

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

IN RE: NEW YORK CITY ASBESTOS LITIGATION

THIS DOCUMENT RELATES TO

ALL ASBESTOS CASES

NYCAL
Index No. 40000/1988

Hon. Peter H. Moulton
Part 50

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' JOINT MOTION FOR STAY**

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PRELIMINARY STATEMENT

Defendants submit this memorandum of law, along with the accompanying Affirmation of Jonathan Kromberg (the “Kromberg Aff.”), in support of Defendants’ joint motion seeking (i) a sixty (60) day stay of all proceedings for all cases currently pending or subsequently commenced in the New York City Asbestos Litigation (“NYCAL”), pursuant to Section 2201 of the Civil Practice Law and Rules (“CPLR”), except for plaintiffs’ depositions and the related pre-deposition discovery in pending and future *in extremis* actions and individual actions at the Court’s discretion; and (ii) such other and further relief as may be just. A stay of all proceedings in NYCAL is necessary in order to allow both the Court and parties sufficient time to develop a new, modernized Case Management Order (“CMO”) that is fair and balanced and continues to protect all parties’ rights.

BACKGROUND

Twenty seven (27) years ago, in response to the unique challenges that were posed by asbestos litigation, the New York City asbestos bar and Supreme Court agreed to the adoption of the NYCAL CMO to guide asbestos litigation in New York City. *See* Kromberg Aff. at Exhibit 2. The stated objective of the CMO is “to encourage and bring about the fair, expeditious, and inexpensive resolution” of the pending asbestos cases. *Id.* at § II; *see also* Kromberg Aff. at Exhibit 3, § II; Kromberg Aff. at Exhibit 4, § II; Kromberg Aff. at Exhibit 5.

The CMO is above all a “product of deliberate, arms-length negotiations through which, to the benefit of both sides, the parties have charted their own course.” *In re NYCAL (All Asbestos Cases)*, 37 Misc. 3d 1232(A), at *3 (Sup. Ct. N.Y. County 2012) (Heitler, J.); *see also In re NYCAL (Ames v. Kentile Floors)*, Index No. 107574/08, at *2 (Sup. Ct., N.Y. County June 17, 2009) (Heitler, J.), *aff’d* 66 A.D.3d 600 (1st Dep’t 2009) (the CMO was “crafted with great care by representatives chosen by both the plaintiffs’ and the defendants’ asbestos personal

injury bar and... bears the imprimatur of the court.”). As originally drafted and intended, the CMO was a carefully-negotiated balance of benefits through which the parties consented to the altering of certain rights and remedies under the CPLR. *See, e.g.*, Kromberg Aff. at Exhibit 1. Twenty seven (27) years later, however, a combination of factors – dramatic changes to the litigation over nearly three decades, recent interpretation of the CMO, implementation of the CMO’s coordinating procedures, and certain systemic favoritism – have together resulted in a far more significant departure from the rights and remedies afforded to Defendants under the CPLR than the original defendants bargained for or reasonably could have anticipated. *See id.* The time has come to right this imbalance.

ARGUMENT

A stay of all proceedings in NYCAL – except for plaintiffs’ depositions and the related pre-deposition discovery in pending and future *in extremis* actions, and individual cases at the Court’s discretion¹ – is necessary to allow the Court and parties sufficient time to develop a much needed, new, fair and balanced CMO. By granting a brief stay, the Court will ensure that the parties give the CMO drafting process the meaningful attention it deserves.

I. It is Well Within the Court’s Discretion to Stay All Proceedings For A Brief Period

It is axiomatic that the underlying purpose of a stay is to promote “comity, orderly procedure, and judicial economy.” *Chan v. Zoullas*, 34 Misc.3d 1210(A), 943 N.Y.S.2d 790 (Sup. Ct. N.Y. County, Jan. 10, 2012) *quoting Asher v. Abbott Labs*, 307 A.D.3d 211, 211, 763

¹ Because Defendants are mindful of the importance of preserving the testimony of terminally ill plaintiffs, Defendants’ request for a stay does not include plaintiffs’ depositions and the related pre-deposition discovery in pending and future *in extremis* actions, which are actions by plaintiffs who are terminally ill from an asbestos-related disease with a life expectancy of less than one year. *See* CMO Section XIII.A.1. The pre-deposition discovery as set forth in CMO Sections VIII.A.1 and B.2 includes plaintiffs’ verified answers to interrogatories; photographs related to purported asbestos exposure; amendments, additions, modifications, or corrections to said answers to interrogatories by handwritten list or otherwise; and plaintiffs’ responses to the standards document requests which accompany the standard interrogatories. *Id.*

N.Y.S.2d 555, 556 (1st Dep't 2003). Consistent with such purpose, CPLR § 2201 provides that “[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.” Thus, in the absence of an express prohibition, CPLR § 2201 affords the Court broad powers to grant a stay. Indeed, the “only limitation on a stay, therefore, is the court's own sense of discretion, prudence, and justice.” *Joseph v. Cheeseboro*, 42 Misc. 2d 917, 919, 248 N.Y.S.2d 969, 971 (N.Y. Civ. Ct. N.Y. County 1964), *rev'd on other grounds*, 43 Misc. 2d 702, 251 N.Y.S.2d 975 (1st Dep't 1964); *Deutsche Bank Natl. Trust Co. v. Oliver*, 24 Misc. 3d 838, 841, 879 N.Y.S.2d 674, 676 (N.Y. Dist. Ct. Nassau County 2009) (quoting *Cheeseboro*, 42 Misc 2d at 919).

Here, there is no law prohibiting the issuance of a stay. Moreover, changing circumstances, as well as grave concerns regarding the interpretation and implementation of the current CMO, strongly counsel in favor of a new CMO in order to avoid potential ongoing and systemic deprivation of Defendants' rights without consent. Under such circumstances, it is more than appropriate for the Court to exercise its discretionary authority under CPLR §2201 in order to issue a stay, and the brief period requested (60 days) is eminently reasonable.

II. A Brief Stay will Not Prejudice the Parties, And Will Prevent Further Harm

Put simply, given the serious concerns laid out in their joint letter of today's date, it is clear that Defendants will continue to suffer irreparable harm if a new CMO is not implemented promptly. *See* Kromberg Aff., Ex. 1. A short stay will help to ensure that both the Court and the parties have sufficient time to focus on and draft a new CMO that will truly “aid[] the parties in facilitating the efficient, economic, and *fair* resolution” of NYCAL cases.” *In re NYCAL (All Asbestos Cases)*, 37 Misc. 3d 1232(A), 1232(A), 966 N.Y.S.2d 347 (Sup. Ct. N.Y. County Nov. 15, 2012) (Heitler, J.) (emphasis added). Thus, far from prejudicing the parties, a stay will help to *prevent* further prejudice in NYCAL. *See, e.g., Britt v. Int'l Bus. Servs., Inc.*, 255 A.D.2d 143,

144, 679 N.Y.S.2d 616, 617 (1st Dep't 1998) (granting stay where plaintiff's prejudice from delay was "not as severe as defendants would suffer without a stay").

In addition, a brief stay will conserve judicial resources. *See Asher*, 307 A.D.2d at 212 (granting a stay in part to "avoid duplication of effort and waste of judicial resources"); *Goodridge v. Fernandez*, 121 A.D.2d 942, 945, 505 N.Y.S.2d 144, 147 (1st Dep't 1986) (finding a stay would avoid "waste of judicial resources"). It is inevitable that the ongoing harm suffered by Defendants under the current CMO will adversely impact the Court. Failure to issue a stay will undoubtedly require that the Court continue to litigate extraneous issues arising from the current CMO. The imposition of a reasonable stay to address the need for a new CMO will prevent the misuse of this Court's resources on issues that may soon be rendered moot. Similarly, a short stay will save all parties from the costs and burdens of undertaking a certain course of discovery or other case preparations that may be rendered a nullity under a new CMO.

Finally, given the brief nature of the stay requested, Plaintiffs will suffer little or no harm. Indeed, any and all cases scheduled to begin trial will be able to proceed to trial by this summer under the current request, and those currently in discovery will continue in short order. *See Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4, 559 N.E.2d 1268, 1271 n.4 (1990) (stating that "the court entertaining the application is duty-bound to consider the relative hardships that would result from granting (or denying) a stay"); *Prudential Oil Corp. v. Phillips Petroleum Co.*, 83 A.D.2d 453, 457, 445 N.Y.S.2d 438, 441 (1st Dep't 1981) (finding lower court had improperly denied defendant's motion for a stay where plaintiff had adduced "no evidence of hardship").

CONCLUSION

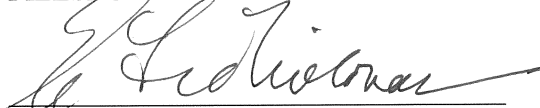
Given the concerns raised by Defendants, a sixty (60) day stay is necessary to afford the Court and parties a reasonable opportunity to draft a new CMO that addresses the current realities of NYCAL and also facilitates the efficient, economic, and fair resolution of the docket.

WHEREFORE, it is respectfully submitted that Defendants' joint motion seeking a stay of all proceedings in the NYCAL docket, except plaintiffs' depositions and the related pre-deposition discovery in pending and future *in extremis* actions and individual cases at this Court's discretion, should be granted, together with such other and further relief as may be just.

Dated: New York, New York
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Respectfully submitted,

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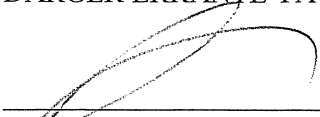
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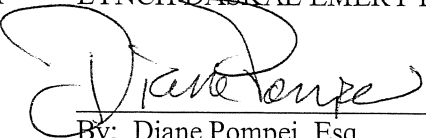
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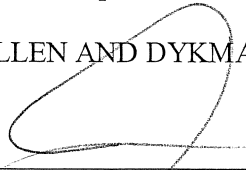
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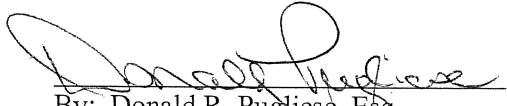
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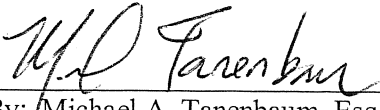

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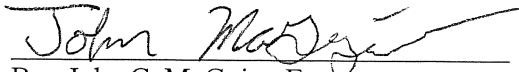
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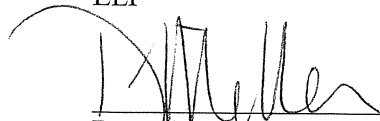
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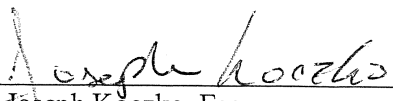
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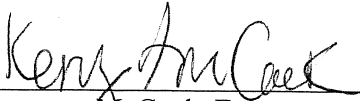
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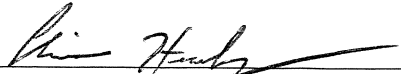
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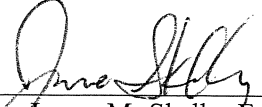
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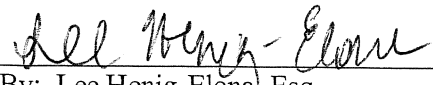
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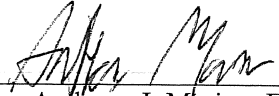
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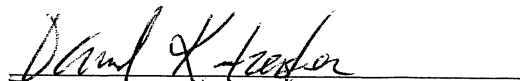
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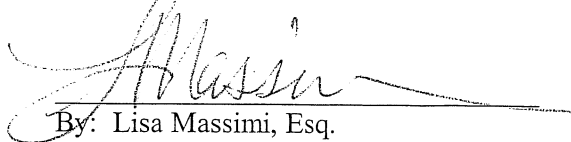
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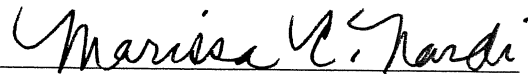
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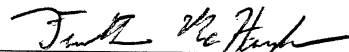
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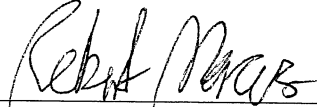
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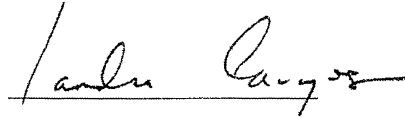
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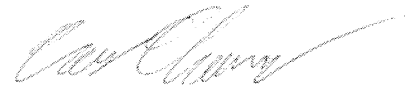
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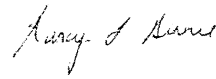
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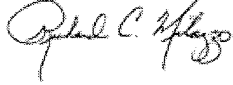
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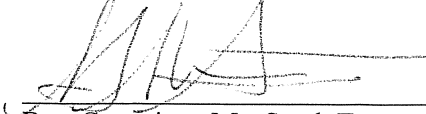
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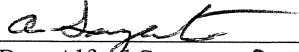
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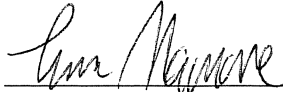
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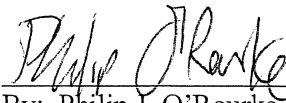
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