388 (1965 Supp. 1984).40/ When that common law duty is simply ignored, there is negligence. When that duty is flaunted by affirmatively and fraudulently misleading conduct, there is fraud.

Second, apart from the contract, federal regulations impose a duty to report and warn of defects. NRC regulations require all vendors of components used in nuclear power plants to report to the NRC and the plant owner any actual or potential deficiencies in the components. 10 CFR Part 21. These regulations have been effective since 1978. Id. TDI, as a supplier of equipment for use in a nuclear power plant, was required to report known or potential defects in the emergency diesel generators.41/ Again, TDI's affirmatively misleading conduct concealing known and suspected defects constituted a

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40/ The duty to warn of dangerous defects arises from common law, though the contract also imposes such a duty in this case.

41/ There is no question that emergency diesel generators come within the reporting requirements. Compare 10 C.F.R. § 21.3(a)(1) (defining "basic components") with 10 C.F.R. Part 50 Appendix A, General Design Criterion 17 (prescribing the requirement for emergency power sources).

fraudulent violation of these standards imposed by the NRC independent of the LILCO-TDI Contract.

Third, TDI also breached the independent duty of its staff engineers to warn users about design defects. The fraudulent misrepresentations made by TDI were explicitly made or sanctioned by engineers in California who have a duty to warn identifiable persons of engineering deficiencies that pose an imminent risk of serious injuries, whether or not the engineer was responsible for causing the defect. See Opinion of the California Attorney General's Office, no. 85-208, September 17, 1985 (LILCO Appdx. J); Cal. Bus. & Prof. Code § 6775(c) (West 1975, Supp. 1986) (LILCO Appdx. K). TDI not only knew or suspected the emergency diesel generators were defective and posed an imminent risk of serious injury, TDI was responsible for creating the defects. Under these facts, TDI had an affirmative, extra-contractual duty to warn LILCO of the defects. See also Johnson v. California, 69 Cal.2d 782, 447 P.2d 352, 355, 73 Cal.Rptr. 240 (1968) (state held liable for damages because employee of Youth Authority placed youth with homicidal tendencies in a foster home without giving notice to foster parents of youth's dangerous propensities); Tarasoff v. Regents of University of California, 17 Cal.3d 425, 551 P.2d 334, 351, 131 Cal.Rptr. 14 (1976) (psychotherapist held liable for wrongful death because of failure to warn victim that

patient had expressed intention to kill her). A professional has a duty to warn when there is a predictable threat of harm to a readily identifiable group of victims. TDI's conduct is more egregious than that in Johnson or Tarasoff because TDI was directly responsible for the creation of the defective and dangerous condition of the emergency diesels. Again, TDI actively, not just negligently, concealed the defects from LILCO.

In sum, Brick does not bar LILCO's fraud claim which stands independent of TDI's contractual duties.42/ The motion to dismiss Count Three should, therefore, be denied.

V. LILCO IS ENTITLED TO RECOVER DAMAGES UNDER ITS NEGLIGENCE AND STRICT LIABILITY CLAIMS

TDI seeks to avoid liability for damages which it characterizes as "economic loss"43/ on the ground that LILCO's

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42/ The cases cited by TDI do not support its analysis. TDI Br. at 54-55. In Miller v. Columbia Records, Miller v. Volk & Huxley, Triangle Underwriters v. Honeywell and Freyne v. Xerox Corp, there was no analysis of the fraud claim. In Sherkate, the alleged fraud involved compensation claimed under a letter of credit for nonconforming goods. The issue was clearly whether the goods conformed to the contract.

43/ Whether LILCO's Complaint seeks "economic loss" which is not recoverable or damages to its property which are recoverable under tort theories of liability begs the question. As the discussion indicates, the analysis must focus on the nature of the harm created by TDI's conduct. If the injury is caused by exposure to an unreasonably dangerous and defective condition, LILCO is entitled to recover damages, including those damages which might otherwise be described as economic loss, under its negligence and strict liability claims.

negligence and strict liability claims allege only that the emergency diesel generators failed to perform as expected. Relying upon a line of cases beginning with Schiavone Construction Co. v. Elgood Mayo Corp., 56 N.Y.2d 667, 451 N.Y.S.2d 720, 436 N.E.2d 1322 (1982), TDI contends that claimants seeking to recover economic loss for the non-performance of a product are relegated to contractual remedies and may not sue in negligence or strict liablity. TDI's contentions ignore both the pleadings and well settled law.

TDI employs this argument to attack Counts Two, Ten and Eleven. As discussed above, TDI wrongly lumps Count Two with the others. Count Two alleges TDI's negligent failure to perform contractual services. This Court has expressly recognized the recoverability of economic loss in such a claim. Consolidated Edison Co. v. Westinghouse Electric Corp., 567 F. Supp. 358, 363-66 (S.D.N.Y. 1983), motion to dismiss denied, 594 F. Supp. 698 (S.D.N.Y. 1984) See Section II.C.1 above.

As to Counts Ten and Eleven, TDI's argument ignores important distinctions between the actual injury incurred and the risk of injury posed by the defective diesels. The gravamen of LILCO's strict liability claim is that TDI sold diesel generators to LILCO that were "unreasonably dangerous" and TDI failed to warn LILCO about the unreasonably dangerous and defective condition. Complaint ¶¶ 98 and 100.44/ Count

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44/ Where the issue presented is the application of the rule against recovery of economic loss, the courts do not distinguish

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Eleven alleges that TDI negligently designed and manufactured the emergency diesels and concealed information about their defective design. Complaint ¶¶ 49-53. The Complaint further alleges that TDI's misconduct endangered public safety. Complaint ¶ 104. Without operative diesels, safety systems necessary to cool the reactor's core and shut down the reactor might not operate in the event of postulated accidents and anticipated operational occurrences. Complaint ¶ 6. In that event, the safety of workers at the plant and residents outside the plant, as well as property at and around the plant would be imperiled. In short, TDI's conduct created serious risk of injury to persons and property.

Moreover, both the Complaint and the Museler Affidavit plainly establish that the crankshaft failures were sudden and totally unexpected. Complaint ¶ 23, Museler Aff. ¶ 21. The crankshaft fracture rendered one emergency diesel generator inoperable. Later LILCO discovered that the two remaining emergency diesels also had cracks in their crankshafts. That

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between claims sounding in negligence and strict liability. E.g., Seely v. White Motor Co., 63 Cal.2d 9, 403 P.2d 145, 151, 45 Cal.Rptr. 17 (1965). If there is an unreasonable risk of harm, then both theories of liability should lie. East River Steamship Corp. v. Delaval Turbine Inc., 752 F.2d 903, 908 n.2 (3d Cir. 1985), cert. granted sub nom, East River Steamship Corp. v. Transamerica Delaval, Inc., 106 S.Ct. 56 (1985).

no one was physically harmed by the calamitous fracture of the crankshaft is a distinction without a difference.

Thus, the gist of LILCO's tort claims is not that it "failed to receive the quality of product [it] expected, but that [it and the public have] been exposed, through a hazardous product, to an unreasonable risk of injury to . . . person or . . . property." Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1169 (3d Cir. 1981) (footnote omitted) (even though damage limited to the defective product, unreasonable risk of injury supported a tort remedy). "Tort law has traditionally redressed injuries properly classified as physical harm to person or property. Id. at 1170. See also Victorson v. Bock Laundry Machine Co., 37 N.Y.2d 395, 373 N.Y.S.2d 39, 335 N.E.2d 275 (1975). The seminal case that applied the distinction between qualitative defects and defects posing physical harm to person or property is Seely v. White Motor Co., 63 Cal.2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). In Seely, Justice Traynor wrote that when the defect is of a type that creates a safety hazard, "[p]hysical injury to property is so akin to personal injury that there is no reason for distinguishing them." 403 P.2d at 152. While deterioration and other defects of poor quality should be considered non-recoverable economic loss, "'sudden and calamitous damage will almost always result in direct property

damage' recoverable in tort." Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d at 1172 (quoting Cloud v. Kit Manufacturing Co., 563 P.2d 248, 251 (Alaska 1977)). See also John R. Dudley Construction, Inc. v. Drott Manufacturing Co., 66 A.D.2d 368, 412 N.Y.S.2d 512, 515 (4th Dept. 1979) (sudden structural fai'ure of bolts connecting superstructure of crane to undercarriage caused collapse of crane with consequent damage to the crane).45/

A manufacturer's responsibility to market safe products does not depend on the fortuity of whether or not a person escapes injury. Pennsylvania Glass, supra, at 1172 (citing Seely v. White Motor Co., 403 P.2d at 151). When the damage caused by a dangerous condition is limited to the product alone with no attendant injury to persons or other property, the "line that is drawn usually depends on the nature of the defect and the manner in which the damage occurred." Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d at 1169. "The defect causing the injuries must be unreasonably dangerous to the owner of the product or to third parties." Butler v. Pittway Corp., No. 85-7092, slip op. at 5397 (2d Cir. Aug. 2,

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45/ Like the failure in the Dudley case, the failure of the crankshaft in Diesel Generator 102 severely damaged other engine components including connecting rod bearings, the jacket water pump, governor and generator rotor. Museler Aff. ¶ 22, Complaint ¶ 21.

1985) (quoting Schiavone, 56 N.Y.2d at 669, 451 N.Y.S.2d at 721). Certainly, many defects do not create such a hazard, while others expose the owner, third parties, or property to an unreasonably dangerous condition. See, e.g., Sharon Steel Corp. v. Lakeshore, Inc., 753 F.2d 851, 855 (10th Cir. 1985) (improper manufacture of sheave wheel shaft created unreasonable risk of injury); U.S. Home Corp. v. George W. Kennedy Construction Co., 565 F. Supp. 67, 68-69 (N.D.Ill. 1983) (truss pipe failure caused collapse of portion of sewer system); ICI Australia Ltd. v. Elliott Overseas Co., 551 F. Supp. 265, 268 (D.N.J. 1982) (sudden and catastrophic failure of compressor coupling caused damage to feedgas train).

Not surprisingly, TDI fails to mention the Second Circuit's recent decision in Butler v. Pittway Corp., supra. The opinion demonstrates that TDI's reliance upon Schiavone and its progeny is completely misplaced in this context. In Butler, the plaintiffs purchased Pittway smoke detectors which failed to sound a timely alarm, aggravating the extent of fire damage to the Butlers' home. Like TDI, Pittway moved to dismiss plaintiffs' property damage claim arguing that "economic losses" were not recoverable in a tort action. The district court granted Pittway's motion concluding that the detectors had only failed to "perform as promised." The Second Circuit reversed, explaining a distinction established in Schiavone that:

> a plaintiff in New York is relegated to contractual remedies and cannot maintain a tort action when a "product, although not itself unduly dangerous, does not function properly, resulting in economic loss other than physical damage to persons or property." Id. at 228, 439 N.Y.S.2d at 937. However, the dissent [whose position was later adopted on appeal] distinguished those cases for which recovery in tort might be sought, namely: "[w]here the product is unduly dangerous so that the defect causes physical damage, presumably due to an accident, to either persons or property." Id., 439 N.Y.S.2d at 937.

Id. at 5394 (quoting the lower court's dissenting opinion by Judge Silverman).

Following the Third Circuit's lead in Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981), the Second Circuit concluded that the analysis does not stop with a simplistic characterization of plaintiff's claim as economic loss. Instead, a court must examine the nature of the defect and determine whether the defect creates a safety hazard which exposes plaintiff to an unreasonably dangerous condition. Slip op. at 5397-98. The cases upon which TDI relies were distinguished because they "oversimplifie[d] the holding of Schiavone." Slip op. at 5400 n.1. Those cases "were properly characterized as economic loss actions because the products' defects were either not dangerous and/or there was no personal injury or property damage suffered." Id. Because the court could not say as a matter of

law that a malfunctioning smoke detector is not a dangerous product, it held that plaintiffs were entitled to an opportunity to show that the alleged failure of the smoke detector exposed them to an unreasonably dangerous condition. Slip op. at 5400-01.

It is also not surprising that TDI fails to mention the Third Circuit's most recent treatment of this issue. In East River Steamship Corp. v. Delaval Turbine, Inc., 752 F.2d 903 (3d Cir. 1985), cert. granted sub nom, East River Steamship Corp. v. Transamerica Delaval, Inc., 106 S.Ct. 56 (1985), TDI contracted to provide high pressure turbines as the main propulsion units for four supertankers. The turbines developed mechanical problems including defective parts which required replacement. The issue before the court was whether damage to a product caused by a design defect is recoverable in tort. Applying analogous admiralty law, the Third Circuit explained that such damage is not recoverable unless the design defect "pose[s] an unreasonable risk of harm to persons or property other than the product itself, as measured by the nature of the design defect, the manner in which the defect manifests itself, and the nature of the inherent risk, if any, created by the design defect." Id. at 904.

Relying upon its earlier decision in Pennsylvania Glass Sand, the court described the framework for determining when plaintiff's loss may be redressed in strict liability or negligence:

> In determining whether tort law should provide a remedy for the plaintiff's losses, the court in PGS considered the nature of the defect, the manner in which the defect manifested itself, and the nature of the risk which was inherent in the defect. The court held that because the design defect was safety-related, because the defect could and did manifest itself in sudden and calamitous manner, and because the safety hazard posed a serious risk to persons and property, the plaintiff stated a cause action in tort for the damages it suffered.

Id. at 908.

Unlike the case at bar, the supertanker owners in East River Steamship proved no risk other than to their economic interests. Id. When the turbines developed mechanical problems, there was no threat to the safety of persons or property. Id. at 909. "Unlike PGS, there was no 'sudden or calamitous' event which triggered the manifestation of the defect and the resulting damage" to the Delaval turbines. Id. The risk created by the defect was simply that the ships' speed would be reduced causing down-time for repairs and lost profits. Id. Unlike LILCO, the supertanker owners failed to allege that the Delaval turbines were unreasonably dangerous or caused injury.

In sum, it is the nature of the risk which determines the availability of a tort remedy. The potential for failure in emergency diesel generators supporting a nuclear power plant creates a serious risk and threat to personal safety and property. That the crankshaft, block and other defects manifested themselves during LILCO's comprehensive testing program instead of during a nuclear accident does not alter the unreasonable danger created by TDI's misconduct. Accordingly, LILCO should be afforded an opportunity to demonstrate that the diesel generators' defects exposed LILCO and the public to an unreasonably dangerous condition and that its damages flowed from those defects and the resulting failures. Counts Two, Ten and Eleven should not be dismissed.

VI. THE PURPORTED CONTRACTUAL LIMITATION OF LIABILITY DOES NOT BAR LILCO'S RECOVERY OF DAMAGES

Again exceeding the proper scope of a Rule 12(b)(6) motion, TDI argues generally that consequential damages are barred by the LILCO-TDI contract. TDI Br. at 67-69. The allegedly applicable contract provision is not contained in the Complaint.46/ Yet even if the Court considers this

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46/ There is at least a factual conflict as to whether the purported contract limitation on consequential damages is partially or totally abrogated by other contract provisions. For example, the Purchase Order includes TDI's agreement to indemnify

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procedurally premature argument, the damage allegations should not be dismissed in whole or in part because (1) the damages sought are not consequential; (2) TDI's intentional wrongdoing and gross negligence overcome the effect of any contract limitation; (3) the contractual damage limitation is also not applicable to TDI's negligence and strict liability; and (4) the limitation is ineffective even to contract damages because other contractually provided remedies have failed of their essential purpose.

A. The Damages Sought By LILCO Are Not Consequential

Contrary to TDI's assertions, the damages which LILCO seeks to recover in this lawsuit cannot be characterized as consequential. Paragraph 25 of the Complaint, which TDI wants to dismiss totally, includes such damages as the price LILCO paid TDI for the diesels, the costs of determining the cause of the defects and fixing the diesels and testing the remedies, licensing costs, and future inspections and monitoring to ensure the reliability of the diesels, all clearly direct

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LILCO for all liability, costs, and the like arising out of any claim or suit or for "public charges and penalties for failure to comply with Federal, State or local law" arising out of any "act or omission, negligent or otherwise," of TDI, except when LILCO was solely negligent as judicially established. TDI Appdx. A-113.

damages. Other damages, such as costs of purchasing other diesels to mitigate for the absence of the defective emergency diesels were necessarily incurred because the repair or replacement promised by TDI in its contract was not delivered. Necessary expenses incurred to mitigate damages are always recoverable. E.g., Spang Industries v. Aetna Casualty and Surety Co., 512 F.2d 365, 369-71 (2d Cir. 1975); Den Norske Ameriekalinje Actiesselskabet v. Sun Printing & Publishing Association, 226 N.Y. 1, 122 N.E. 463, 465 (1919).

In contrast to LILCO's particularized damage allegations, TDI does not undertake any specific discussion of the damages claimed. The Court should, therefore, conclude that this is but a half-hearted argument which TDI knows is inappropriate at this time. Since it is impossible to determine on the record before the Court that the damages claimed are consequential, dismissal is not appropriate and TDI's motion should be denied.

B. TDI's Intentional Wrongdoing And Gross Negligence Entitle LILCO To Recover Consequential Damages

Even if the Court could characterize the damages as consequential, the Complaint states a valid claim for their recovery. A contractual limitation of liability may not be enforced if it would permit a party to avoid liability for damages caused by intentional wrongdoing or gross negligence.

Kalisch-Jarcho, Inc. v. City of New York, 58 N.Y.2d 377, 461 N.Y.S.2d 746, 749-50, 448 N.E.2d 413 (1983); I.C.C. Metals, Inc. v. Municipal Warehouse Co., 50 N.Y.2d 657, 431 N.Y.S.2d 372, 376, 409 N.E.2d 849 (1980). Thus dismissal would be inappropriate since the Complaint alleges in detail fraud, willful and wanton conduct and gross negligence by TDI. Such callous disregard for safety plus the inherent bad faith in TDI's contractual dealings should not be rewarded by upholding the contractual damage limitation.

It has long been settled that a contractual limitation of liability for consequential damages does not bar recovery of such damages if a party's claims of fraudulent inducement to contract are sustained. See International Business Machines Corp. v. Catamore Enterprises, Inc., 548 F.2d 1065, 1076 (1st Cir. 1976), cert. denied, 431 U.S. 960 (1977) (decided under New York law); Price Brothers v. Olin Construction, Inc., 528 F. Supp. 716, 721 (W.D.N.Y. 1981); APLications Inc. v. Hewlett-Packard Co., 501 F. Supp. 129, 136 (S.D.N.Y. 1980); American Electric Power Co. v. Westinghouse Electric Corp., 418 F. Supp. 435, 460 (S.D.N.Y. 1976). Recent developments in New York law indicate that LILCO is also entitled to consequential damages if it suffered such damages as a result of TDI's intentional misconduct or gross negligence in the performance of its duties under the contract. In Kalisch-Jarcho, Inc. v. City of New

York, supra, a construction contractor contended that the delays were caused by the City's active interference. The New York Court of Appeals held that a contractual limitation on delay damages could not be enforced

> when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or, when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit.

461 N.Y.S.2d at 750 (footnotes and citations omitted). The court emphasized that "the policy which condemns such conduct is so firm" that it overcomes the intentions of the parties in framing such a provision. Id.

Similarly, in I.C.C. Metals, Inc. v. Municipal Warehouse, Co., supra, the Court of Appeals held that a contractual limitation on liability could not be enforced if there was a showing of intentional wrongdoing:

> It has long been the law in this State that a warehouse, like a common carrier, may limit its liability for loss of or damage to stored goods even if the injury or loss is the result of the warehouse's negligence . . .. This rule . ... is premised on the distinction between an intentional and an unintentional tort. Although public policy will in many situations countenance voluntary prior limitations upon that liability which the law would otherwise impose upon one who acts carelessly, such prior limitations may not properly be applied so as to

> dismiss one's liability for injuries resulting from an affirmative and intentional act of misconduct . . .. Any other rule would encourage wrongdoing . . ..

431 N.Y.S.2d at 376 (citations omitted).

Once again, the cases cited by TDI are inapposite. Only one, American Electric Power Co. v. Westinghouse Electric Corp., supra, involves claims of intentional wrongdoing. It is also the only case cited which was decided under New York law.47/ And, contrary to TDI's position, there the court held that a contractual limitation precluding recovery of consequential damages could not be effective if the plaintiff's fraud claims were sustained at trial. 418 F. Supp. at 460. Furthermore, the decision predated I.C.C. Metals, Inc. v. Municipal Warehouse Co., supra, and Kalisch-Jarcho, Inc. v. City of New York, supra.

C. The Consequential Damage Exclusion Also Does Not Apply To Negligence And Strict Liability

In addition to its inapplicability to fraud, intentional wrongdoing and gross negligence, any contractual damages limitation would also be inapplicable to LILCO's recovery under Counts Two, Ten and Eleven alleging various theories of negligence and strict liability.

47/ Royal Indemnity Co. v. Westinghouse Elec. Corp., 385 F. Supp. 520 (S.D.N.Y. 1974), was decided under New Jersey law.

New York recognizes contractual disclaimers of tort liability only when the exclusion is "clear," "explicit," and "unequivocal." Gross v. Sweet, 49 N.Y.2d 102, 424 N.Y.S.2d 365, 368, 400 N.E.2d 306 (1979). The limitation of liability must plainly extend to negligence or other fault. Id. See also Willard Van Dyke Productions, Inc. v. Eastman Kodak Co., 12 N.Y.2d 301, 239 N.Y.S.2d 337, 339, 189 N.E.2d 693 (1963). Even then, such exculpatory clauses are not favored and are closely scrutinized. Id. Every inference is drawn against their enforcement. Gross v. Sweet, supra, at 367.

The purported limitation of liability cited in TDI's Brief, p. 68, has no such explicit language. It broadly states that "[u]nder no circumstances shall Delaval be liable for special or consequential damages. . . ." It does not mention negligence or any other tort liability. Especially, therefore, at the pleadings stage, the Court should presume the purported contractual limitation of liability inapplicable to tort damages.

While New York courts do not require that the word "negligence" explicitly appear, "words of similar import" must be used. Gross v. Sweet, 424 N.Y.S.2d at 368. Language such as "without warranty or liability of any kind" has been held ineffective to disclaim liability for negligence. Willard Van Dyke Productions, Inc. v. Eastman Kodak Co., 239 N.Y.S.2d at

340. In O'Brien v. Grumman Corp., 475 F. Supp. 284 (S.D.N.Y. 1979), this Court found the following language did not evidence the unmistakable intent of the parties to exclude liability for negligence:

> Buyer hereby waives and releases all rights, claims and remedies with respect to any and all warranties, express, implied or statutory . . ., duties, obligations and liabilities arising by law or otherwise and including, but without being limited to, any obligation of Grumman with respect to incidental or consequential damages or damages for loss of use.

Id. at 288. Like the O'Brien contract, the TDI contract does not mention compensatory or punitive damages, but only "special and consequential" damages.48/

Accordingly, this is yet a third reason why the damages claim should not be dismissed.

48/ Also, like the O'Brien contract, the TDI contract discusses potential negligence of TDI in other parts of the contract, e.g., the Liability and Indemnification section, but not in the "Limits of Liability" section. Compare American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435, 452 n.25 (S.D.N.Y. 1976) where this Court enforced a contract limitation on negligence liability where "negligence" was specifically mentioned in the limitation clause. The Court observed that the contract stated that the repair or replacement of parts would be an exclusive remedy and that it "would 'constitute fulfillment of all liabilities of the Company to the purchaser, whether based on contract, negligence or otherwise with respect to or arising out of such equipment.'" Besides lacking any reference to negligence or tort liability, the TDI contract has no language making exclusive its promise to repair or replace defective equipment. TDI has not argued that its promises to repair or replace -- which were repudiated -- were exclusive remedies.

D. The Other Contract Remedies Have Failed Of Their Essential Purpose

A fourth reason for rejecting TDI's reliance on its limitation of remedy is N.Y.U.C.C. § 2-719(2) (McKinney 1964) which states that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act." An exclusive or limited remedy fails of its essential purpose when it operates "to deprive a party of the substantial benefit of the bargain." Cayuga Harvester Inc. v. Allis-Chalmers Corp., 95 A.D.2d 5, 465 N.Y.S.2d 606, 611 (4th Dept. 1983) (quoting Clark v. International Harvester Co., 99 Idaho 326, 340, 581 P.2d 784 (1978)). Whether this occurs is a question of fact. Id. at 611-12. Such a fact question is clearly raised by the Complaint which alleges that TDI intentionally deceived LILCO with respect to the defects, that TDI was notified of each of the defects and that TDI repudiated its obligation to remedy the defects and repair or replace the emergency diesel generators. As a result, LILCO was deprived of the benefit of its bargain, i.e. licensable, reliable emergency diesel generators.

Although New York courts generally hold that a consequential damages exclusion is enforceable despite the failure of a repair or replacement provision, on the theory that they are two discrete ways of limiting liability, the

courts implicitly recognize exceptions to the rule. For example, in Cayuga Harvester, the court held the two provisions independent but noted that the buyer did not allege that the seller repudiated its limited remedy obligations or was willfully dilatory. Instead, the court observed that the seller had made extensive efforts to comply. 465 N.Y.S.2d at 612. Importantly, the court strongly implied that if the seller had willfully repudiated the limited remedy, the consequential damages exclusion could not be enforced. Id. at 614-616.49/

In sum, the Complaint plainly presents a claim for the damages described in ¶ 25. At a minimum, the enforceability of the alleged consequential damages exclusion is a question of fact which is not ripe for the Court's determination.

49/ In a case pre-dating Cayuga Harvester, this Court had interpreted New York law differently. American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435, 458-59 (S.D.N.Y. 1976). There the Court enforced a consequential damage exclusion even assuming repudiation of the obligation to repair or replace, absent a showing of fraudulent inducement. Cayuga, however, more accurately reflects New York law which makes enforceability of such a provision a fact question. Other courts applying the same UCC provision agree. E.g., RRX Industries, Inc. v. Lab-Con Inc., 772 F.2d 543, 547 (9th Cir. 1985) (applicability of consequential damage exclusion in face of failure of remedy is question of fact); Milgard Tempering, Inc. v. Selas Corp. of America, 761 F.2d 553, 556-57 (9th Cir. 1985) (summary judgment inappropriate since only after all of the circumstances surrounding the negotiation and performance of the contract have been determined at trial can the enforceability of consequential damage limitation be determined).

VII. DISCOVERY SHOULD NOT BE STAYED

LILCO served its First Set of Interrogatories and Request for Production of Documents to TDI on August 30, 1985 and its second set on November 7, 1985. Though TDI has responded with several specific objections and some general promises to supply information, it has not responded substantively to anything. Instead, it has moved to stay discovery pending resolution of its motion to dismiss. LILCO's noticed deposition of Transamerica Corporation has been deferred for the same reason.

TDI's request for a stay of discovery is nearly moot since TDI has arrogated to itself a stay by simply objecting in whole to LILCO's First and Second Sets of Interrogatories and Request for Production of Documents. While LILCO has not to date pressed this issue, discovery should not be stayed any longer, implicitly or otherwise. Thus, LILCO requests that the Court order discovery to proceed immediately.

TDI's request for a stay is predicated upon its unwarranted inference of a claim for delay of Shoreham's commercial operation. As discussed above, LILCO makes no such claim here. Consequently, the torrent of discovery on that issue and joinder of additional parties predicted by TDI will not be necessary. While discovery by LILCO will necessarily require TDI to produce much information -- much of it no doubt

incriminating and harmful to TDI's claim, based on information already obtained from former TDI employees -- that is no reason for the stay of discovery.

LILCO has pleaded eleven good claims in this action. It has made a prima facie showing of extensive wrongdoing by TDI. A further stay will only delay inevitable discovery and unnecessarily protract this case. Moreover, given the evidence already uncovered of TDI's fraud and deceit, and given LILCO's ongoing concern since the TDI diesels remain in use at Shoreham (where they have been thoroughly rebuilt) and other plants, it is important that LILCO be afforded access to TDI's documents and pertinent witnesses quickly to avoid further wrongdoing.50/

CONCLUSION

For the reasons discussed above, LILCO's Complaint cites eleven claims upon which relief can, and should, be granted against TDI. TDI's intentional wrongdoing, recklessness, negligence and breach of contract with respect to emergency diesel generators vital to the safe operation of the Shoreham Nuclear Power Station should not be shielded by a plethora of misapplied procedural ploys.

50/ It is no secret that the NRC's Office of Investigation has been ordered to investigate TDI. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-18, 21 NRC 1637, 1643-45 (1985).

Accordingly, TDI's motions to dismiss and to stay discovery should be denied.

Dated: February 3, 1986

HUNTON & WILLIAMS

By _____
(A Member of the Firm)

299 Park Avenue
New York, New York 10171
(212) 980-8200

707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212
(804) 788-8466

1 Hannover Square
Fayetteville Street Mall
Raleigh, North Carolira 27601
(919) 899-3019

Counsel for Long Island
Lighting Company

AFFIDAVIT OF SERVICE

I hereby certify that a true copy of the foregoing RESPONSE OF LONG ISLAND LIGHTING COMPANY TO MOTIONS TO DISMISS AND TO STAY DISCOVERY was this day delivered by hand to Robert E. Smith, Esq., Rosenman, Colin, Freund, Lewis & Cohen, 575 Madison Avenue, New York, New York 10022 and to Ira M. Millstein, Esq. and James W. Quinn, Esq., Weil, Gotshal & Manges, 767 Fifth Avenue, New York, New York 10153.

This the _____ day of February, 1986.

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