

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

**NOTICE OF MOTION FOR
STAY**

PLEASE TAKE NOTICE that, upon the annexed Affirmation of Jonathan Kromberg, dated March 31, 2015, the accompanying Memorandum of Law, and upon the prior pleadings and proceedings herein, Defendants will move this Court before the Motion Support Office, Room 130, 60 Centre Street, New York, New York, on the 9th of April 2015 at 9:30 in the morning, or as soon thereafter as counsel can be heard, for an Order (i) staying for sixty (60) days all proceedings for all cases currently pending or subsequently commenced in the New York City Asbestos Litigation, pursuant to Section 2201 of the Civil Practice Law and Rules, 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.

PLEASE TAKE FURTHER NOTICE that, in accordance with Rule 2214(b), answering papers, if any, are to be served at least two (2) days prior to the return date of this motion.

Dated: New York, New York
March 31, 2015



By: Jonathan Kromberg, Esq.
DARGER ERRANTE YAVITZ & BLAU LLP
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COUNTY OF NEW YORK

IN RE: NEW YORK CITY ASBESTOS LITIGATION

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Hon. Peter H. Moulton
Part 50

**AFFIRMATION IN SUPPORT
OF DEFENDANTS' JOINT
MOTION FOR STAY**

JONATHAN KROMBERG, an attorney duly admitted to practice before the courts of the State of New York, affirms the following to be true pursuant to N.Y. C.P.L.R. § 2106 and under penalties of perjury:

1. I am a partner with the law firm Darger Errante Yavitz & Blau LLP, co-liaison counsel for Defendants in the New York City Asbestos Litigation ("NYCAL"). I am fully familiar with the facts and circumstances set forth herein.

2. I respectfully submit this affirmation pursuant to N.Y. C.P.L.R. § 2201 in support of Defendants' joint motion seeking a stay of all proceedings for all cases currently pending or subsequently commenced in NYCAL for a period of no less than sixty (60) days, together with such other and further relief as may be just.

3. Annexed hereto as Exhibit 1 is Defendant's joint correspondence to the Hon. Peter H. Moulton, dated March 31, 2015.

4. Annexed hereto as Exhibit 2 is the NYCAL Case Management Order No. 1, so ordered March 25, 1988.

5. Annexed hereto as Exhibit 3 is the NYCAL Amended Case Management Order, so ordered September 20, 1996.

6. Annexed hereto as Exhibit 4 is the NYCAL Amended Case Management Order, so ordered February 19, 2003.

7. Annexed hereto as Exhibit 5 is the NYCAL Amended Case Management Order, so ordered May 26, 2011.

8. No prior application has been made for the relief requested.

WHEREFORE, it is respectfully submitted that Defendants' joint motion seeking a stay of all proceedings in the NYCAL docket should be granted, together with such other and further relief as may be just.

Dated: New York, New York
March 31, 2015



Jonathan Kromberg, Esq.
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116 East 27th Street, 12th Floor
New York, New York 10016
(212) 452-5300
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Exhibit 1



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March 31, 2015

BY HAND

Hon. Peter H. Moulton
Administrative Judge
New York County Supreme Court, Civil Term
60 Centre Street
New York, NY 10007

Re: NYC Asbestos Litigation ("NYCAL")

Dear Justice Moulton:

The signatories hereto (collectively, "Defendants") welcome Your Honor to your new positions as administrative judge of the Supreme Court, New York County and the New York City Asbestos Litigation ("NYCAL"). We write to bring certain matters to your attention in advance of the "NYCAL Town Hall" conference Your Honor has scheduled for April 9.

Your arrival coincides with a period of great upheaval in this litigation, much of which involves the current NYCAL Case Management Order ("CMO"). There is widespread agreement that the CMO needs to be changed so that it conforms with the nature of asbestos litigation as it exists now, rather than as it existed decades ago when the CMO was implemented. While we understand and appreciate the efforts of Justice Freedman and others to adopt special mechanisms in response to the extraordinary problems created by the "elephantine mass"¹ of asbestos claims facing the courts at the time the CMO was prepared, there is no longer any compelling reason for depriving a category of defendants of their basic due process rights today.

¹ *Norfolk & Western Ry. Co. v. Ayers*, 123 S. Ct. 1210, 1228 (2003).

Defendants' concerns surrounding the legitimacy and continued viability of the current CMO cannot be overstated. Because the CMO departs from the New York Civil Practice Law and Rules ("CPLR"), it must be founded on consent, as it originally was. But many of the signatories to this letter were not parties when the plaintiffs and defendants originally agreed upon the CMO and never consented to these procedures. Moreover, recent interpretation of the CMO, implementation of its coordinating procedures, and systemic favoritism have together resulted in a far more significant departure from the rights and remedies afforded to Defendants under the CPLR than even those Defendants involved in the original negotiations had bargained for, or could reasonably have anticipated.

Accordingly, Defendants request that Your Honor make the development of a new CMO an immediate and leading priority. Defendants stand ready to meet with the Court and Plaintiffs' counsel to engage in the meaningful work of developing a new CMO that will once again "aid[] the parties in facilitating the efficient, economic, and *fair* resolution" of NYCAL cases.²

Given the need for reform of the CMO, and to provide the parties a fair opportunity to do so, Defendants also propose that Your Honor issue a sixty day stay of all pending NYCAL cases, which should be sufficient time to prepare a new CMO with the cooperation of all the parties. 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 discovery³ in pending and future *in extremis* actions, and the stay, of course, could be lifted for individual cases as Your Honor deems appropriate.⁴ We have today filed a limited Motion for Temporary Stay requesting such relief.

In order to provide the context for Defendants' motion, what follows is a summary of our view of the current state of affairs in NYCAL. This discussion is not intended to

² *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).

³ Pre-deposition discovery is set forth in CMO Sections VIII.A.1 and B.2, which require plaintiffs to produce prior to depositions 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.

⁴ The *in extremis* action are "actions brought 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.

be comprehensive, but rather an overview of some of the biggest problems facing Defendants in NYCAL. We welcome the opportunity to discuss these issues with Your Honor.⁵

THE CHANGING NATURE OF ASBESTOS LITIGATION

In the last two decades, asbestos litigation, including NYCAL, has dramatically changed. The vast number of cases against known asbestos producers created a crisis in the courts in the 1980s and early 1990s. Both plaintiffs' counsel and defendants' counsel had to find a manageable system to resolve large numbers of cases where the presence of asbestos was conceded and the only real issue was product identification.

Since the CMO was adopted, the key parties responsible for the manufacture or installation of asbestos insulation have filed for bankruptcy. One hundred seven companies have filed for asbestos-related bankruptcies in the last thirty two years, over forty companies declaring bankruptcy in the last decade, and six companies declaring bankruptcy in 2013 alone. Because of this, plaintiffs now cast their nets ever-wider in "search of the solvent bystander."⁶ The result is that, with increasing frequency over the last decade, lawsuits are filed against a new generation of defendants, *e.g.*, "those who manufactured products in which asbestos was encapsulated, distributed products containing asbestos, or owned premises that contained asbestos."⁷

And it is not just the defendants who have changed. The claims brought against them also are different: the "nontraditional" industries named as defendants have seen an increase in claims involving off-site exposure, such as "take-home" exposure from laundering the work clothes of family members and exposure from home repairs, remodeling or auto work.⁸ As a result, the majority of the claims defendants face

⁵ Because it is not publically available, we attach hereto as Exhibit A a copy of Bates White Economic Consulting, "NYCAL Filings and Verdict Trends" (Dec. 2, 2014) which is cited throughout this letter. Should the Court desire a copy of any other item cited herein, please let us know.

⁶ Mark A. Behrens and Cary Silverman, *Punitive Damages in Asbestos Personal Injury Litigation: The Basis for Deferral Remains Sound*, 8 Rutgers J. L. & Pub. Pol'y 50, 53-54 (2011).

⁷ *Overview of Asbestos Claims Issues and Trends*, Am. Acad. Actuaries, 3 (Aug. 2007); *cf.* Pls. Revised Joint Br. in Support of Appl. to End the Deferral of NYCAL Causes of Action for Punitive Damages, dated April 2, 2013, at 7, Index No. 40000/88 (Sup. Ct. N.Y. Cnty.) (describing "the original set of defendants" as "typically those that had marketed and supplied ultra hazardous asbestos-containing thermal insulation materials").

⁸ *See, e.g., Holdampf v. A.C. & S, Inc. (In re NYCAL)*, 5 N.Y.3d 486 (2005) (claims that take-home exposure from laundering husband's clothes caused wife's injuries); *In re Grossman's, Inc.*, 389 B.R. 384, 387 (Bankr. D. Del. 2008) (claims that 1997 home remodeling projects caused plaintiff's injuries);

(... continued)

today involve *de minimis* or remote asbestos exposure. The type of injury has also changed: The majority of new asbestos cases being filed in NYCAL are brought by plaintiffs suffering from lung cancer, not mesothelioma. Lung cancer and mesothelioma claims are significantly different.

THE CURRENT NYCAL REGIME

As one journalist noted, Defendants have watched helplessly as NYCAL transformed into “the plaintiffs’ bars’ best friend” and a “windfall” for plaintiffs’ firms, at the expense of Defendants’ right to equal treatment under the law.⁹ While the original NYCAL CMO was intended to be first and foremost a consent document—a “product of deliberate, arms-length negotiations through which, to the benefit of both sides, the parties have charted their own course”¹⁰—many factors have disturbed this carefully-negotiated balance. As a result, NYCAL now falls well outside the norm, even when compared to other jurisdictions with major asbestos dockets.

Pervasive and Prejudicial Case Consolidations

Perhaps the most troubling example of NYCAL falling well outside modern norms is in the area of case consolidations. While New York law permits consolidations in appropriate circumstances, their place in asbestos litigation—where consolidation has become the norm—is questionable. Courts in other jurisdictions “have ended or substantially curbed the use of trial consolidations in asbestos cases.”¹¹ For example, the Philadelphia Court of Common Pleas recently adopted a protocol that prohibits trial consolidations of asbestos cases unless all parties agree or the cases involve the same law, same disease, and same plaintiffs’ law firm, and even in those

(... continued)

Chavers v. Gen. Motors Corp., 79 S.W.3d 361, 364 (Ark. 2002) (involving allegations by estate of “shade tree mechanic” whose exposure allegedly resulted from family auto work); see also Stephen J. Carroll et al., Rand Inst. for Civil Justice, *Asbestos Litigation* (2005) at 21, available at http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf, at xxv (“Now many claims come from workers who were exposed to asbestos while working in other industries, such as textiles, paper, glass, and food and beverage, where they typically did not handle asbestos but asbestos was present in the atmosphere.”); *id.* at 76 (noting rise in claims by workers exposed to asbestos in nontraditional industries).

⁹ *Shelly Silver’s Asbestos Gold*, WALL ST. J., Feb. 1, 2015.

¹⁰ *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.).

¹¹ Mark A. Behrens, *What’s New in Asbestos Litigation*, 28 REV. LITIG. 500, 510 (2009).

circumstances, the consolidations are limited to three cases.¹² Courts in Delaware,¹³ Michigan,¹⁴ Mississippi,¹⁵ Ohio,¹⁶ and San Francisco¹⁷ have similarly curbed the bundling of asbestos cases for trial, as have the legislatures of Texas,¹⁸ Kansas,¹⁹ and Georgia.²⁰ These jurisdictions have acknowledged that case consolidations amount to an “assembly line approach to justice” that “allows the plaintiffs firms to pick and choose what to highlight and create [a] kind of ‘franken-plaintiff.’”²¹

By contrast, NYCAL asbestos cases that have little in common are routinely consolidated, a practice that “stacks the deck against defendants who feel compelled to settle rather than risk a jackpot verdict.”²² In a particularly compelling example from 2012, seven NYCAL mesothelioma cases involving different worksites, occupations, exposure periods, diseases, plaintiff health statuses, and even legal

¹² *In re Mass Tort and Asbestos Programs*, General Court Regulation No. 2012-03 (Ct. Com. Pl., Phila. County, Pa. Feb. 15, 2012); *In re Mass Tort and Asbestos Programs*, General Court Regulation No. 2013-01 (Ct. Com. Pl., Phila. County, Pa. Feb. 7, 2013).

¹³ *In re Asbestos Litig.*, No. 77C-ASB-2 (Del. Super. Ct. New Castle County Dec. 21, 2007) (Standing Order No. 1).

¹⁴ Prohibition on “Bundling” Cases, Administrative Order No. 2006-6 (Mich. Aug. 9, 2006), available at <http://courts.michigan.gov/SUPREMECOURT/Resources/Administrative/2003-47-080906.pdf>.

¹⁵ See, e.g., *E.g., Alexander v. AC & S, Inc.*, 2005-CA-01031-SCT, 947 So. 2d 891 (Miss. 2007); *Albert v. Allied Glove Corp.*, 2005-CA-01022-SCT, 944 So. 2d 1 (Miss. 2006); *Amchem Prods., Inc. v. Rogers*, 2003-IA-00237-SCT, 912 So. 2d 853 (Miss. 2005); *Ill. Cent. R.R. v. Gregory*, 2003-IA-01795-SCT, 912 So. 2d 829 (Miss. 2005); *3M Co. v. Johnson*, 2002-CA-01651-SCT, 895 So. 2d 151 (Miss. 2005); *Harold's Auto Parts, Inc. v. Mangialardi*, 2004-IA-01308-SCT, 889 So. 2d 493 (Miss. 2004).

¹⁶ OHIO R. CIV. P. 42(A)(2) (“In tort actions involving an asbestos claim, . . . [f]or purposes of trial, the court may consolidate pending actions only with the consent of all parties. Absent the consent of all parties, the court may consolidate, for purposes of trial, only those pending actions relating to the same exposed person and members of the exposed person’s household.”).

¹⁷ *San Francisco Trial Judge Vacates His Own Consolidation Order*, HARRISMARTIN’S COLUMNS—ASBESTOS, May 2008, at 13, 13.

¹⁸ See TEX. CIV. PRAC. & REM. CODE ANN. §90.009 (West, Westlaw through 2011 Reg. Sess.).

¹⁹ See KAN. STAT. ANN. § 60-4902(j) (West, Westlaw through 2012 Reg. Sess.).

²⁰ See GA. CODE ANN. § 51-14-11 (2009).

²¹ Lawsuit Reform Alliance of New York, *Legal Reform Group Calls for Further Investigation by US Attorney into New York City Asbestos Courts*, Jan. 26, 2015.

²² *Shelly Silver's Asbestos Gold*, WALL ST. J., Feb. 1, 2015.

theories were consolidated for a single trial.²³ That trial resulted in a jury award of \$51 million.²⁴ In another precedent setting example from 2013, a single consolidated trial resulted in a \$190 million jury award.²⁵ And at the December 2, 2014 Perrin Conferences' 4th Annual New York Asbestos Litigation Conference, several NYCAL judges suggested that Defendants should anticipate more and larger consolidations in the coming months.²⁶

Few rulings are as prejudicial to defendants as consolidation orders, since the presentation of different cases to the same jury at the same time "tends to bolster each claim, to defendants' disadvantage" and "prejudice[s] the defendants[]" right to a fair trial."²⁷ Moreover, in consolidated trials "there is a higher probability that at least one defendant will appear callous, and this benefits all plaintiffs."²⁸ Other commentators have observed that even small scale consolidations "significantly improve outcomes

²³ *Matter of New York City Asbestos Litig.*, 36 Misc. 3d 1234(A), 1234A (Sup. Ct. N.Y. County 2012); see also American Tort Reform Foundation, *Judicial Hellholes 2014-2015* (2014), at 9.

²⁴ *Matter of New York City Asbestos Litig.*, 121 A.D.3d 230 (1st Dep't 2014) (only two defendants remained at the time of verdict).

²⁵ Bates White Economic Consulting, "NYCAL Filings and Verdict Trends" (Dec. 2, 2014) (attached hereto). Although Justice Madden subsequently remitted the jury award in that case (see *Assenzio et al. v A.O. Smith Water Prods. Co.*, Nos. 190008/12, 190026/12, 190200/12, 190183/12, and 190184/12, 2015 N.Y. Misc. LEXIS 355 (Sup. Ct. N.Y. County Feb. 5, 2015)), her ruling does nothing to change the prejudice to Defendants apparent on the face of the original award. Candidly, Defendants should not have to gamble that, when the day is done, judges will use their discretion to undo runaway jury awards.

²⁶ The Plaintiffs' bar and several judges have previously suggested that consolidations are necessary in asbestos litigation due to the volume of filings and in order to enact speedy resolution. However, as illustrated by recent NYCAL trial data, single case trials move considerably more quickly to verdict, undermining any suggestion that consolidation is a necessity in order to manage the asbestos docket.

²⁷ *Alter v. Oppenheimer & Co.*, 8 Misc. 3d 1008(A), 1008A, 801 N.Y.S.2d 776, 776 (N.Y. Sup. Ct. 2005) (citing *Bradford v. Coleman Catholic High School*, 110 A.D.2d 965, 966, 488 N.Y.S.2d 105, 106 (3d Dep't 1985)); *Korren v. Eli Lilly & Co.*, 150 Misc.2d 429, 432, 568 N.Y.S.2d 670, 672 (N.Y. Sup. Ct. N.Y. County 1990) (holding that the presentation of numerous DES claims before a single jury would "tend to unfairly bolster the case against the defendants in an impermissibly prejudicial manner"); see also *United States v. Sarracino*, 340 F.3d 1148, 1165 (10th Cir. 2003) (recognizing that the "[s]erious risk of prejudice, from the jury considering evidence against a defendant which is only admissible against a co-defendant . . . is increased when many defendants are tried together 'in a complex case and they have markedly different degrees of culpability'") (quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993)).

²⁸ Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. LEGAL STUD. 365, 373 (2006).

for plaintiffs.”²⁹ There is simply no corresponding benefit for Defendants, whether in large or small scale consolidations.

NYCAL statistics confirm this problem, and in many ways, are even starker than the examples cited above. According to publicly available data, the average plaintiff award in consolidated mesothelioma trials in NYCAL between 2010 and 2014 was over \$24 million per plaintiff, compared to an average of \$7 million per plaintiff in individual trials over the same period.³⁰ The average award for *all* mesothelioma verdicts in NYCAL now stands at \$16 million per plaintiff,³¹ “clocking in at two to three times the national average.”³² NYCAL verdicts also dwarf those in the rest of New York State: Since 2007, the average jury award for an asbestos claim in *all* NYCAL cases is \$21.7 million, or approximately seven times the \$3.1 million average award in courts throughout the rest of the state.³³ And while the frequency of a defense verdict is 3 in 5 in individual NYCAL cases, it drops to only 1 in 5 in NYCAL consolidations.³⁴

Twenty years ago, consolidation may have been efficient because a plaintiff could be grouped with others who had the same kind of jobs, worked at the same job sites at the same time, were suing the same defendants, and had the same disease. Now, however, joint trials routinely involve multiple plaintiffs suing different defendants in cases that have virtually nothing in common, other than the fact that they allege injury as a result of the inhalation of asbestos. The cases involve markedly dissimilar worksites, exposure histories, and, in some cases, injuries; similarly, there are often few, if any, common fact witnesses. Such consolidation is inherently unfair and deprives defendants of a fair trial and due process.

²⁹ Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 574 (2007).

³⁰ Bates White Economic Consulting, “NYCAL Filings and Verdict Trends” (Dec. 2, 2014).

³¹ Bates White Economic Consulting, “NYCAL Filings and Verdict Trends” (Dec. 2, 2014).

³² *Shelly Silver’s Asbestos Gold*, WALL ST. J., Feb. 1, 2015.

³³ Joe Nocera, *New York’s Real Scandal*, N.Y. TIMES, Jan. 30, 2015, at A19; *see also* Data compiled by the American Tort Reform Association, *available at*

<http://atra.org/sites/default/files/documents/NYCAL%20v.%20NON-NYCAL.pdf>.

³⁴ *See* Data compiled by the American Tort Reform Association regarding NYCAL Trials Since 1/1/2011, *available at* <http://atra.org/sites/default/files/documents/Consolidation%20Effect.pdf>.

Outlier Rulings On Other Key Issues

In addition to routine consolidations, NYCAL also has distinguished itself as a jurisdiction outside the norm on a variety of other key legal issues:

- *Burden of Proof Upended.* In a December 2014 ruling, the Court held that NYCAL defendants must definitively show their non-liability in cases where the plaintiff “has no personal knowledge whether the [products] he encountered were actually manufactured by [the defendant].”³⁵ According to outside observers, “[t]his Kafkaesque ruling lifts the plaintiff’s traditional burden to prove the case, including whether an alleged injury was caused by exposure to the defendant’s product, and seeks to crush the defendant by forcing it to prove otherwise.”³⁶
- *Late Product Identification.* As the CMO is currently applied, Plaintiffs are allowed to provide short-form complaints that do not necessarily identify the product that supposedly contained asbestos and to which they were allegedly exposed. Compare CMO § VI.B, with CPLR § 3013. As a result, Defendants may not know until late in the proceeding as a result of depositions whether they are legitimately in the case at all. The consequence is wasteful expenditures by Defendants with no corresponding benefit to Plaintiffs.
- *Disclosure of Bankruptcy Trust Claims Delayed.* As a result of a November 2012 Order, the Court has, in effect, opened the door for plaintiffs’ attorneys to circumvent the CMO requirement that they file their client’s asbestos bankruptcy trust claims before trial.³⁷ More specifically, the Court ruled that “[t]he CMO requires Plaintiffs to file their *intended* claims with the various bankruptcy trusts within certain time limitations, not claims they may not *anticipate* filing. . . .”³⁸ Plaintiffs’ lawyers have seized upon this language, contending that it permits them to delay the filing of asbestos bankruptcy trust

³⁵ See *Sowa v A.O. Smith Water Prod. Co.*, No. 190405/13, 2014 N.Y. Misc. LEXIS 5177 (Sup. Ct. N.Y. County Dec. 1, 2014) (Heitler, J.).

³⁶ American Tort Reform Foundation, *Judicial Hellholes 2014-2015* (2014), at 11.

³⁷ The CMO provides that “[a]ny plaintiff who intends to file a proof of claim form with any bankrupt entity or trust shall do so no later than ten (10) days after plaintiff’s case is designated in a FIFO Trial Cluster, except in the in extremis cases in which the proof of claim form shall be filed no later than ninety (90) days before trial.” NYCAL CMO § XV(E)(2)(l).

³⁸ *Matter of New York City Asbestos Litig.*, 37 Misc. 3d 1232(A), 1232A (Sup. Ct. N.Y. County Nov. 15, 2012) (emphasis in original).

claims.³⁹ The Court's ruling is particularly disturbing in view of the recent federal bankruptcy decision in *In re Garlock Sealing Technologies, LLC*, which explored at length both the potential for and actual manipulation of asbestos settlements in light of the current divide between the tort and trust systems.⁴⁰

- *Recklessness Charges as the Norm.* Despite the very high standard for a recklessness finding under New York law,⁴¹ juries in NYCAL cases are virtually always charged on the issue of recklessness. This all but guarantees that juries find that each and every defendant is reckless, even those that receive a very small allocation of fault, which in turn results in the disproportionate allocation of liability.⁴² Under New York law, defendants who are found to have engaged in reckless behavior—no matter how minimally at fault—are punished by the imposition of joint and several liability, requiring them to pay for the shares of liability owed by bankrupts and other entities. *See* N.Y. C.P.L.R. § 1602(7).
- *Punitive Damages Reintroduced.* On April 15, 2014, the Court lifted the nearly twenty-year long deferral of punitive damages claims in NYCAL.⁴³ The motivation for the request was transparent: By way of example, Perry Weitz of the Weitz & Luxenberg firm explicitly stated that he intends to use the threat of punitive damages to force settlements out of “recalcitrant

³⁹ Transcript of Proceedings, American Bar Association Task Force on Asbestos Litigation and the Bankruptcy Trusts, June 6, 2013, at TR 115.

⁴⁰ *See In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (Bankr. W.D.N.C. 2014).

⁴¹ *See Maltese v. Westinghouse Elec. Corp.*, 89 N.Y.2d 955, 956-957, 678 N.E.2d 467 (1997) (finding the evidence insufficient to support the jury's finding of reckless disregard, and noting that New York has “adopted a gross negligence standard, requiring that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow’ and has done so with conscious indifference to the outcome”) (internal quotation marks omitted).

⁴² *See, e.g.,* Verdict Sheets in *Assenzio v. A.O. Smith Water Products, et al.*, (Index No. 190008/12), *Brunck v. A.O. Smith Water Products, et al.* (Index No. 190026/12), *Levy v. A.O. Smith Water Products, et al.* (Index No. 190200/12), *Serna v. A.O. Smith Water Products, et al.* (Index No. 190183/12), *Vincent v. A.O. Smith Water Products, et al.* (Index No. 190183/12) (awarding total damages of **\$190 million**); *Dummitt v. A. W. Chesterton, et al.* (Index No. 190196/10), and *Konstantin v. A. W. Chesterton, et al.* (Index No. 190134/10) (awarding total damages of nearly **\$52 million**) (attached hereto as Exhibit B).

⁴³ *See Order in In Re: NYCAL (All NYCAL Cases)*, No. 40000/1988 (Sup. Ct. N.Y. County Apr. 8, 2014).

defendants and insurers,” since Defendants that choose to exercise their right to a jury trial will now risk even more astronomical verdicts.⁴⁴ The ruling has transformed NYCAL in to the only major asbestos docket that permits both punitive damages and trial consolidations.⁴⁵ Moreover, the Court provided no guidance as to a procedural protocol governing such claims, which has resulted, understandably, in NYCAL trial judges handing down a series of inconsistent and divergent rulings with respect to administering such claims.⁴⁶ Given these uncertainties, Defendants respectfully contend that there should be a stay of any punitive damages proceeding until this Court enters a new CMO.

⁴⁴ Transcript of proceedings in *In Re: NYCAL (Chidester, et al.)*, No. 190293/2011 (Sup. Ct. N.Y. County Dec. 16, 2013), TR 36.

⁴⁵ The consequences of such a combination could be truly staggering. Evidence of one defendant's bad acts in consolidated trials inevitably bolsters the punitive damages claims against the other defendants, confusing the jury and resulting in prejudice to the defendants against whom the plaintiffs have no viable claim for punitive damages. See *Frankson v. Brown & Williamson Tobacco Corp.*, 67 A.D.3d 213, 221, 886 N.Y.S.2d 714, 721 (2d Dep't 2009) (noting that “a showing of harm to others [is] relevant to the portion of the punitive damages constitutional equation, which requires the jury to gauge the reprehensibility of the defendant's conduct”); see also *Grefer v. Alpha Tech.*, 901 So. 2d 1117, 1150 (La. App. 4 Cir. Mar. 31, 2005) (finding that introduction of evidence of bad acts irrelevant to plaintiff's claim “confused the jury, contributing to its exorbitant punitive damage award”). Correspondingly, because of the numerous differences between asbestos cases consolidated for trial and the many different defendants in each, individual defendants' defenses are often lost in the confusion of a joint trial. See, e.g., *Malcolm v National Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) (reversing in part because one defendant had different defenses to liability and a joint trial would be highly prejudicial).

⁴⁶ For example, in the *Antle* trial, Justice Shulman precluded plaintiffs from seeking punitive damages claims, declaring that the introduction of such claims in cases where discovery was substantially completed amounts to a violation of Defendants' due process rights. See Transcript of Proceedings in *In Re: NYCAL (Antle)*, No. 190360/12 (Sup. Ct. N.Y. County April 28, 2014), TR 14-25. Justice Jaffe precluded punitive damages claims on similar grounds in the *Fersch* trial, finding that discovery was complete and the Order could not be applied retroactively. See Transcript of Proceedings in *Fersch v. Amchem Prods., Inc., et al.*, No. 190486/12 (Sup. Ct. N.Y. County April 10, 2014), TR 8. In contrast, Justice Silver entertained plaintiffs' request to seek punitive damages without even considering due process concerns, focusing instead on the level of misconduct required for a punitive damages charge. See Transcript of Proceedings in *Carlucci v. A.W. Chesterton Co., Inc., et al.*, No. 190486/11 (Sup. Ct. N.Y. County April 17, 2014), TR 2223. Justice Kern, meanwhile, expressed uncertainty in interpreting the Order, and ultimately ruled that she would wait until the end of trial to decide all of the issues regarding punitive damages for the consolidated trial. See Transcript of Proceedings in *Bryant, et al. v. ABB, Inc.*, Index No. 190161/13 (Sup. Ct. N.Y. County April 21, 2014) TR 79.

Preferential Treatment

While the rulings described above have made major impacts on asbestos litigation in New York, there is also a more subtle component to the day-to-day conduct of business in NYCAL. In Defendants' experience, Plaintiffs' firms routinely receive preferential treatment above and beyond any advantages actually provided for by the CMO. These benefits include:

- *Forum Requirements.* While forum challenges are theoretically permitted in NYCAL, they are now rarely granted in practice because the standard plaintiffs must meet in order to be included in a NYCAL *in extremis* docket is extremely low. In its 2014 ruling in *Golden v. Alliance Laundry Systems, et al.*, the Court rejected the recommendations of prior Special Masters requiring plaintiffs to demonstrate "significant exposure to asbestos in any one of the five boroughs" as "measured by length of time and quality of exposure,"⁴⁷ and announced that plaintiffs need only show a "nexus to New York City."⁴⁸ The Court relied on this exceedingly low standard to place the *Golden* case on the NYCAL *in extremis* docket, despite the fact that the plaintiff's nexus to New York City amounted to "three days of alleged bystander exposure" while aboard a ship docked at the Brooklyn Navy Yard, although he had "many years of exposure at his father's Philadelphia tailor shop."⁴⁹
- *Fast-Tracking of Cases.* It is Defendants' collective experience that asbestos cases take priority over all other non-asbestos civil matters. As a result, asbestos cases often get first choice of available jury pools, court rooms and related resources. Moreover, even within NYCAL, where the CMO anticipates a certain level of expedition for *in extremis* cases, certain Plaintiffs' firms appear to have their cases advanced faster than others, with the result that trial scheduling, priority and order can be almost entirely unpredictable.

⁴⁷ See recommendations in *O'Connor v. Air & Liquid Systems Corp., et al.* (Index No. 190156/12), *Stitt v. Burnham Corp., et al.* (Index No. 190478/12), *Lowe v. Air & Liquid Systems Corp., et al.* (Index No. 190332/11), and *Logan v. A.P. Moller-Maersk, Inc., et al.* (Index No. 190203/12).

⁴⁸ See *Golden v. Alliance Laundry Systems, et al.*, No. 190160/13 (Sup. Ct. N.Y. County Feb. 5, 2014) (Heitler, J.).

⁴⁹ See *Golden v. Alliance Laundry Systems, et al.*, No. 190160/13 (Sup. Ct. N.Y. County Feb. 5, 2014) (Heitler, J.).

- *Cherry-picking cases.* The Court routinely permits Plaintiffs' firms to manipulate the trial calendar by selecting for trial only particular cases from a given cluster despite the fact that all of their clients' cases must be timely prepared for trial. For example, for its October 2014 trial cluster of 42 cases, Weitz & Luxenberg cherry-picked 16 cases disproportionate to the mix of diseases in the cluster. Although half of the cases in the cluster were lung cancer cases, Weitz & Luxenberg designated for trial only 4 of 21 lung cancer cases compared to 16 of 21 mesothelioma cases. This disproportionate grouping of cases appears specifically designed to prejudice Defendants by front-loading Plaintiffs' ostensibly strongest cases, regardless of any outstanding discovery. Furthermore, such a grouping is ineffective in promoting resolution of non-mesothelioma cases, which comprise an increasing percentage of the NYCAL asbestos docket.⁵⁰ And, after the Plaintiffs' firms cherry-pick those certain cases from a given cluster, they fail to prosecute the remaining cases. The Court has endorsed this recent practice over Defendants' repeated objections.
- *Discovery Disputes.* Where Defendants have disputed Plaintiffs' discovery requests, the Court almost invariably resolves the disputes in favor of Plaintiffs. For example, in a recent ruling, a defendant was required to produce over 12 million commercial records and engineering drawings without a confidentiality order.⁵¹ Indeed, out of eight discovery decisions issued by the Court since 2008, only one was resolved in favor of defendants—and, as explained in Section B *infra*, dicta in that decision left open the possibility of manipulative delays in the filing of asbestos bankruptcy trust claims, with the practical result that disclosure of those claims before trial is often avoided.⁵²
- *Summary Judgment Motions.* Over the last few years, the Court's posture towards summary judgment has rendered this form of pre-trial relief a virtual nullity in NYCAL. For example, the Court has ceased to rule upon

⁵⁰ See Manual for Complex Litigation, § 22.315 (4th ed. 2004) ("If individual trials... are to produce reliable information about other mass tort cases, the specific plaintiffs and their claims should be representative of the range of cases.... To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly or limit the selection to cases that the parties agree are typical of the mix of cases.").

⁵¹ See *McCloskey v. A.O. Smith Water Products, et al.*, Index No. 190441/12 (attached hereto as Exhibit C).

⁵² See *Matter of New York City Asbestos Litig.*, 37 Misc. 3d 1232(A), 1232A (Sup. Ct. N.Y. County Nov. 15, 2012) (emphasis in original).

Defendants' unopposed summary judgment motions and, when such motions are opposed, the Court overwhelmingly denies them.

- *Evidentiary Motions.* Motions *in limine* by Defendants have been increasingly discouraged, both through summary denials as well as through courtroom policies that have greatly curtailed the briefing of such motions. For example, in a 2014 trial, one justice stated that she had “made a major mistake this time in allowing every defendant to file their own *in limine* motion,” announcing that “[t]hat’s something I will not do again.”⁵³ Subsequently, in a 2015 case, that same justice required that defendants jointly make motions *in limine* in one letter “not to exceed five pages,” and that “case-specific” motions be made by letter “not to exceed two pages.”⁵⁴
- *Smoking Lung Cancer Cases.* The American Cancer Society estimates that 221,200 Americans will be diagnosed with lung cancer in 2015.⁵⁵ More than 13,000 New Yorkers will be diagnosed with lung cancer, and almost 9,000 will die from that disease in 2015.⁵⁶ The Surgeon General of the United States, and every major medical organization around the world, agree that between 85 to 90 percent of lung cancers in this country are caused by cigarette smoke.⁵⁷ While plaintiffs’ and defense counsel can debate the issue of whether a particular lung cancer case may be related to asbestos to some extent, there is no reasonable debate that the cause of almost 90 percent of lung cancers is the more than 69 known carcinogens in cigarette smoke. Despite those realities, NYCAL has experienced a flood of lung cancer claims, especially since 2011 when a New York City court determined that two plaintiffs – both of whom were smokers – were entitled to jury awards of

⁵³ *Bryant, et al. v. ABB, Inc.*, Index No. 190161/13 (Sup. Ct. N.Y. County April 21, 2014), TR 4.

⁵⁴ Decision and Order in *Bryant, et al. v. ABB, Inc.*, Index No. 190161/13 (Sup. Ct. N.Y. County Feb. 18, 2014).

⁵⁵ *How many people get lung cancer?*, American Cancer Society, available at <http://www.cancer.org/cancer/lungcancer-smallcell/overviewguide/lung-cancer-small-cell-overview-key-statistics>.

⁵⁶ *About Lung Cancer*, New York State Department of Health, available at <https://www.health.ny.gov/statistics/cancer/registry/abouts/lung.htm>


⁵⁷ *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General, Executive Summary*, U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2014, at 2, available at <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/exec-summary.pdf>.

\$13.6M and \$8.5M.⁵⁸ One need only to watch television for a few minutes in New York City before seeing a law firm advertisement soliciting clients by highlighting the billions of dollars “set aside” in “asbestos trusts” for lung cancer claimants. NYCAL lung cancer plaintiffs are granted preferential trial dates without even the most cursory analysis of their smoking history, other smoking-related diseases, or whether they have any legitimately diagnosed underlying asbestos-related disease, such as bilateral interstitial fibrosis.⁵⁹ As such, millions of dollars are being unnecessarily spent in NYCAL on cases that are not related to asbestos exposure, thereby depleting judicial and financial resources that should be available for plaintiffs with asbestos-related diseases

CONCLUSION

Based upon their innovative programs, such as the formation of a Commercial Division, and dedicated jurists, New York courts should enjoy a reputation for fair dealing and equal justice. The contrast, however, between how Defendants are treated elsewhere in the New York court system and NYCAL is striking. Defendants are committed to working with both Your Honor and Plaintiffs’ counsel to prepare a new CMO that will strike a balance in NYCAL so that all litigants are treated fairly and in accordance with due process. The current CMO fails to do so, and Defendants’ consent to a CMO in NYCAL is dependent upon a new CMO that does provide for such fairness. Through this letter and the accompanying limited Motion for Temporary Stay – which exempts plaintiffs’ depositions and the related pre-deposition discovery in pending and future *in extremis* actions and individual cases at this Court’s discretion – Defendants formally seek Your Honor’s assistance to address the issues plaguing NYCAL, and are committed to promptly begin the process of drafting a new, modern and balanced CMO that will protect the interests of all parties.

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⁵⁸ See Verdict Sheets in *Koczur v. A.C. & S., Inc., et al.*, Index No. 122340/99 and *McCarthy v. A.C. & S., Inc., et al.*, Index No. 100490/99 (attached hereto as Exhibit D).

⁵⁹ See CMO Section XIII.A.1.

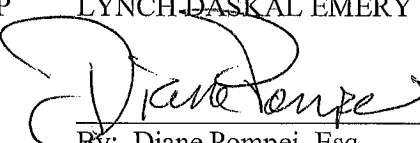
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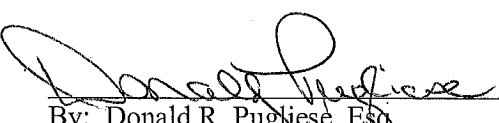
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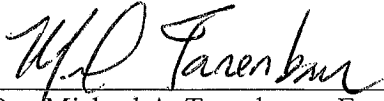
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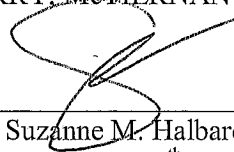
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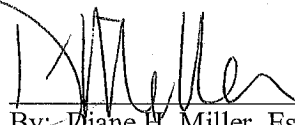
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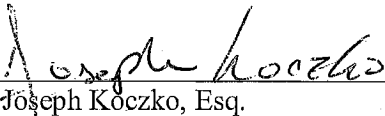
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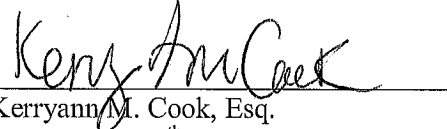
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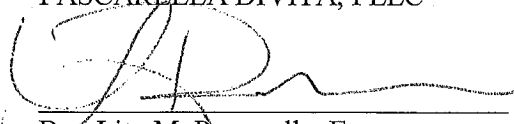
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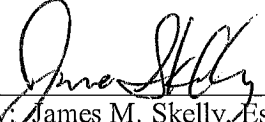
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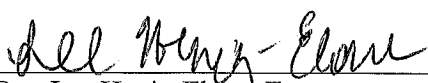
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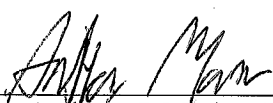
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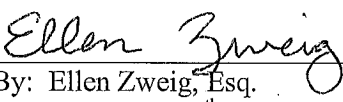

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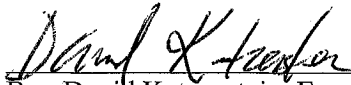
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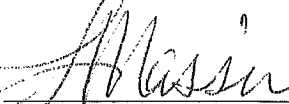
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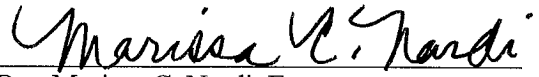
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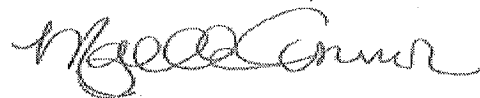
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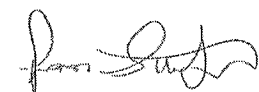
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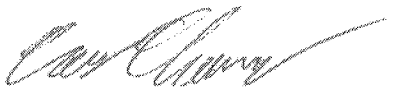
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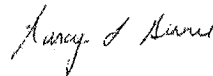
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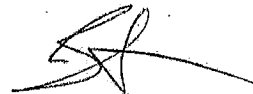
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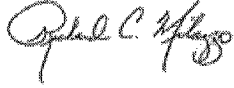
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KENT & MCBRIDE, P.C.



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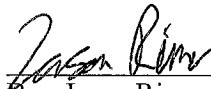
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RENZULLI LAW FIRM, LLP



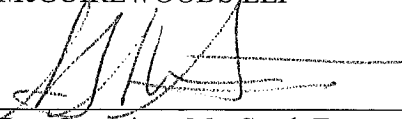
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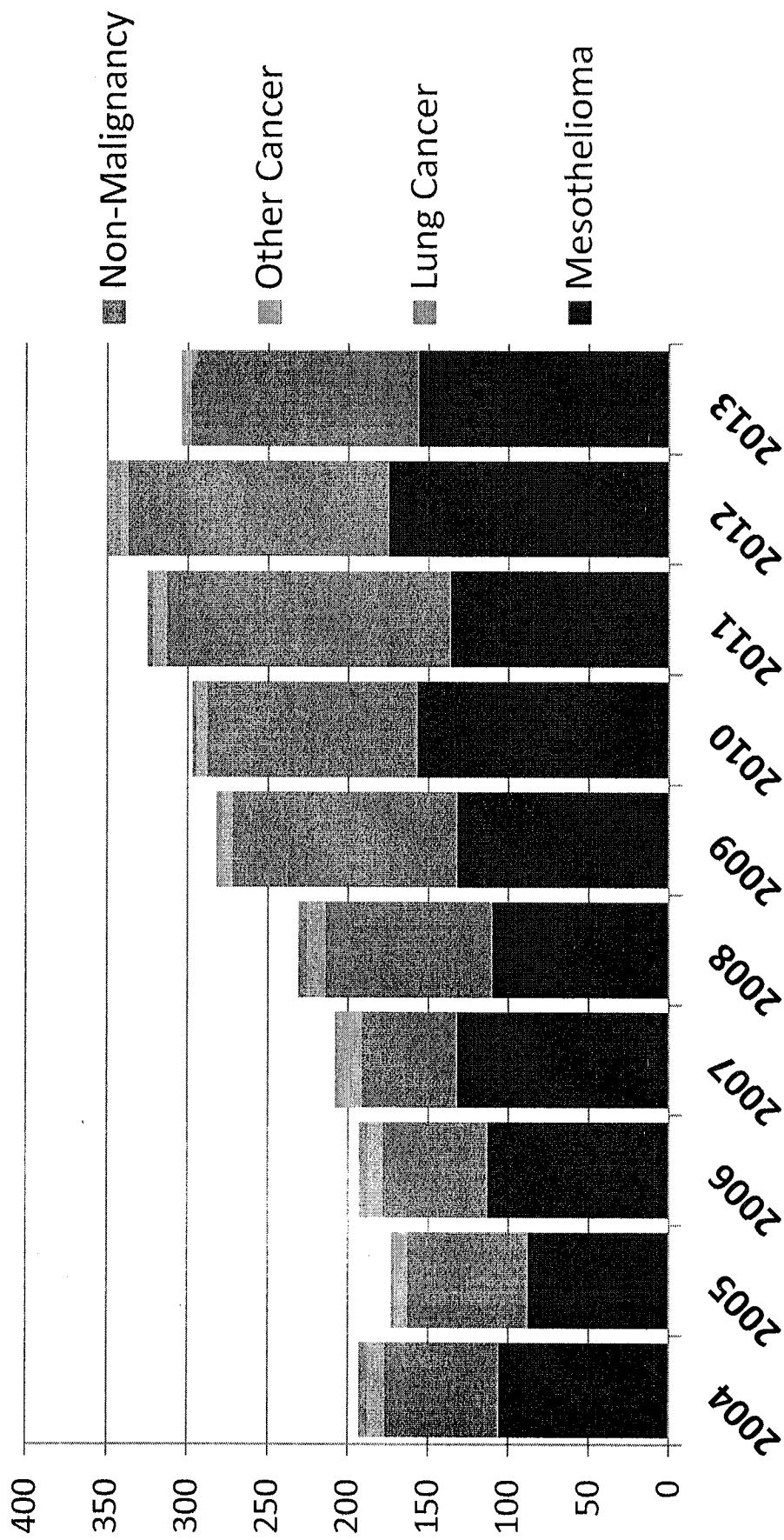
All Defense Counsel

Exhibit A

NYCAL Filing and Verdict Trends

December 2, 2014

NYCAL filings since 2004



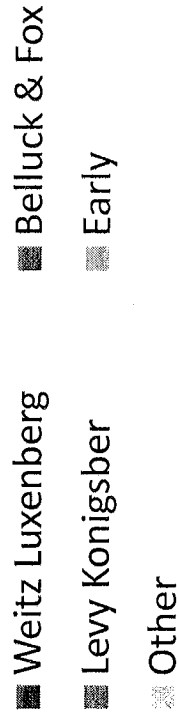
Includes filings from NYCAL's 1) active docket un-clustered, 2) extremis clusters, and 3) FIFO clusters

December 2, 2014

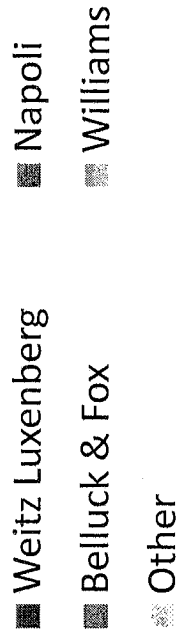
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NYCAL percent filings by law firm from 2011 through 2013

Mesothelioma

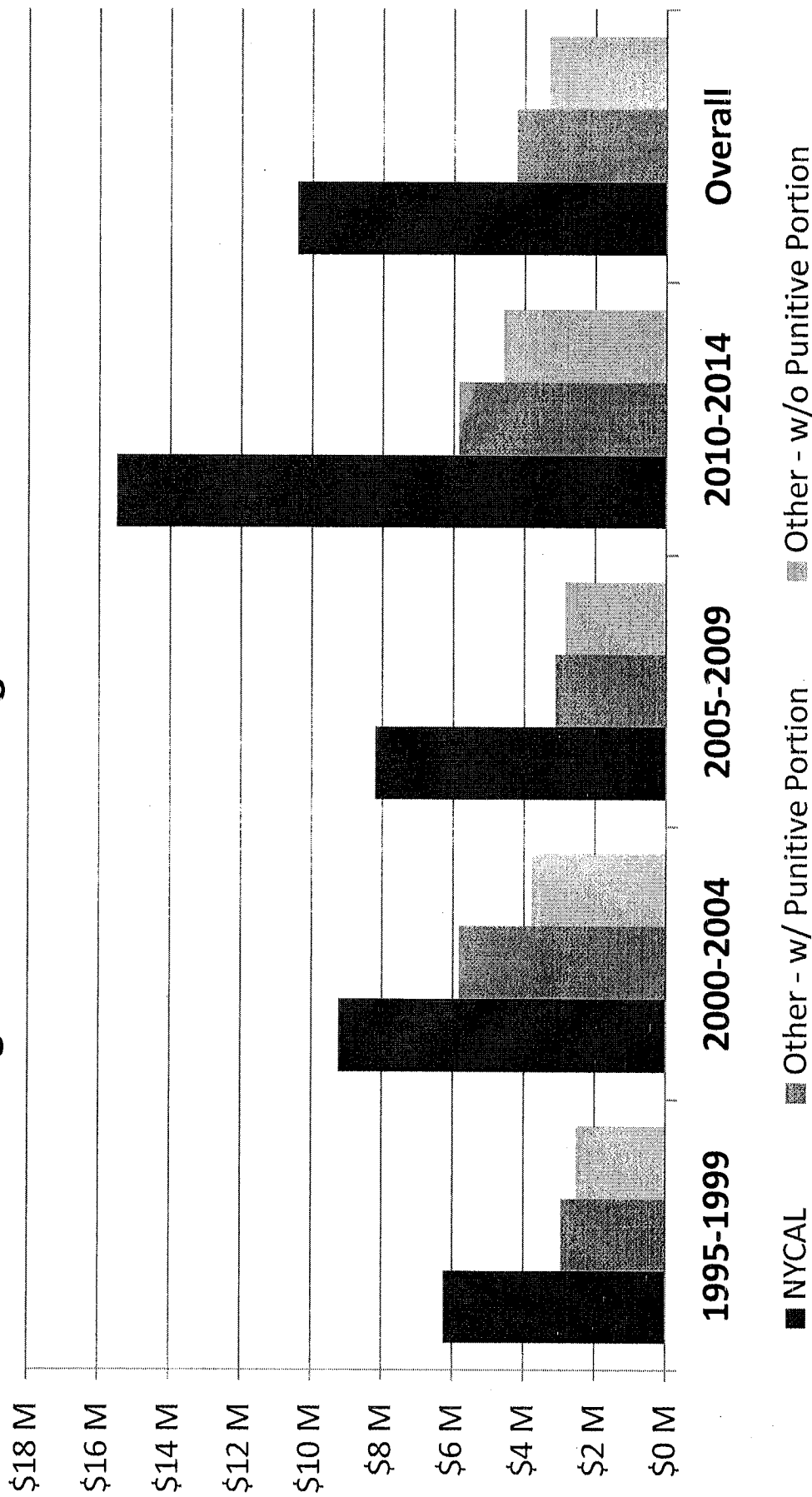


Lung Cancer



Mesothelioma verdicts

Average Award Including Defense Verdicts

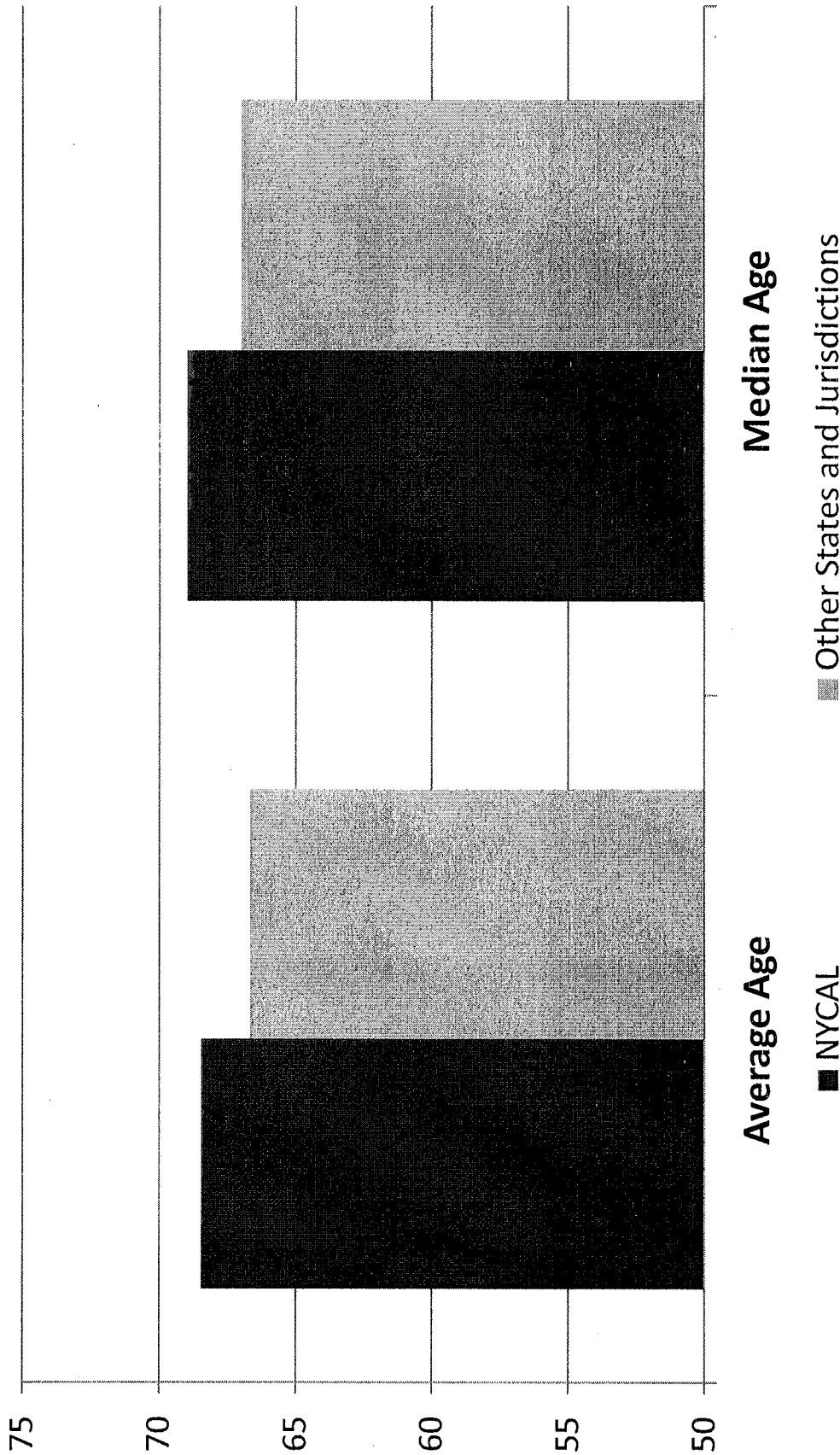


December 2, 2014

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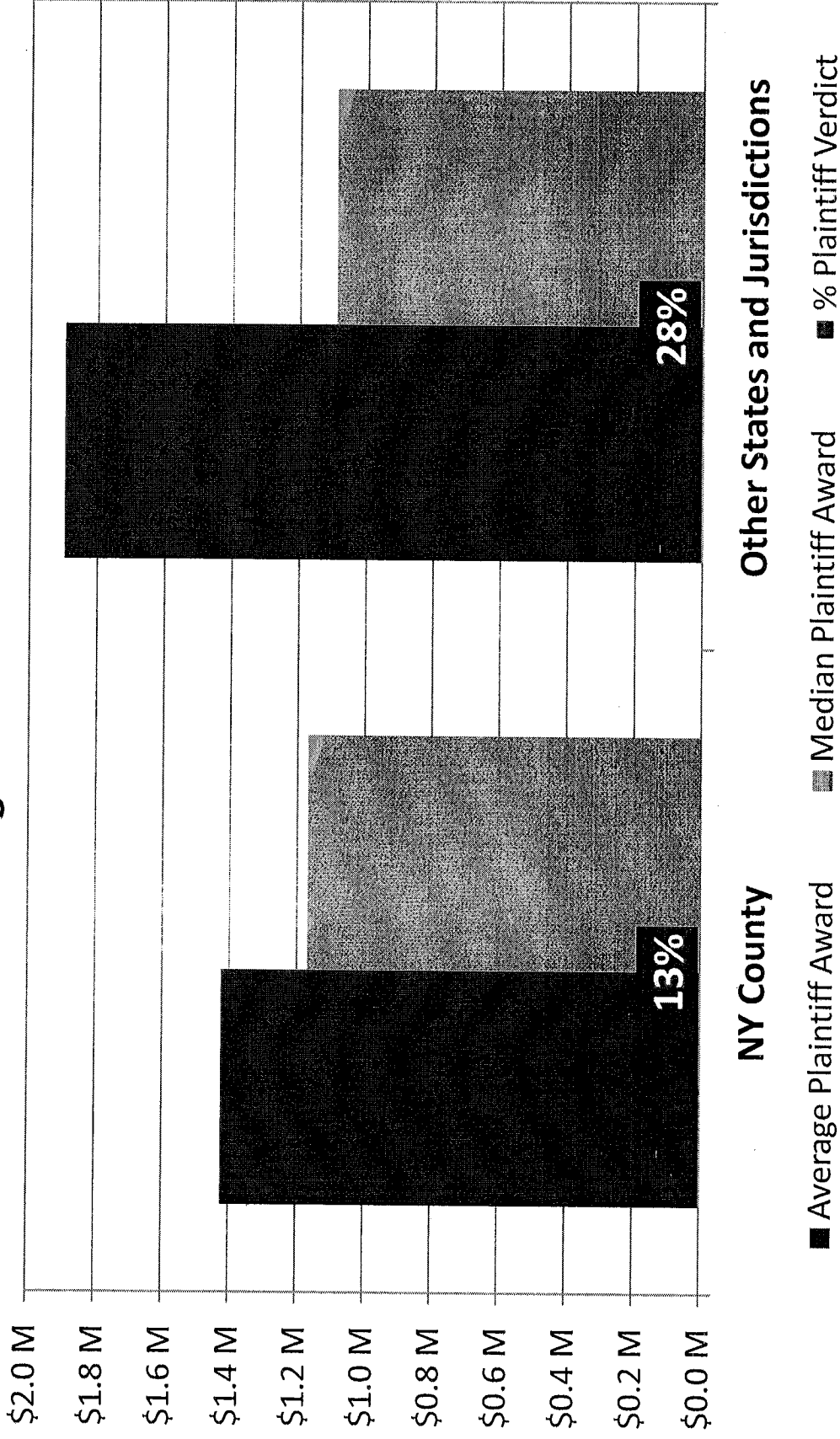
Age of plaintiff for cases that went to verdict

Mesothelioma verdicts between 2010 and 2014



Medical malpractice wrongful death verdicts

Average Plaintiff Award



December 2, 2014

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NYCAL mesothelioma verdicts since 2010

Verdict Year	Lead Plaintiff	Plaintiffs @ start of trial	Pre-Verdict Settlements	Plaintiff verdict	Defense verdict	Total Award	Avg. Plaintiff Award
2010	DIETZ	1	0	0	1	\$0	\$0
2011	BENTON	1	0	1	0	\$2,500,000	\$2,500,000
2012	ZAUGG	1	0	0	1	\$0	\$0
2013	VEGA	1	0	0	1	\$0	\$0
2014	CARLUCCI	1	0	1	0	\$7,333,000	\$7,333,000
2014	JUNI JR	1	0	1	0	\$11,000,000	\$11,000,000
2014	NORTH	1	0	1	0	\$7,000,000	\$7,000,000
2014	THIBODEAU	1	0	0	1	\$0	\$0
Individual trials		8	0	4	4	\$27,833,000	\$6,958,250
2011	DUMMITT	2	0	2	0	\$51,000,000	\$25,500,000
2012	PAOLINI	2	0	0	2	\$0	\$0
2013	ASSENZIO	5	0	5	0	\$190,000,000	\$38,000,000
2013	PERAICA	7	6	1	0	\$35,000,000	\$35,000,000
2014	SWEBERG	2	0	2	0	\$25,000,000	\$12,500,000
2014	MCCLOSKEY	3	0	3	0	\$12,500,000	\$4,166,667
Consolidated trials		21	6	13	2	\$313,500,000	\$24,115,385

NYCAL Filing and Verdict Trends

December 2, 2014

This document was designed for discussion purposes only. It is not intended to be used without the accompanying oral presentation and discussion

Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
DAVID KONSTANTIN,

Plaintiff,

INDEX NO. 190134/10

A.W. CHESTERTON, et al,

Defendants.
-----X

JURY INTERROGATORIES

NOTE: At least five (5) jurors must agree on the answer to each and every question below, although they need not be the same five (5) jurors for each question.

1. Did the joint compound used at 622 Third Avenue or Olympic Towers construction sites contain asbestos?

<u>YES</u>	<u>NO</u>	<u>Vote</u>	<u>Signature of Dissenter, if any</u>
------------	-----------	-------------	---------------------------------------

If you answered Yes, proceed to Question 2.

If you answered No, stop your deliberations and report your verdict to the Court.

2. Was the asbestos containing joint compound an unsafe product?

<u>YES</u>	<u>NO</u>	<u>Vote</u>	<u>Signature of Dissenter, if any</u>
------------	-----------	-------------	---------------------------------------

If you answered Yes, proceed to Question 3.

If you answered No, stop your deliberations and report your verdict to the Court.

3. Did defendant Tishman Liquidating Corporation know, or in the exercise of reasonable care, should it have known, that unsafe asbestos containing joint compound was being used at the 622 Third Avenue work site and/or the Olympic Towers work site?

<u>YES</u>	<u>NO</u>	<u>Vote</u>	<u>Signature of Dissenter, if any</u>
------------	-----------	-------------	---------------------------------------

If you answered Yes, proceed to Question 4.

If you answered No, stop your deliberations and report your verdict to the Court.

4. Was plaintiff David Konstantin exposed to asbestos containing joint compound at the 622 Third Avenue work site and/or the Olympic Towers work site?

<u>✓</u>			
YES	NO	Vote	Signature of Dissenter, if any

If you answered Yes, proceed to Question 5.

If you answered No, stop your deliberations and report your verdict to the Court.

5. Was exposure to asbestos a cause of plaintiff David Konstantin's mesothelioma of the tunica vaginalis?

<u>✓</u>			
YES	NO	Vote	Signature of Dissenter, if any

If you answered Yes, proceed to Question 6.

If you answered No, stop your deliberations and report your verdict to the Court.

6. Did defendant Tishman Liquidating Corporation exercise supervisory control, as explained in the court's instructions, over the drywall subcontractors using asbestos containing joint compound at the 622 Third Avenue work site and/or the Olympic Towers work site?

<u>✓</u>			
YES	NO	Vote	Signature of Dissenter, if any

If you answered Yes, proceed to Question 7.

If you answered No, proceed to Question 10.

7. Did defendant Tishman Liquidating Corporation know, or in the exercise of reasonable care, should it have known, that its drywall subcontractors were using unsafe sanding methods with respect to the asbestos containing joint compound at the 622 Third Avenue work site and/or the Olympic Towers work site?

<u>✓</u>			
YES	NO	Vote	Signature of Dissenter, if any

If you answered Yes, proceed to Question 8a.

If you answered No, proceed to Question 10.

8a. Did defendant Tishman Liquidating Corporation fail to use reasonable care to prevent or correct the use of unsafe asbestos containing joint compound at the 622 Third Avenue work site and/or the Olympic Towers work site?

YES NO Vote Signature of Dissenter, if any

Proceed to Question 8b.

8b. Did defendant Tishman Liquidating Corporation fail to use reasonable care to prevent or correct its subcontractors' unsafe sanding methods with respect to the asbestos containing joint compound at the 622 Third Avenue work site and/or the Olympic Towers work site?

YES NO Vote Signature of Dissenter, if any

If you answered Yes to either or both Questions 8a or 8b, proceed to Question 9.
If you answered No to both Questions 8a and 8b, proceed to Question 10.

9. Was defendant Tishman Liquidating Corporation's failure to use reasonable care to prevent or correct the use of unsafe asbestos containing joint compound or its drywall subcontractors' unsafe sanding methods for this joint compound at the 622 Third Avenue work site and/or the Olympic Towers work site, a substantial factor in causing plaintiff David Konstantin's injury?

YES NO Vote Signature of Dissenter, if any

Proceed to Question 10.

10. Did defendant Tishman Liquidating Corporation create an unsafe condition at the 622 Third Avenue work site and/or the Olympic Towers work site by permitting its employees to sweep asbestos-containing joint compound dust in the presence of plaintiff David Konstantin?

YES NO Vote Signature of Dissenter, if any

If you answered Yes, proceed to Question 11.

If you answered No, but you answered Yes to Question 9, proceed to Question 12.

If you answered No, and you also answered No to both Questions 8a and 8b, or No to Question 9, stop your deliberations and report your verdict to the Court.

11. Was defendant Tishman Liquidating Corporation's failure to use reasonable care in sweeping asbestos containing joint compound dust in the presence of plaintiff David Konstantin at 622 Third Avenue work site and/or the Olympic Towers work site, a substantial factor in causing David Konstantin's mesothelioma of the tunica vaginalis?

<u>YES</u>	<u>NO</u>	<u>Vote</u>	<u>Signature of Dissenter, if any</u>
------------	-----------	-------------	---------------------------------------

If you answered Yes, proceed to Question 12.

If you answered No, but you answered Yes to Question 9, proceed to Question 12.

If you answered No, and you also answered No to both Questions 8a and 8b, or No to Question 9, stop your deliberations and report your verdict to the Court.

12. Did defendant Tishman Liquidating Corporation act with reckless disregard for the safety of others, namely plaintiff David Konstantin?

<u>YES</u>	<u>NO</u>	<u>Vote</u>	<u>Signature of Dissenter, if any</u>
------------	-----------	-------------	---------------------------------------

Proceed to Question 13.

13. Was plaintiff David Konstantin exposed to asbestos in the joint compound of any of the following companies?

Georgia Pacific	Yes <u>✓</u>	No <u> </u>	Vote <u> </u>	<u> </u> Dissenter, if any
Kaiser Gypsum	Yes <u>✓</u>	No <u> </u>	Vote <u> </u>	<u> </u> Dissenter, if any
United State Gypsum	Yes <u>✓</u>	No <u> </u>	Vote <u> </u>	<u> </u> Dissenter, if any

If you answered Yes to any of the above in Question 13, proceed to Question 14.

If you answered No to all of the above in Question 13, proceed to Question 17.

BEFORE ANSWERING QUESTION 14, CROSS OUT THE NAME OF EACH COMPANY FOR WHICH YOU ANSWERED NO IN QUESTION 13.

14. Did any of the following companies fail to exercise reasonable care by not providing adequate warning to plaintiff David Konstantin about the potential hazards of exposure to asbestos with respect to the use of their joint compound?

Georgia Pacific	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote _____	_____
				Dissenter, if any
Kaiser Gypsum	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote _____	_____
				Dissenter, if any
United State Gypsum	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Vote _____	_____
				Dissenter, if any

If you answered Yes to any of the above in Question 14, proceed to Question 15.

If you answered No to all of the above in Question 14, proceed to Question 17.

BEFORE ANSWERING QUESTION 15, CROSS OUT THE NAME OF EACH COMPANY FOR WHICH YOU ANSWERED NO IN QUESTION 14.

15. Were these companies' failure to warn a substantial factor in causing plaintiff David Konstantin's mesothelioma of the tunica vaginalis?

Georgia Pacific	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote _____	_____
				Dissenter, if any
Kaiser Gypsum	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote _____	_____
				Dissenter, if any
United State Gypsum	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Vote _____	_____
				Dissenter, if any

If you answered Yes to any of the above in Question 15, proceed to Question 16.

If you answered No to all of the above in Question 15, proceed to Question 17.

BEFORE ANSWERING QUESTION 16, CROSS OUT THE NAME OF EACH COMPANY FOR WHICH YOU ANSWERED NO IN QUESTION 15.

16. For each of the companies listed below, set forth its percentage of fault. (The total percentage must equal 100%).

Tishman Liquidating Corporation	<u>76</u> %	Vote <u>5/1</u>	<u>#5</u> Dissenter, if any
Georgia Pacific	<u>8</u> %	Vote <u>5/1</u>	Dissenter, if any
Kaiser Gypsum	<u>8</u> %	Vote <u>5/1</u>	Dissenter, if any
United State Gypsum	<u>8</u> %	Vote <u>5/1</u>	Dissenter, if any
<u>TOTAL</u>		<u>100%</u>	

Proceed to Question 17.

17. What is the sum of money that will justly and fairly compensate plaintiff David Konstantin for the following items of damages, if any? If you decide not to make an award as to any item listed below, you will insert the word "none" as to that item.

Pain and suffering from the onset of his mesothelioma of the tunica vaginalis until today

\$ 7 M

Future pain and suffering

\$ 12 M

Number of years

1.5 years

Lost earnings from the onset of his mesothelioma of the tunica vaginalis until today

\$ 64,832

Future lost earnings

\$ 485,325

Number of years

7 years

6-0

5-1

Dissenter, if any

We, the undersigned jurors in this action, concur and answer the above questions in accordance with the instructions of this Court and report our verdict as stated above. At least five (5) jurors have agreed on the answer to each question.

1. _____

4. _____

2. _____

5. _____

3. _____

6. _____

DATED:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
RONALD DUMMITT,

Plaintiff,

INDEX NO. 190196/10

A.W. CHESTERTON, et al,

Defendants.

-----X

JURY INTERROGATORIES

NOTE: At least five (5) jurors must agree on the answer to each and every question below, although they need not be the same five (5) jurors for each question.

1a. Was plaintiff Ronald Dummitt exposed to asbestos from gaskets, packing and lagging and/or insulation used in connection with defendant Crane's valves?

<u>✓</u>	<u> </u>	<u> </u>	<u> </u>
YES	NO	Vote	Signature of Dissenter, if any

If you answered Yes, proceed to Question 1b.

If you answered No, proceed to Question 2a.

1b. Did defendant Crane fail to exercise reasonable care by not providing an adequate warning about the hazards of exposure to asbestos with respect to the use of its valves?

<u>✓</u>	<u> </u>	<u> </u>	<u> </u>
YES	NO	Vote	Signature of Dissenter, if any

If you answered Yes, proceed to Question 1c.

If you answered No, proceed to Question 2a.

1c. Was defendant Crane's failure to warn plaintiff Ronald Dummitt a substantial contributing factor in causing his mesothelioma?

<u>✓</u>	<u> </u>	<u> </u>	<u> </u>
YES	NO	Vote	Signature of Dissenter, if any

If you answered Yes, proceed to Question 1d.

If you answered No, proceed to Question 2a.

1d. Did defendant Crane act with reckless disregard for the safety of others, namely plaintiff Ronald Dummitt?

✓ _____ YES	_____ NO	_____ Vote	_____ Signature of Dissenter, if any
-------------------	-------------	---------------	---

Proceed to Question 2a.

2a. Was plaintiff Ronald Dummitt exposed to asbestos from gaskets and lagging pads used in connection with the manhole cover on defendant Elliott's deaerating tank?

✓ _____ YES	_____ NO	_____ Vote	_____ Signature of Dissenter, if any
-------------------	-------------	---------------	---

If you answered Yes, proceed to Question 2b.

If you answered No, and you answered Yes to 1c, proceed to Question 3a.

If you answered No, and you answered No to 1a, 1b or 1c, stop your deliberations and report your verdict to the Court.

2b. Did defendant Elliott fail to exercise reasonable care by not providing an adequate warning about the hazards of exposure to asbestos with respect to the use of its manhole cover?

✓ _____ YES	_____ NO	_____ Vote	_____ Signature of Dissenter, if any
-------------------	-------------	---------------	---

If you answered Yes, proceed to Question 2c.

If you answered No, and you answered Yes to 1c, proceed to Question 3a.

If you answered No, and you answered No to 1a, 1b or 1c, stop your deliberations and report your verdict to the Court.

2c. Was defendant Elliott's failure to warn plaintiff Ronald Dummit a substantial contributing factor in causing his mesothelioma?

✓ _____ YES	_____ NO	5-1 _____ Vote	_____ Signature of Dissenter, if any
-------------------	-------------	----------------------	---

If you answered Yes, proceed to 2d.

If you answered No, and you answered Yes to 1c, proceed to Question 3a.

If you answered No, and you answered No to 1a, 1b or 1c, stop your deliberations and report your verdict to the Court.

2d. Did defendant Elliott act with reckless disregard for the safety of others, namely plaintiff Ronald Dummitt?

✓ _____ YES	_____ NO	_____ Vote	_____ Signature of Dissenter, if any
-------------------	-------------	---------------	---

Proceed to Question 3a.

3a. Was plaintiff Ronald Dummitt exposed to asbestos containing products made, sold, distributed or applied by any of the following companies:

Asbestos Supply Co.	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote _____	_____ Dissenter, if any
Atlas	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote _____	_____ Dissenter, if any
Atwood-Morrill	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote _____	_____ Dissenter, if any
Aurora Pumps	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote _____	_____ Dissenter, if any
Babcock & Wilcox	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote _____	_____ Dissenter, if any
Bailey Meter Co.	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote _____	_____ Dissenter, if any
Buffalo Pumps	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote _____	_____ Dissenter, if any
Combustion Engineering	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote _____	_____ Dissenter, if any
Consolidated Supply	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote _____	_____ Dissenter, if any
Crosby/FMC Corp,	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote _____	_____ Dissenter, if any
DeLaval/IMO	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote _____	_____ Dissenter, if any
Diamond Power	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote _____	_____ Dissenter, if any
Electrolux/Copes-Vulcan	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote _____	_____ Dissenter, if any
Flexitallic	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote _____	_____ Dissenter, if any
Foster Wheeler	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote _____	_____ Dissenter, if any

Garlock	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
General Electric	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Halliburton/Worthington Pumps/ Pacific Pumps	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Harris Supply	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Johns-Manville	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Leslie Controls	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Manning, Maxwell & Moore	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Marotta	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Tyco International Inc/Yarway	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Union Asbestos & Rubber Co.,	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
V.S. Jenkins	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Velan Valves	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Walworth Co.	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Warren Pumps	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Westinghouse/CBS Corp.	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>

If you answered Yes to any of the above, proceed to Question 3b.

If you answered No to all of the above, proceed to Question 5.

BEFORE ANSWERING QUESTION 3B, CROSS OUT THE NAME OF EACH COMPANY FOR WHICH YOU ANSWERED NO IN QUESTION 3A.

3b. Did any of the following companies fail to exercise reasonable care by not providing an adequate warning to plaintiff Ronald Dummitt about the potential hazards of exposure to asbestos?

Asbestos Supply Co.	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Atlas	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Atwood-Morrill	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Aurora Pumps	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Babcock & Wilcox	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Bailey Meter Co.	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Buffalo Pumps	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Combustion Engineering	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Consolidated Supply	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Crosby/FMC Corp,	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
DeLaval/IMO	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Diamond Power	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Electrolux/Copes-Vulcan	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Flexitallic	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Foster Wheeler	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
Garlock	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>
General Electric	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Vote <input type="checkbox"/>	<u>Dissenter, if any</u>

Halliburton/Worthington Pumps/
Pacific Pumps

Yes ___ No ☒ Vote ___
Dissenter, if any

Harris Supply

Yes ___ No ☒ Vote ___
Dissenter, if any

Johns-Manville

Yes ___ No ☒ Vote ___
Dissenter, if any

Leslie Controls

Yes ___ No ☒ Vote ___
Dissenter, if any

Manning, Maxwell & Moore

Yes ___ No ☒ Vote ___
Dissenter, if any

Marotta

Yes ___ No ☒ Vote ___
Dissenter, if any

Tyco International Inc/Yarway

Yes ___ No ☒ Vote ___
Dissenter, if any

Union Asbestos & Rubber Co.,

Yes ___ No ☒ Vote ___
Dissenter, if any

V.S. Jenkins

Yes ___ No ☒ Vote ___
Dissenter, if any

Velan Valves

Yes ___ No ☒ Vote ___
Dissenter, if any

Walworth Co.

Yes ___ No ☒ Vote ___
Dissenter, if any

Warren Pumps

Yes ___ No ☒ Vote ___
Dissenter, if any

Westinghouse/CBS Corp.

Yes ___ No ☒ Vote ___
Dissenter, if any

If you answered Yes to any of the above, proceed to Question 3c.

If you answered No to all of the above, proceed to Question 5.

**BEFORE ANSWERING QUESTION 3C, CROSS OUT THE NAME OF EACH
COMPANY FOR WHICH YOU ANSWERED NO IN QUESTION 3A OR 3B.**

3c. Were these companies' failure to warn a substantial factor in causing plaintiff Ronald Dummitt's mesothelioma?

Asbestos Supply Co.

Yes ___ No ___ Vote ___
Dissenter, if any

Atlas

Yes ___ No ___ Vote ___
Dissenter, if any

Atwood-Morrill

Yes ___ No ___ Vote ___
Dissenter, if any

Aurora Pumps	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Babcock & Wilcox	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Bailey Meter Co.	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Buffalo Pumps	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Combustion Engineering	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Consolidated Supply	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Crosby/FMC Corp,	Yes ____	No ____	Vote ____	_____ Dissenter, if any
DeLaval/IMO	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Diamond Power	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Electrolux/Copes-Vulcan	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Flexitallic	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Foster Wheeler	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Garlock	Yes ____	No ____	Vote ____	_____ Dissenter, if any
General Electric	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Halliburton/Worthington Pumps/ Pacific Pumps	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Harris Supply	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Johns-Manville	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Leslie Controls	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Manning, Maxwell & Moore	Yes ____	No ____	Vote ____	_____ Dissenter, if any
Marotta	Yes ____	No ____	Vote ____	_____ Dissenter, if any

Tyco International Inc/Yarway	Yes	No	Vote	_____	Dissenter, if any
Union Asbestos & Rubber Co.,	Yes	No	Vote	_____	Dissenter, if any
Velan Valves	Yes	No	Vote	_____	Dissenter, if any
V.S. Jenkins	Yes	No	Vote	_____	Dissenter, if any
Walworth Co.	Yes	No	Vote	_____	Dissenter, if any
Warren Pumps	Yes	No	Vote	_____	Dissenter, if any
Westinghouse/CBS Corp.	Yes	No	Vote	_____	Dissenter, if any

If you answered Yes to any of the above, proceed to Question 4.

If you answered No to all of the above, proceed to Question 5.

BEFORE ANSWERING QUESTION 4, CROSS OUT THE NAME OF CRANE IF YOU ANSWERED NO TO QUESTIONS 1A, 1B OR 1C, AND CROSS OUT THE NAME OF ELLIOTT IF YOU ANSWERED NO TO QUESTIONS 2A, 2B OR 2C. ALSO CROSS OUT THE NAME OF EACH COMPANY FOR WHICH YOU ANSWERED NO IN QUESTIONS 3A, 3B OR 3C. UNLESS A COMPANY'S NAME IS CROSSED OUT BELOW, YOU MUST CONSIDER THAT COMPANY IN ANSWERING QUESTION 4.

4. For each of the companies listed below set forth its percentage of fault. (The total percentage must equal 100%).

Crane Co.	<u>99</u>	%	Vote	<u>51</u>	<u>11</u>	Dissenter, if any
Elliott Co.	<u>1</u>	%	Vote	_____	_____	Dissenter, if any
Asbestos Supply Co.	_____	%	Vote	_____	_____	Dissenter, if any
Atlas	_____	%	Vote	_____	_____	Dissenter, if any
Atwood-Morill	_____	%	Vote	_____	_____	Dissenter, if any
Aurora Pumps	_____	%	Vote	_____	_____	Dissenter, if any
Babcock & Wilcox	_____	%	Vote	_____	_____	Dissenter, if any

Bailey Meter Co.	_____ %	Vote _____	Dissenter, if any _____
Buffalo Pumps	_____ %	Vote _____	Dissenter, if any _____
Combustion Engineering	_____ %	Vote _____	Dissenter, if any _____
Consolidated Supply	_____ %	Vote _____	Dissenter, if any _____
Crosby/FMC Corp,	_____ %	Vote _____	Dissenter, if any _____
DeLaval/IMO	_____ %	Vote _____	Dissenter, if any _____
Diamond Power	_____ %	Vote _____	Dissenter, if any _____
Electrolux/Copes-Vulcan	_____ %	Vote _____	Dissenter, if any _____
Flexitallic	_____ %	Vote _____	Dissenter, if any _____
Foster Wheeler	_____ %	Vote _____	Dissenter, if any _____
Garlock	_____ %	Vote _____	Dissenter, if any _____
General Electric	_____ %	Vote _____	Dissenter, if any _____
Halliburton/Worthington Pumps/ Pacific Pumps	_____ %	Vote _____	Dissenter, if any _____
Harris Supply	_____ %	Vote _____	Dissenter, if any _____
Johns-Manville	_____ %	Vote _____	Dissenter, if any _____
Leslie Controls	_____ %	Vote _____	Dissenter, if any _____
Manning, Maxwell & Moore	_____ %	Vote _____	Dissenter, if any _____
Marotta	_____ %	Vote _____	Dissenter, if any _____
Tyco International Inc/Yarway	_____ %	Vote _____	Dissenter, if any _____
Union Asbestos & Rubber Co.,	_____ %	Vote _____	Dissenter, if any _____

Velan Valves	_____ %	Vote _____	Dissenter, if any _____
V.S. Jenkins	_____ %	Vote _____	Dissenter, if any _____
Walworth Co.	_____ %	Vote _____	Dissenter, if any _____
Warren Pumps	_____ %	Vote _____	Dissenter, if any _____
Westinghouse/CBS Corp.	_____ %	Vote _____	Dissenter, if any _____
<u>TOTAL 100%</u>			

Proceed to Question 5.

5. What is the sum of money that will justly and fairly compensate plaintiff Ronald Dummitt for the following items of damages, if any? If you decide not to make an award as to any item listed below, you will insert the word "none" as to that item.

Pain and suffering from the
onset of his mesothelioma
until today

\$ 16 m.

Future pain and suffering

\$ 16 m.

Number of years

.5 years

_____	_____	_____
6-0	5-1	Dissenter, if any

We, the undersigned jurors in this action, concur and answer the above questions in accordance with the instructions of this Court and report our verdict as stated above. At least five (5) jurors have agreed on the answer to each question.

1. _____

4. _____

2. _____

5. _____

3. _____

6. _____

DATED:

Exhibit C

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

In Re: NEW YORK CITY ASBESTOS LITIGATION

This Document Relates To:

MARY ANNE MCCLOSKEY AS ADMINISTRATRIX
OF THE ESTATE OF PATRICK MCCLOSKEY,

Plaintiffs,

- against -

A.O. SMITH WATER PRODUCTS *et al.*,

Defendants.

Index No.: 190441/2012

AMENDED
NOTICE OF APPEAL

PLEASE TAKE NOTICE that, pursuant to NY CPLR § 5513(a), Defendant-Appellant Cleaver-Brooks, Inc. ("Defendant") hereby appeals to the Appellate Division, First Department, from an order dated December 15, 2014, attached hereto, and entered on December 19, 2014, in connection with the actions indexed at the above-noted index number, which did not provide the relief requested by the Defendant-Appellant herein, in the Office of the Clerk of New York, in the County of New York, per the Honorable Sherry K. Heitler, Administrative Judge, and this appeal is taken from each and every part of that order as well as from the whole thereof.

Dated: New York, New York
January 7, 2015

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To:

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Supreme Court of the State of New York
New York County
60 Centre Street
New York, New York 10007

Honorable Sherry K. Heitler
Administrative Judge
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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

-----X
IN RE: NYCAL (New York City Asbestos Litigation)
-----X

MARYANN MCCLOSKEY, as Executrix of the Estate for
the estate of PATRICK MCCLOSKEY, and
MARYANN MCCLOSKEY, Individually,

Index No: 190441/2012

Plaintiffs,

NOTICE OF
ENTRY

-against-

AO SMITH WATER PRODUCTS CO., ET AL.,

Defendants.

-----X
ALL CASES IN WHICH CLEAVER BROOKS COMPANY
INC. IS A DEFENDANT
-----X

Index No: 040000/1988

C O U N S E L O R S :

PLEASE TAKE NOTICE that the within is a true copy of a Decision and Order, dated December 15,
2014 and entered on December 19, 2014 with the Clerk of the Supreme Court of the State of New York, in
and for the County of New York.

Dated: New York, New York
December 19, 2014

WEITZ & LUXENBERG, P.C.

BY: 

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

INDEX NO. 190441/12
MOTION DATE _____
MOTION SEQ. NO. 023

Index Number : 190441/2012
MCCLOSKEY, PATRICK
vs
A.O. SMITH WATER PRODUCTS CO.
Sequence Number : 023
OTHER RELIEFS (CLEAVER-BROOKS)

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

~~Upon the foregoing papers, it is ordered that this motion is~~

is decided in accordance with the
memorandum decision dated 12-15-14.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12-15-14


_____, J.S.C.
HON. SHERRY KLEIN HEITLER

1. CHECK ONE:☐ CASE DISPOSED☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE:MOTION IS: ☐ GRANTED☐ DENIED☐ GRANTED IN PART☐ OTHER
3. CHECK IF APPROPRIATE:☐ SETTLE ORDER☐ SUBMIT ORDER
- ☐ DO NOT POST☐ FIDUCIARY APPOINTMENT☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----- X
IN RE: ALL WEITZ & LUXENBERG CASES IN WHICH
CLEAVER-BROOKS, INC. IS A DEFENDANT

Index No. 040000/88
Motion Sequence # 015

----- X
MARY ANNE McCLOSKEY, as Administratrix
of the Estate of PATRICK McCLOSKEY,

Index No. 190441/12
Motion Sequence # 023

Plaintiff,

DECISION AND ORDER

- against -

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants
----- X

Motion sequence nos. 015 and 023 are consolidated for disposition.

By order dated June 11, 2014, this court confirmed a November 9, 2013 written recommendation by Special Master Shelley Rosoff Olsen which among other things directed defendant Cleaver-Brooks, Inc. ("CB") to produce to plaintiffs' counsel, the law firm of Weitz & Luxenberg, P.C. ("Plaintiffs"), certain documents in its possession, including those that "reference or otherwise mentioned asbestos or asbestos containing products, components or parts used on, in or in conjunction with, or as replacement parts for its boilers."¹ In so holding this court conveyed that compliance would not be problematic so long as CB and Plaintiffs worked together to devise a document production protocol.² Since then CB has resolutely taken the position that my order is unduly burdensome, although the parties have attempted, albeit unsuccessfully, to resolve these issues with the assistance of the Special Master and this court.

¹ A copy of the Special Master's recommendation is submitted as Plaintiffs' exhibit B ("Recommendation").

² A copy of my June 11, 2014 order, which is incorporated by reference herein and made a part hereof, is submitted as Plaintiffs' exhibits C.

Motion Sequence #023, which CB filed under Master NYCAL Index Number 40000/88 and under Index No. 190441/12, is designated as a motion for clarification. In that regard CB seeks to establish certain parameters of its discovery obligations, and asserts the following:

- NYCAL plaintiffs seeking access to its documents should agree to and abide by a confidentiality order;
- Use of CB's records should be restricted to NYCAL cases;
- Production should be limited to those documents which explicitly reference asbestos or asbestos-containing parts;
- Plaintiffs should not be granted access to CB's "Index Card" repository which contains basic information regarding each of its 90,000 boilers;
- Plaintiffs should bear the costs of inspecting and copying the documents they review and select for production;
- CB should not be required to disclose or provide access to its electronic database of digitized commercial records prepared at the direction of CB's counsel for the purpose of defending CB in asbestos cases throughout the country. Such electronic database constitutes attorney work product which is protected from disclosure.

Plaintiffs argue that CB's motion is a delay tactic to slow the production of material information and should be denied outright since these issues have already been endlessly litigated. Substantively Plaintiffs argue that CB's so-called clarifications are unwarranted, inconsistent with this court's prior rulings, and contrary to New York law, to wit:

- CB's arguments (re: confidentiality, NYCAL limitations, Index Cards, production costs) were not raised in any discussions leading up to the issuance of the Special Master's Recommendation;
- Both the Recommendation and this court's confirmation order establish the broad nature of CB's discovery obligations;
- Plaintiffs are entitled to production of the index cards to facilitate its search of CB's commercial files, drawings, and specifications;
- CB's "hard drive" is not attorney work product and would sizably reduce the burden of production on both parties;
- Plaintiffs are willing to enter into a confidentiality agreement to avoid further litigation even though CB's commercial drawings do not contain trade secrets. However, the procedures proposed by CB to determine confidentiality are draconian and CB's definition of "confidential" is overly broad.

In Motion Sequence 015, filed exclusively under Master NYCAL Index Number 40000/88, Plaintiffs move for sanctions against CB pursuant to CPLR 3214 and CPLR 3126 in light of its purported “decade-long pattern of wilful and contumacious dilatory practices”.³ Plaintiffs specifically seek: (1) an order compelling CB to provide complete responses to Plaintiffs’ First Standard Set of Liability Interrogatories and Requests for Production of Documents (“Interrogatories”)⁴; (2) an order conditionally striking CB’s 18th, 19th, 27th, 29th, and 50th affirmative defenses in all Weitz & Luxenberg cases in which CB is a defendant; and (3) an order prohibiting CB from introducing any evidence at trial in support of said defenses until such time as it complies with its discovery obligations.

DISCUSSION

Once again the court has been asked to intervene in this never-ending dispute between Plaintiffs and CB over the scope of CB’s discovery obligations. Given my prior rulings I did not think that further judicial intervention would be necessary. I am hopeful that this decision finally puts these issues to rest.

CPLR 3101 “sounds the keynote” for disclosure in New York State. It has “pervasive bearing [and] establishes the broad scope of disclosure” permitted in our court system. (Patrick M. Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3101:1, at 13). CPLR 3101(a) allows a party to obtain “full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof” This statute “embodies the policy determination that liberal discovery encourages fair and effective resolution of

³ Affirmation of Gennaro Savastano, Esq. dated July 7, 2014, ¶ 7.

⁴ See Exhibit D to the NYCAL Case Management Order, as amended (“CMO”), which can be accessed at the NYCAL website, www.nycal.net.

disputes on the merits, minimizing the possibility for ambush and unfair surprise.” *Spectrum Sys. Int’l Corp. v Chem. Bank*, 78 NY2d 371, 376 (1991). Consistent therewith, the words “material” and “necessary” have been “interpreted liberally to require disclosure . . . of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” *Allen v Crowell - Collier Publ. Co.*, 21 NY2d 403, 406 (1968); *see also Mann ex rel. Akst v Cooper Tire Co.*, 33 AD3d 24, 29 (1st Dept 2006). “Pretrial disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof,’ including material which might be used in cross-examination.” *Polygram Holding, Inc. v Cafaro*, 42 AD3d 339, 341 (1st Dept 2007) (quoting *Fell v Presbyterian Hosp. in City of N.Y. at Columbia-Presbyt. Med. Ctr.*, 98 AD2d 624, 625 [1983]). “The test is one of usefulness and reason.” *Allen v Crowell-Collier Publ. Co.*, *supra*, at 406.

The ultimate objective of the CMO, the provisions of which are consistent with the CPLR, is “to allow the parties to obtain reasonably necessary documents and information without imposing undue burdens in order to permit the parties to evaluate the cases, reach early settlements, and prepare unsettled cases for trial.”⁵ Discovery in asbestos cases can be complex, time-consuming and expensive,⁶ and this court has strived to minimize costs by ensuring that streamlined discovery is conducted under the NYCAL Special Master’s supervision consistent with the CPLR and the CMO. In doing so, this court has broadly interpreted the discovery obligations of both plaintiffs and defendants alike with the hope that over time these asbestos cases can be resolved without occasioning expensive and drawn out disclosure periods. This approach has been consistently

⁵ CMO § II.

⁶ *In re New York City Asbestos Litig.*, 37 Misc. 3d 1232(A) (Sup. Ct. NY Co. Nov 15, 2012, Heitler, J.)

approved by the First Department. See *In re New York City Asbestos Litig. (Georgia-Pacific)*, 109 AD3d 7 (1st Dept 2013); *In re NYC Asbestos Litigation (Ames v Kentile Floors)*, Index No. 107574/08, at *2 (Sup. Ct. NY. Co. June 17, 2009, Heitler, J.), *aff'd* 66 AD3d 600 (1st Dept 2009).

A. The Scope of CB's Discovery Obligations

This dispute dates back many years and arises from what has come to be known as the “no-duty defense” which certain NYCAL defendants formulated in response to Plaintiffs’ claim that equipment manufacturers failed to warn against the hazards associated with after-market asbestos component parts.⁷ This duty to warn was recently confirmed by the First Department in *Matter of New York City Asbestos Litig. [Dummit]*, 121 AD3d 230 (1st Dept 2014).

For some time now CB has asserted a no-duty defense as a part of its trial strategy. In response Plaintiffs have sought a broad range of documents from CB in order to show that it specified asbestos-containing components on its boilers. CB turned over limited records pertaining only to the boilers that the plaintiff in a specific case allegedly encountered. The parties then sought the intervention of the Special Master, who determined that CB’s disclosure obligation was much broader. Her ruling, which is discussed in my prior order, bears repeating here (Plaintiffs’ exhibit B):

By ruling dated October 22, 2013, I reminded the parties that, consistent with my May 2013 ruling ordering the production of all operating and instruction manuals, parts and service manuals, drawings and blueprints for all CB boilers “at-issue”, this was to be broadly interpreted unless CB intended to withdraw its Berkowitz no-duty defense. Given that CB does, in fact, intend to raise a Berkowitz no-duty defense, plaintiffs are entitled to broad discovery in order to rebut that defense. This is consistent not only with both the spirit of the CMO and the CPLR, but with numerous decisions of this Court, and its Appellate Division. Moreover, compliance with the standard NYCAL discovery is not optional, nor is it contingent on defense counsel’s opinion (or that of its appellate counsel), as to relevance. In

⁷ See *Berkowitz v A.C. & S., Inc.*, 288 AD2d 148, 149 (1st Dept 2001); *Sawyer v A.C. & S., Inc., et al.*, 32 Misc. 3d 1237[A], Index No. 111152/99 (Sup. Ct. NY Co. 2011, Heitler, J.)

any event, CB's general knowledge and/or recommendation of the use of asbestos insulation on and in its boilers, and the use of asbestos packing, gaskets and tape is relevant to plaintiffs' ability to rebut the Berkowitz defense.

* * * *

CB's discovery obligations are broad, continuing and are not extinguished by virtue of resolving the particular matter in which CB was first ordered to produce standard NYCAL responses.

* * * *

CB is directed to comply fully with the standard NYCAL discovery requests within one week of the date of this Recommendation. For all boilers it manufactured and/or sold, CB is directed to produce all documents, to the extent not previously exchanged, including, but not limited to all design drawings, blueprints, diagrams, specifications and recommendation that reference or otherwise mention asbestos or asbestos containing products, components or parts used on, in or in conjunction with, or as replacement parts for its boilers.

This court unequivocally confirmed the Recommendation in its June 11, 2014 order. As such CB was mandated to: (1) produce "all operating and instruction manuals, parts and service manuals, drawings and blueprints for all CB boilers 'at issue'"; (2) "comply fully with the Standard NYCAL discovery requests"; and (3) "produce all documents, to the extent not previously exchanged, including, but not limited to all design drawings, blueprints, diagrams, specifications and recommendations that referenced or otherwise mention asbestos or asbestos-containing products, components or parts used on, in or in conjunction with, or as replacement parts for its boilers". *Id.*

What CB now essentially asks this court to do is apply the principle *expressio unius est exclusio alterius*⁸ by "confirm[ing] that the production of documents is limited to those referencing asbestos."⁹ To be clear, this was never the court's intention. Nor does it appear to have been that of the Special Master who otherwise would not have preceded her ruling with "including, but not

⁸ "The express mention of one thing excludes all others"

⁹ CB's memorandum of law, dated July 16, 2014, p. 16.

limited to", the plain meaning of which is that the production of documents that explicitly reference asbestos was not meant to be exhaustive of CB's disclosure obligations. *See In re Goetz's Will*, 71 App Div 272 (1st Dept 1902) (The word "[i]ncluding" is not a word of limitation, rather is it a word of enlargement, and in ordinary signification implies that something else has been given beyond the general language which precedes it."). To hold otherwise would unjustly and unreasonably prevent Plaintiffs from obtaining relevant documents (i.e., correspondence with customers, installation reports, field service reports) simply because they do not contain the word "asbestos".

As an example, CB Technical Services manager John Tornetta explained the purpose of CB's index card repository as follows¹⁰:

Cleaver-Brooks also maintains 80-90,000 index cards for each of its boiler shipments. The index cards are arranged alphabetically by the name of the job site to which Cleaver-Brooks boilers have been shipped. The cards identify the job site and the boiler unit number(s) contained in the shipment. The unit numbers are in turned [sic] used to access the commercial records for each unit number. The index cards are not an inventory of boilers by state, and Cleaver-Brooks cannot search the cards by state. Nor do the index cards reference asbestos or any asbestos-containing parts. The index cards are maintained as confidential, internal documents.

Thus, even though CB's index cards do not reference asbestos, it is clear that they are necessary to facilitate Plaintiffs' search of CB's commercial records, drawings, and specifications, and must therefore be produced.

B. CB's Database of Commercial Records

CB has taken every opportunity to argue that the production of its 12 million document repository would be prohibitively expensive using its antiquated microfiche system. Now CB has revealed that for over a year it has engaged an outside law firm to transfer upwards of 9 million pages of commercial files to an easily accessible computer hard drive, the production of which

¹⁰

Supplemental Affidavit of John Tornetta, sworn to July 14, 2014, ¶ 9.

would virtually eliminate production costs. Notwithstanding, CB takes the position here that this database is privileged as attorney work product and therefore not discoverable.

In general, “[t]he work product of an attorney shall not be obtainable” CPLR 3101(c); *see Hickman v Taylor*, 329 US 495 (1947). While this is an absolute privilege, (*see Spectrum Sys. Intl. Corp, supra*, at 376), it “applies only to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer’s learning and professional skills, such as those reflecting an attorney’s legal research, analysis, conclusions, legal theory or strategy.” *Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 190-191 (1st Dept 2005); *see also Hickman, supra*, at 511 (work-product of an attorney includes interviews, mental impressions, and personal beliefs); *Spectrum Sys. Intl. Corp, supra*, at 376.

Under CPLR 3101(d)(2), non-attorney materials prepared in anticipation of trial may also be considered privileged. Examples include liability insurer’s files (*Kandel v Tocher*, 22 AD3d 513 [1st Dept 1965]; *Finegold v Lewis*, 22 AD2d 447 [2d Dept 1965]), records created by experts prior to trial (*Giordano v New Rochelle Mun. Hous. Auth.*, 84 AD3d 729 [2d Dept 2011]), and witness statements taken by counsel (*Valencia v Obayashi Corp.*, 84 AD3d 786 [2d Dept 2011]).

CB’s hard drive does not fall into the category of the materials at issue in *Kandel*, *Finegold*, *Giordano*, and *Valencia*. It is therefore not protected from disclosure. By CB’s own admission, the hard drive was compiled for the dual purposes of facilitating its ability to comply with its nationwide discovery obligations and modernizing its own records, to wit¹¹:

On or about December 5, 2013, to facilitate the ability of C-B and its defense counsel across the nation to respond to increasing discovery demands being advanced in the asbestos litigation, and to make the commercial records more readily accessible for use by C-B’s defense counsel, my firm arranged to have the commercial records digitized. The records are

¹¹ Supplemental Affidavit of John Laffey, Esq., sworn to July 16, 2014, ¶ 4.

kept on an independent server housed at my firm. C-B does not have access to the digitized version of the commercial records, the originals of which continued to be maintained by C-B on microfiche in the ordinary course of business.

That CB routed the task of digitizing its in-house records to an outside law firm does not cloak those records with privileged immunity. *See Spectrum Systems Int'l Corp., supra* (citing *Weisgold v Kiamesha Concord, Inc.*, 51 Misc. 2d 456 [Sup. Ct. Sullivan Co. Aug. 1, 1966]); *Carlo v Queens Transit Corp.*, 76 AD2d 824 (2d Dept 1980); Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3101:35, at 82-84. Moreover, nothing in the record before me suggests that the documents were manipulated in any way or that the hard drive contains counsel's thoughts, summaries, strategies, notes, or commentaries. Just the opposite, and as Plaintiffs put it, on the facts herein the hard drive appears to me nothing more than the functional equivalent of a photocopy of the subject documents, no more, no less. The process which CB undertook only recently in the ordinary course of business to bring it into the modern age may not now be characterized as privileged for purposes of CPLR 3101(d)(2) to shield it from its legitimate disclosure obligations. *See Westhampton Adult Home Inc. v National Union Fire Ins. Co.*, 105 AD2d 627, 627-28 (1st Dept 1984).

Pursuant to CPLR 3101(d)(2), privileged materials prepared in anticipation of litigation may be obtained if the party seeking discovery demonstrates that it has a substantial need for the materials, or that it is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. *See Giordano, supra*. Were the court to accept CB's assertions that Plaintiffs' discovery requests are overly burdensome, the hard drive would relieve such burden.

The court is surprised by CB's reluctance to turn over a copy of its digital files given its position on prior motions that compliance with its disclosure obligations using its antiquated microfiche system is overly burdensome. And while Plaintiffs have offered to share in the time and

expense associated therewith, the bottom line is that CB bears the costs associated with its own discovery obligations. *See U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 94 AD3d 58, 62 (1st Dept 2012) (“it is the producing party that is to bear the cost of the searching for, retrieving, and producing documents, including electronically stored information.”); *Clarendon Natl. Ins. Co. v Atlantic Risk Mgt., Inc.*, 59 AD3d 284, 285 (1st Dept 2009) (“during the course of the action, each party should bear the expenses it incurs in responding to discovery requests.”). It would therefore be to CB’s detriment not to produce the disk, which indisputably contains almost all of the information that can be found on its microfiche reels.

C. Confidentiality Order

At a July 14, 2014 court conference CB insisted that it is entitled to a confidentiality order before it would grant Plaintiffs access to its files. The parties have since exchanged proposed agreements but have been unable to agree on terms.¹² CB now argues that the court should enter an order which sets forth strict procedures in terms of assessing the confidentiality of its files. I decline to do so given the circumstances of this case.

The notion that a confidentiality order is necessary to protect CB’s trade secrets is suspect given that the parties have engaged in decades of litigation without one. Over the years CB has furnished NYCAL plaintiffs with site-specific commercial records and commercial drawings on a case-by-cases basis, including customer correspondence, contract negotiations, specifications, installation and maintenance reports, and redacted drawings. These same documents have been used as exhibits in motion practice and admitted as evidence at trial. The court is unaware of a single

¹² A copy of Plaintiffs’ draft confidentiality order is attached as exhibit A to the August 29, 2014 affirmation of David Keyko, Esq. CB’s draft confidentiality order is attached thereto as exhibit B. A redlined draft which shows the differences between the two proposals is attached thereto as exhibit C.

instance in which CB has conditioned their release upon a plaintiff's entering into a confidentiality agreement.

Moreover, CB has not met its burden to show that the documents sought by Plaintiffs contain actual trade secrets. *See Mann ex rel. Akst, supra*, 33 AD3d at 30-31 ("when trade secrets are sought by an adverse party in litigation, the burden of establishing that the information sought is a trade secret lies with the disclosure objectant. If that burden is met, the party seeking disclosure must show that the information appears to be indispensable and cannot be acquired in any other way.") A trade secret may be defined as a "formula, pattern, device or compilation of information ... used in one's business ... which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it."¹³ In determining whether information qualifies as a trade secret, New York courts consider the following factors: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by the employees of the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the efforts expended to develop the information; (6) the ease or difficulty with which the information could be acquired and/or duplicated by others. *Ashland Management v Janien*, 82 NY2d 395, 407 (1993).

CB argues that the engineering drawings and specifications for its boilers and their component parts reflect decades of investment in research, design and development; that such unpatented know-how, experience, and knowledge give CB a competitive advantage. In turn CB argues that the disclosure of such information without a confidentiality order could have very serious

¹³

RESTATEMENT OF TORTS § 757, comment b.

financial and commercial consequences on its continued operations.¹⁴

The flaw in CB's argument is that Plaintiffs have agreed to limit production to CB's pre-1986 documents given their belief that CB ceased incorporating asbestos into its products in 1985. In other words, the documents sought by Plaintiffs are at least 30 years old. Despite CB's arguments to the contrary, the court has a hard time imagining how the acquisition of such information by an industry competitor would somehow erase its current competitive advantage.

This is not to say that CB's documents do not contain proprietary information or that they are not worthy of some sort of protection. However, CB has not shown herein that the court should require Plaintiffs to accept their proposed procedures and definitions for assessing confidentiality. This is especially true since the parties have the benefit of and expertise of the Special Master whom the court believes is keenly positioned to evaluate whether or not any such materials should be given a confidential designation and whether there should be any limitations upon their use.

Thus, those documents which are responsive to Plaintiffs' disclosure notices as to which CB asserts confidentiality shall be designated on a privilege log and submitted to the Special Master for *in-camera* review. Should the Special Master (and if necessary the court) determine that any or all of the documents listed thereon should be kept confidential the court will enter a confidentiality order regarding same.¹⁵

¹⁴ Tornetta Affidavit, ¶¶ 8, 10, 14.

¹⁵ As the court declines to enter a confidentiality order herein there need is no to determine whether its documents can only be used in NYCAL. That being said, the court must express its general reluctance to limit the parties rights in other jurisdictions.

D. Plaintiffs' cross-motion

Plaintiffs' cross-motion seeks to compel CB to provide full and complete Interrogatory Responses, to strike certain of CB's affirmative defenses, and to prohibit CB from introducing any evidence at trial in support of such defenses.

That portion of Plaintiffs' motion regarding CB's Interrogatory Responses is granted. Compliance with standard NYCAL discovery is not optional nor is it contingent on CB's counsel's opinion whether the information sought is relevant.

This court reserves judgment on the remainder of Plaintiffs' cross-motion pending the completion of discovery as directed herein. CB is strongly cautioned that further non-compliance and/or delay will result in the requested sanctions.

CONCLUSION

The CPLR requires the court to ensure that pre-trial disclosure is broad enough for litigants to obtain relevant information so that their claims may be adjudicated on the merits. In the context of this case, this means that CB must produce, among other things, records which bear any relation to Plaintiffs' claim that CB's boilers incorporated asbestos components and/or that it advised its customers to maintain its boilers using asbestos components. CB's own narrow interpretation of the Special Master's Recommendation and this court's June 11, 2014 order would improperly allow it to withhold thousands of pages of relevant information and force Plaintiffs to haphazardly review its commercial records out of context. This cannot be allowed to continue.

In light of all of the foregoing, it is hereby

ORDERED that Cleaver-Brooks, Inc.'s request for clarification is decided as set forth herein, and otherwise denied; and it is further

ORDERED that¹⁶:

- within 60 days from the date hereof, CB is directed to produce an electronic copy of its digitized commercial records database and paper copies of any commercial records not yet digitized;
- within 60 days from the date hereof, CB is directed to produce electronic copies (to the extent they exist, and otherwise paper copies) of all other relevant documents and records, *including but not limited to* commercial records, boiler drawings, designs and specifications, correspondence, and installation and maintenance reports;
- within 60 days from the date hereof, CB is directed to provide Plaintiffs access to its index card database and any microfiche reels and microfiche readers in its possession;
- CB shall bear the cost of such production.

It is further ORDERED that any documents which CB believes in good faith should be withheld as confidential or privileged shall be designated on a privilege log and submitted to the Special Master for *in-camera* review; and it is further

ORDERED that Plaintiffs' motion for sanctions is granted to the extent that, within 60 days from the date hereof, CB is directed to provide full and complete responses to Plaintiffs' First Standard Set of Liability Interrogatories and Requests for Production of Documents; and it is further

ORDERED that the remainder of Plaintiff's motion for sanctions is held in abeyance pending the completion of discovery as set forth herein.

This constitutes the decision and order of the court.

DATED:

12-15-14



SHERRY KLEIN HEITLER, J.S.C

¹⁶

As set forth herein, CB's discovery obligations are limited to pre-1986 documents.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

IN RE: NYCAL (New York City Asbestos Litigation)

MARYANN MCCLOSKEY, as Executrix of the Estate for
the estate of PATRICK MCCLOSKEY, and
MARYANN MCCLOSKEY, Individually,

Index No: 190441/2012

Plaintiffs,

NOTICE OF
ENTRY

-against-

AO SMITH WATER PRODUCTS CO., ET AL.,

Defendants.

ALL CASES IN WHICH CLEAVER BROOKS COMPANY
INC. IS A DEFENDANT

Index No: 040000/1988

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)

)SS.:

COUNTY OF NEW YORK)

GINA NICASIO, being duly sworn, deposes and says that affiant is associated with the attorneys for the plaintiff(s) herein; is not a party to this action; and resides at Queens County, New York; and;

That on the 19th day of December 2014, affiant served a copy of

ORDER WITH NOTICE OF ENTRY

VIA THE NYSC ECF SYSTEM AND VIA HAND DELIVERY ON:

Suzanne Halbardier, Esq.
Barry McTiernan & Moore
2 Rector Street
New York, NY 10006

Deponent is over the age of 18 years.


GINA NICASIO

Sworn to before me this
19th day of December 2014


NOTARY PUBLIC

Exhibit D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 1

-----X		
IN RE: NEW YORK CITY	:	NYCAL
ASBESTOS LITIGATION	:	
-----X		
DOROTHY A. KOCZUR, Individually and as	:	
Executrix for the Estate of WALTER S.	:	
KOCZUR,	:	Index No. 122340/99
	:	
Plaintiff,	:	<u>VERDICT SHEET</u>
	:	
-against-	:	
	:	
A.C. & S., INC., et al.,	:	
	:	
Defendants.	:	
-----X		

HON. MARTIN SHULMAN:

NOTE: At least five (5) jurors must agree on the answer to each question, but
 the same five (5) jurors need not agree on the answer to every
 question.

Question #1

Was Walter Koczur's lung cancer only caused by his cigarette smoking?

Yes _____ No ✓ _____

Dissenting Juror, if any _____

1. <u>Unanimous - 6 of 6</u>	2. _____
3. _____	4. _____
5. _____	6. _____

If you answered "Yes", stop here, sign the last page of the verdict sheet, and report your verdict to the court.

If you answered "No", then in light of the fact that Walter Koczur's cigarette smoking was conceded to be a substantial factor in causing his lung cancer, proceed to Question 2.

Question #2

Was Walter Koczur exposed to an asbestos-containing sheet gasket or asbestos containing gaskets manufactured, sold or distributed by The Goodyear Tire & Rubber Company?

Yes ✓ No _____

Dissenting Juror, if any _____

1. 6 of 6 2. _____
3. _____ 4. _____
5. _____ 6. _____

If you answered "No", proceed to Question 6.

If you answered "Yes", proceed to Question 3.

Question #3

Was the asbestos-containing sheet gasket or asbestos containing gaskets manufactured, sold or distributed by The Goodyear Tire & Rubber Company defective or unreasonably dangerous due to a failure to warn about the risk of disease from using its asbestos-containing sheet gasket material?

Yes ✓ No _____

Dissenting Juror, if any _____

1. 6 of 6 2. _____
3. _____ 4. _____
5. _____ 6. _____

If you answered "No", proceed to Question 6.

If you answered "Yes", go to Question 4

Question #4

Did The Goodyear Tire & Rubber Company fail to exercise reasonable care by not providing an adequate warning about the risks of disease from its asbestos-containing sheet gasket or asbestos containing gaskets to Walter Koczur?

Yes ✓ No _____

Dissenting Juror, if any _____

1. 6 of 6 2. _____
3. _____ 4. _____
5. _____ 6. _____

If you answered "No", proceed to Question 6.

If you answered "Yes", proceed to Question 5.

Question #5

Was the failure to warn by The Goodyear Tire & Rubber Company for its asbestos-containing sheet gasket or asbestos containing gaskets a substantial factor in causing Mr. Koczur's lung cancer?

Yes ✓ No _____

Dissenting Juror, if any _____

1. 6 of 6 2. _____
3. _____ 4. _____
5. _____ 6. _____

If you answered "No", proceed to Question 6.

If you answered "Yes", still proceed to Question 6.

Question #6

Was Walter Koczur exposed to an asbestos-containing sheet gasket or asbestos containing gaskets manufactured, sold or distributed by Goodyear Canada, Inc.?

Yes ✓ No _____

Dissenting Juror, if any _____

1. 6 of 6 2. _____
3. _____ 4. _____
5. _____ 6. _____

If you answered "No" Question 6, and previously answered "No" to either of Questions 2, 3, 4, or 5, stop here, sign the last page of the verdict sheet, and report your verdict to the court.

If you answered "Yes", proceed to Question 7.

Question #7

Was the asbestos-containing sheet gasket or asbestos containing gaskets manufactured, sold or distributed by Goodyear Canada, Inc. defective or unreasonably dangerous due to a failure to warn about the risk of disease from using its asbestos-containing sheet gasket material?

Yes ✓ No _____

Dissenting Juror, if any _____

- | | |
|------------------|----------|
| 1. <u>6 of 6</u> | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |

If you answered "No" Question 7, and previously answered "No" to either Questions 2, 3, 4, or 5, stop here, sign the last page of the verdict sheet, and report your verdict to the court.

If you answered "Yes", proceed to Question 8.

Question #8

Did Goodyear Canada, Inc. fail to exercise reasonable care by not providing an adequate warning about the risks of disease from its asbestos-containing sheet gasket or asbestos containing gaskets to Walter Koczur?

Yes ✓

No _____

Dissenting Juror, if any _____

1. 6 of 6 2. _____
3. _____ 4. _____
5. _____ 6. _____

If you answered "No" Question 8, and previously answered "No" to either Questions 2, 3, 4, or 5, 2, 3 or 4, stop here, sign the last page of the verdict sheet and report your verdict to the court.

If you answered "Yes", proceed to Question 9

Question #9

Was the failure to warn by Goodyear Canada, Inc. for its asbestos-containing sheet gasket or asbestos containing gaskets a substantial factor in causing Mr. Koczur's lung cancer?

Yes ✓

No _____

Dissenting Juror, if any _____

1. 6 of 6 2. _____
3. _____ 4. _____
5. _____ 6. _____

If you answered "No" Question 9, and previously answered "No" to either Questions 2, 3, 4, or 5, stop here, sign the last page of the verdict sheet, and report your verdict to the court.

If you answered "Yes", proceed to Question 10.

Question # 10

Was Walter Koczur exposed to the asbestos-containing products used, supplied, manufactured, sold or distributed by any of the following companies/entities?

- | | | | |
|-----|------------------------|--------------|-------------|
| 1. | American Standard | Yes _____ | No <u>✓</u> |
| 2. | Bell & Gossett | Yes _____ | No <u>✓</u> |
| 3. | Cleaver Brooks | Yes _____ | No <u>✓</u> |
| 4. | Combustion Engineering | Yes <u>✓</u> | No _____ |
| 5. | Crane | Yes _____ | No <u>✓</u> |
| 6. | Foster Wheeler | Yes <u>✓</u> | No _____ |
| 7. | Goulds | Yes _____ | No <u>✓</u> |
| 8. | Haliburton/Worthington | Yes _____ | No <u>✓</u> |
| 9. | J.H.Knox | Yes <u>✓</u> | No _____ |
| 10. | Peerless | Yes _____ | No <u>✓</u> |
| 11. | Quackenbush | Yes <u>✓</u> | No _____ |
| 12. | Union Boiler | Yes <u>✓</u> | No _____ |
| 13. | Utica | Yes _____ | No <u>✓</u> |
| 14. | Weil-McLain | Yes _____ | No <u>✓</u> |

Dissenting Juror, if any _____

1. 6 of 6 2. _____
3. _____ 4. _____
5. _____ 6. _____

If your answer is "No" to any of the companies, cross their names off Questions 11 and 12.

If you answered "No" to all of the companies, skip the next question(s) and proceed to Question 14.

Question #11

Were the asbestos-containing products manufactured, sold or distributed by any of the following companies defective or unreasonably dangerous due to a failure to warn about the risk of disease from their use?

- | | | | |
|-----|------------------------|--------------|----------|
| 1. | American Standard | Yes _____ | No _____ |
| 2. | Bell & Gossett | Yes _____ | No _____ |
| 3. | Cleaver Brooks | Yes _____ | No _____ |
| 4. | Combustion Engineering | Yes <u>✓</u> | No _____ |
| 5. | Crane | Yes _____ | No _____ |
| 6. | Foster Wheeler | Yes <u>✓</u> | No _____ |
| 7. | Goulds | Yes _____ | No _____ |
| 8. | Haliburton/Worthington | Yes _____ | No _____ |
| 9. | J.H.Knox | Yes <u>✓</u> | No _____ |
| 10. | Peerless | Yes _____ | No _____ |

- | | | | | | |
|-----|--------------|-----|-------------------------------------|----|--------------------------|
| 11. | Quackenbush | Yes | <input checked="" type="checkbox"/> | No | <input type="checkbox"/> |
| 12. | Union Boller | Yes | <input checked="" type="checkbox"/> | No | <input type="checkbox"/> |
| 13. | Utica | Yes | <input type="checkbox"/> | No | <input type="checkbox"/> |
| 14. | Weil-McLain | Yes | <input type="checkbox"/> | No | <input type="checkbox"/> |

Dissenting Juror, if any _____

- 6 of 6
- | | |
|----------|----------|
| 1. _____ | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |

If your answer is "No" to any of the companies, cross their names off Questions 12 and 13.

If your answered "No" to all of the companies, skip to Question 14.

Question #12

Did any of the following companies fail to exercise reasonable care by not providing an adequate warning about the risks of disease from their asbestos-containing products to Walter Koczur?

- | | | | | | |
|----|------------------------|-----|-------------------------------------|----|--------------------------|
| 1. | American Standard | Yes | <input type="checkbox"/> | No | <input type="checkbox"/> |
| 2. | Bell & Gossett | Yes | <input type="checkbox"/> | No | <input type="checkbox"/> |
| 3. | Cleaver Brooks | Yes | <input type="checkbox"/> | No | <input type="checkbox"/> |
| 4. | Combustion Engineering | Yes | <input checked="" type="checkbox"/> | No | <input type="checkbox"/> |
| 5. | Crane | Yes | <input type="checkbox"/> | No | <input type="checkbox"/> |

- | | | | | | |
|-----|------------------------|-----|-------------------------------------|----|-------|
| 6. | Foster Wheeler | Yes | <input checked="" type="checkbox"/> | No | _____ |
| 7. | Goulds | Yes | _____ | No | _____ |
| 8. | Haliburton/Worthington | Yes | _____ | No | _____ |
| 9. | J.H.Knox | Yes | <input checked="" type="checkbox"/> | No | _____ |
| 10. | Peerless | Yes | _____ | No | _____ |
| 11. | Quackenbush | Yes | <input checked="" type="checkbox"/> | No | _____ |
| 12. | Union Boiler | Yes | <input checked="" type="checkbox"/> | No | _____ |
| 13. | Utica | Yes | _____ | No | _____ |
| 14. | Weil-McLain | Yes | _____ | No | _____ |

Dissenting Juror, if any _____

- 6 of 6
- | | |
|----------|----------|
| 1. _____ | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |

If your answer is "No" to any of the companies, cross their names off Questions 13.

If your answered "No" to all of the companies, skip to Question 14.

Question #13

Was the failure to warn by any of the following companies for their asbestos-containing products a substantial factor in causing Mr. Koczur's lung cancer?

- | | | | | | |
|----|-------------------|-----|-------|----|-------|
| 1. | American Standard | Yes | _____ | No | _____ |
| 2. | Bell & Gossett | Yes | _____ | No | _____ |

- | | | | | | |
|-----|------------------------|-----|----------|----|-------|
| 3. | Cleaver Brooks | Yes | _____ | No | _____ |
| 4. | Combustion Engineering | Yes | <u>✓</u> | No | _____ |
| 5. | Crane | Yes | _____ | No | _____ |
| 6. | Foster Wheeler | Yes | <u>✓</u> | No | _____ |
| 7. | Goulds | Yes | _____ | No | _____ |
| 8. | Haliburton/Worthington | Yes | _____ | No | _____ |
| 9. | J.H.Knox | Yes | <u>✓</u> | No | _____ |
| 10. | Peerless | Yes | _____ | No | _____ |
| 11. | Quackenbush | Yes | <u>✓</u> | No | _____ |
| 12. | Union Boiler | Yes | <u>✓</u> | No | _____ |
| 13. | Utica | Yes | _____ | No | _____ |
| 14. | Weil-McLain | Yes | _____ | No | _____ |

Dissenting Juror, if any _____

- | | |
|----------|----------|
| 1. _____ | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |

If your answer is "No" to any or all of the companies, cross their names off Questions 14, and still proceed to Question 14

Question #14

Provide the percentage of fault for Mr. Koczur, Defendants Goodyear Tire & Rubber Company, Goodyear Canada and the following companies.

- | | | |
|-----|------------------------|------------------|
| 1. | Walter Koczur | <u>27.5</u> % |
| 2. | Goodyear USA | <u>27.19</u> % |
| 3. | Goodyear Canda | <u>18.13</u> % |
| 4. | American Standard | _____ % |
| 5. | Bell & Gossett | _____ % |
| 6. | Cleaver Brooks | <u>0.2124</u> % |
| 7. | Combustion Engineering | _____ % |
| 8. | Crane | _____ % |
| 9. | Foster Wheeler | <u>12.7376</u> % |
| 10. | Goulds | _____ % |
| 11. | Haliburton/Worthington | _____ % |
| 12. | J.H.Knox | <u>3.398</u> % |
| 13. | Peerless | _____ % |
| 14. | Quackenbush | <u>3.186</u> % |
| 15. | Union Boiler | <u>7.646</u> % |
| 16. | Utica | _____ % |
| 17. | Weil-McLain | _____ % |

100%

6 of 6

Dissenting Juror, if any _____

- | | |
|----------|----------|
| 1. _____ | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |

Proceed to Question 15

Question #15

Set forth the amount of damages awarded to Walter Koczur for the pain and suffering resulting from his lung cancer from his diagnosis of lung cancer to the date of his death (January 12, 1998 to March 23, 1998).

(If you decide not to make an award as to the above item, write in the word "NONE").

\$ 11,666,667

6 of 6

Dissenting Juror, if any _____

- | | |
|----------|----------|
| 1. _____ | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |

Proceed to Question 16

Question #16

State the total amount awarded to Dorothy A. Koczur, if any, sustained by the loss of her husband's services and society.

(If you decide not to make an award as to the above item, write in the word "NONE").

\$ 1,983,333.00

Dissenting Juror, if any 6 of 6

- | | |
|----------|----------|
| 1. _____ | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |

We, the Jury, confirm that the above votes and the corresponding vote counts accurately reflect the actual votes of the individual jurors.

This is a correct report of the Jury's Verdict.

(Each juror must sign this Verdict Sheet)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 1

-----X
IN RE: NEW YORK CITY :
ASBESTOS LITIGATION :

NYCAL

-----X
CAROL ANN MCCARTHY, Individually and as :
Executrix for the Estate of EUGENE G. :
MCCARTHY, :

Index No. 100490/99

Plaintiff,

VERDICT SHEET

-against-

A.C. & S., INC., et al.,

Defendants.
-----X

HON. MARTIN SHULMAN:

NOTE: At least five (5) jurors must agree on the answer to each question, but
the same five (5) jurors need not agree on the answer to every
question.

Question #1

Was Eugene McCarthy's lung cancer only caused by his cigarette smoking?

Yes _____

No ☒ _____

Dissenting Juror, if any _____

6 of 6

1. _____

2. _____

3. _____

4. _____

5. _____

6. _____

If you answered "No", then in light of the fact that Eugene McCarthy's cigarette smoking was conceded to be a substantial factor in causing his lung cancer, proceed to Question 2.

Was Eugene McCarthy exposed to an asbestos-containing sheet gasket or asbestos containing gaskets manufactured, sold or distributed by The Goodyear Tire & Rubber Company?

Dissenting Juror, if any _____

6 of 6

1. _____

2. _____

3. _____

4. _____

5. _____

6. _____

If you answered "Yes", proceed to Question 3.

Question #3

Was the asbestos-containing sheet gasket or asbestos containing gaskets manufactured, sold or distributed by The Goodyear Tire & Rubber Company defective or unreasonably dangerous due to a failure to warn about the risk of disease from using its asbestos-containing sheet gasket material?

Yes ✓ No _____

Dissenting Juror, if any _____

1. 6 of 6 2. _____
3. _____ 4. _____
5. _____ 6. _____

If you answered "No", proceed to Question 6.

If you answered "Yes", go to Question 4

Question #4

Did The Goodyear Tire & Rubber Company fail to exercise reasonable care by not providing an adequate warning about the risks of disease from its asbestos-containing sheet gasket or asbestos containing gaskets to Eugene McCarthy?

Yes ✓ No _____

Dissenting Juror, if any _____

1. 6 of 6 2. _____
3. _____ 4. _____
5. _____ 6. _____

If you answered "No", proceed to Question 6.

If you answered "Yes", proceed to Question 5.

Question #5

Was the failure to warn by The Goodyear Tire & Rubber Company for its asbestos-containing sheet gasket or asbestos containing gaskets a substantial factor in causing Mr. McCarthy's lung cancer?

Yes ✓ No _____

Dissenting Juror, if any _____

- | | |
|------------------|----------|
| 1. <u>6 of 6</u> | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |

If you answered "No", proceed to Question 6.

If you answered "Yes", still proceed to Question 6.

Question #6

Was Eugene McCarthy exposed to an asbestos-containing sheet gasket or asbestos containing gaskets manufactured, sold or distributed by Goodyear Canada, Inc.?

Yes ✓ No _____

Dissenting Juror, if any _____

- | | |
|------------------|----------|
| 1. <u>6 of 6</u> | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |

If you answered "Yes", proceed to Question 7.

Question #7

Was the asbestos-containing sheet gasket or asbestos containing gaskets manufactured, sold or distributed by Goodyear Canada, Inc. defective or unreasonably dangerous due to a failure to warn about the risk of disease from using its asbestos-containing sheet gasket material?

Yes ✓ No

Dissenting Juror, if any _____

6 of 6

1. _____

2. _____

3. _____

4. _____

5. _____

6. _____

If you answered “No” Question 7, and previously answered “No” to either Questions 2, 3, 4, or 5, stop here, sign the last page of the verdict sheet, and report your verdict to the court.

If you answered "Yes", proceed to Question 8.

Question #8

Did Goodyear Canada, Inc. fail to exercise reasonable care by not providing an adequate warning about the risks of disease from its asbestos-containing sheet gasket or asbestos containing gaskets to Eugene McCarthy?

Yes ✓

No _____

Dissenting Juror, if any _____

- | | |
|------------------|----------|
| 1. <u>6 of 6</u> | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |

If you answered "No" Question 8, and previously answered "No" to either Questions 2, 3, 4, or 5, stop here, sign the last page of the verdict sheet and report your verdict to the court.

If you answered "Yes", proceed to Question 9

Question #9

Was the failure to warn by Goodyear Canada, Inc. for its asbestos-containing sheet gasket or asbestos containing gaskets a substantial factor in causing Mr. McCarthy's lung cancer?

Yes ✓

No _____

Dissenting Juror, if any _____

- | | |
|------------------|----------|
| 1. <u>6 of 6</u> | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |

If you answered "No" Question 9, and previously answered "No" to either Questions 2, 3, 4, or 5, stop here, sign the last page of the verdict sheet, and report your verdict to the court.

If you answered "Yes", proceed to Question 10.

Question # 10

Was Eugene McCarthy exposed to the asbestos-containing products used, supplied, manufactured, sold or distributed by any of the following companies/entities?

- | | | |
|--------------------------------|--------------|----------|
| 1. Buff, Saddleman & Winkleman | Yes <u>✓</u> | No _____ |
| 2. Crane | Yes <u>✓</u> | No _____ |
| 3. Dana (Victor) | Yes <u>✓</u> | No _____ |
| 4. Foster Wheeler | Yes <u>✓</u> | No _____ |
| 5. Goulds | Yes <u>✓</u> | No _____ |
| 6. Haliburton/Worthington | Yes <u>✓</u> | No _____ |
| 7. Higgins | Yes <u>✓</u> | No _____ |
| 8. Merritt Chapman and Scott | Yes <u>✓</u> | No _____ |
| 9. National Gypsum | Yes <u>✓</u> | No _____ |

Dissenting Juror, if any _____

- 6 of 6
- | | |
|----------|----------|
| 1. _____ | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |

If your answer is "No" to any of the companies, cross their names off Questions 11 and 12.

If you answered "No" to all of the companies, skip the next question(s) and proceed to Question 14.

Question #11

Were the asbestos-containing products manufactured, sold or distributed by any of the following companies defective or unreasonably dangerous due to a failure to warn about the risk of disease from their use?

- | | | | | | |
|----|-----------------------------|-----|----------|----|-------|
| 1. | Buff, Saddleman & Winkleman | Yes | <u>✓</u> | No | _____ |
| 2. | Crane | Yes | <u>✓</u> | No | _____ |
| 3. | Dana (Victor) | Yes | <u>✓</u> | No | _____ |
| 4. | Foster Wheeler | Yes | <u>✓</u> | No | _____ |
| 5. | Goulds | Yes | <u>✓</u> | No | _____ |
| 6. | Haliburton/Worthington | Yes | <u>✓</u> | No | _____ |
| 7. | Higgins | Yes | <u>✓</u> | No | _____ |
| 8. | Merritt Chapman and Scott | Yes | <u>✓</u> | No | _____ |
| 9. | National Gypsum | Yes | <u>✓</u> | No | _____ |

Dissenting Juror, if any _____

- | | | | |
|----|---------------|----|-------|
| 1. | <u>6 of 6</u> | 2. | _____ |
| 3. | _____ | 4. | _____ |
| 5. | _____ | 6. | _____ |

If your answer is "No" to any of the companies, cross their names off Questions 12 and 13.

If your answered "No" to all of the companies, skip to Question 14.

Question #12

Did any of the following companies fail to exercise reasonable care by not providing an adequate warning about the risks of disease from their asbestos-containing products to Eugene McCarthy?

Yes ✓ No _____

- | | | | |
|----|-----------------------------|--------------|----------|
| 1. | Buff, Saddleman & Winkleman | Yes <u>✓</u> | No _____ |
| 2. | Crane | Yes <u>✓</u> | No _____ |
| 3. | Dana (Victor) | Yes <u>✓</u> | No _____ |
| 4. | Foster Wheeler | Yes <u>✓</u> | No _____ |
| 5. | Goulds | Yes <u>✓</u> | No _____ |
| 6. | Haliburton/Worthington | Yes <u>✓</u> | No _____ |
| 7. | Higgins | Yes <u>✓</u> | No _____ |
| 8. | Merritt Chapman and Scott | Yes <u>✓</u> | No _____ |
| 9. | National Gypsum | Yes <u>✓</u> | No _____ |

Dissenting Juror, if any _____

- | | |
|------------------|----------|
| 1. <u>6 of 6</u> | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |

If your answer is "No" to any of the companies, cross their names off Questions 13.

If your answered "No" to all of the companies, skip to Question 14.

Question #13

Was the failure to warn by any of the following companies for their asbestos-containing products a substantial factor in causing Mr. Koczur's lung cancer?

- | | | | | | |
|----|-----------------------------|-----|----------|----|-------|
| 1. | Buff, Saddleman & Winkleman | Yes | <u>✓</u> | No | _____ |
| 2. | Crane | Yes | <u>✓</u> | No | _____ |
| 3. | Dana (Victor) | Yes | <u>✓</u> | No | _____ |
| 4. | Foster Wheeler | Yes | <u>✓</u> | No | _____ |
| 5. | Goulds | Yes | <u>✓</u> | No | _____ |
| 6. | Haliburton/Worthington | Yes | <u>✓</u> | No | _____ |
| 7. | Higgins | Yes | <u>✓</u> | No | _____ |
| 8. | Merritt Chapman and Scott | Yes | <u>✓</u> | No | _____ |
| 9. | National Gypsum | Yes | <u>✓</u> | No | _____ |

Dissenting Juror, if any _____

- | | | | |
|----|---------------|----|-------|
| 1. | <u>6 of 6</u> | 2. | _____ |
| 3. | _____ | 4. | _____ |
| 5. | _____ | 6. | _____ |

If your answer is "No" to any or all of the companies, cross their names off Questions 14,

and still proceed to Question 14

Question #14

Provide the percentage of fault for Mr. McCarthy, Defendants Goodyear Tire & Rubber Company, Goodyear Canada and the following companies.

- | | | |
|-----|-------------------------------|-------------|
| 1. | Eugene McCarthy | <u>55</u> % |
| 2. | Goodyear USA | <u>7</u> % |
| 3. | Goodyear Canda | <u>5</u> % |
| 4. | Buff, Saddleman and Winkleman | <u>1</u> % |
| 5. | Crane | <u>3</u> % |
| 6. | Dana (Victor) | <u>13</u> % |
| 7. | Foster Wheeler | <u>9</u> % |
| 8. | Goulds | <u>2</u> % |
| 9. | Haliburton/Worthington | <u>1</u> % |
| 10. | Higgins | <u>1</u> % |
| 11. | Merritt Chapman and Scott | <u>1</u> % |
| 12. | National Gypsum | <u>2</u> % |

100%

Dissenting Juror, if any _____

- | | |
|------------------|----------|
| 1. <u>6 of 6</u> | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |

Proceed to Question 15

Question #15

Set forth the amount of damages awarded to Eugene McCarthy for the pain and suffering resulting from his lung cancer from his diagnosis of lung cancer to the date of his death (September 18, 1996 to September 23, 1998).

(If you decide not to make an award as to the above item, write in the word "NONE").

\$ 8,500,000

Dissenting Juror, if any _____

- | | |
|------------------|----------|
| 1. <u>6 of 6</u> | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |

We, the Jury, confirm that the above votes and the corresponding vote counts accurately reflect the actual votes of the individual jurors.

This is a correct report of the Jury's Verdict.

(Each juror must sign this Verdict Sheet)

Exhibit 2

SUPREME COURT : ALL COUNTIES
WITHIN THE CITY OF NEW YORK

-----X

IN RE NEW YORK CITY
ASBESTOS LITIGATION

New York Asbestos
Litigation (NYAL)

Index No. 40000

-----X

CASE MANAGEMENT
ORDER NO. 1

This Document Relates To:
All Cases

-----X

I. Applicability of This Order

This Order applies to all pretrial procedures involving all asbestos personal injury and wrongful death cases now or hereafter assigned to the undersigned, except as otherwise directed by the Court upon motion and for cause shown by the party seeking to have this Order declared inapplicable and supercedes all previous orders entered in the asbestos litigation, previously pending in all counties in the City of New York, Supreme Court.

II. Objectives

It is the objective of the Court to encourage and bring about the fair, expeditious, and inexpensive resolution of these cases. In an effort to achieve this goal, a case management plan ("CMP") is established to allow the parties to obtain reasonably necessary documents and information without imposing undue burdens in order to permit the parties to evaluate the case, reach early settlements, and prepare unsettled cases for trial. The essential components of the CMP include, to the extent feasible:

(1) standardization of pleadings and discovery so that the parties can obtain the necessary information to evaluate cases for settlement or to prepare them for trial at minimum cost;

(2) conducting early pretrial conferences to explore settlement opportunities, to resolve pretrial management problems, and to establish discovery cut-off dates;

(3) the clustering, ordering, and firm scheduling of cases, individually or in groups, for pretrial procedures and trial.

(4) the coordination of discovery, the use and compensation of Liaison Counsel, and other orders as necessary to avoid duplication, contain costs, and expedite disposition through settlement or trial.

III. Filing Procedures

A. Files

A master file, to be known as New York Asbestos Litigation ("NYAL") Master file, is hereby established in the Office of the Clerk of New York County which shall be the file for all asbestos cases assigned to the undersigned for coordinated pretrial proceedings, whether such cases were commenced in New York, Kings, Queens, Bronx or Richmond County. Entries on the NYAL file shall be applicable to each asbestos case assigned to the undersigned for coordinated pretrial proceedings.

The original of this Order shall be filed by the County Clerk in the Master File herein established, and a copy shall be deemed to be part of the record of each coordinated action.

A separate file shall also be maintained under a separate Index Number for each individual action in the Office of the Clerk of New York County, and entries shall be made thereon in accordance with this Order.

B. Captions of Cases

Every document filed in these coordinated actions, that has general application to all cases, shall bear a caption as follows:

SUPREME COURT : ALL COUNTIES
WITHIN THE CITY OF NEW YORK

- - - - -X

IN RE NEW YORK CITY
ASBESTOS LITIGATION

NYAL
(Title of Document)

- - - - -X

Index #40000

C. Filing of Papers

(1) When a paper has general application to all cases, the caption shall bear index number 40000 and the Clerk of New York County shall file such a paper in the Master File. No further papers need to be filed. Any document so filed shall be deemed to have been filed in each case to which this Order applies and shall constitute part of the record of each such case.

(2) When a paper, other than a Plaintiff's Statement Form 1, like a motion, is applicable only to an individual case, the attorney submitting such paper for filing shall supply a cover sheet containing the caption, name and index number to which the paper is applicable. The Clerk of New York County shall not file such a paper in the Master File; rather, after receipt by the Clerk, the Clerk shall file the original in the individual case file under the appropriate index number. With respect to a Plaintiff's Statement Form 1, the Clerk of New York County shall file the original in the NYAL Master File bearing

the index number 40000 and a copy in the file of each action pending in New York County to which the paper is intended to be applicable, bearing its own separate index number.

(3) When a paper is filed that is applicable to two or more but less than all of these coordinated actions, the captions shall state the case names and separate index numbers to which actions that paper is applicable. The Clerk of New York County shall file the original of such paper bearing the index number 40000 in the NYAL Master File and a copy in the separate file bearing the index number of each action pending in New York County to which the paper is intended to be applicable.

(4) It shall be the responsibility of the attorney submitting such paper for filing to supply a cover sheet containing the captions, names and index numbers of all cases to which the paper is applicable and supply the County Clerk with sufficient copies of any such paper to facilitate compliance with the directions of this paragraph.

IV. Rules of Procedure

The Civil Practice Law and Rules and the Local Rules of the Supreme Court of the State of New York, New York County shall govern all proceedings herein, except where otherwise expressly provided in this Order.

V. Admission of Attorneys

Any attorney admitted to practice before a court of general jurisdiction in one of the fifty states but who is not a member of the bar of this State and who is acting as counsel for

a party in these coordinated actions shall be deemed admitted pro hac vice to practice before the Court in connection with these actions.

VI. Pleadings

A. To assist in the "grouping" or "clustering" of cases, the actions shall be identified by number (e.g., Category 1) as falling within one of the following types of asbestos cases, based on the nature of the individual plaintiff's or decedent's primary exposure:

- (1) shipyard;
- (2) insulating trade;
- (3) boiler trade;
- (4) construction trade;
- (5) plant worker;
- (6) brake lining or friction worker;
- (7) seaman;
- (8) railroad employee;
- (9) non-occupational;
- (10) other.

B. "Plaintiff's Statement" (Form 1), annexed hereto, identifying the appropriate category, inter alia, shall be filed in each new case within fifteen (15) days of serving of the complaint or, in the case of already served actions, within forty-five (45) days of the filing of this Order.

The plaintiff shall indicate in the statement which category of asbestos cases is being alleged by the plaintiff. The statement shall be filed with the Clerk and served on plaintiffs' and

defendants' Liaison Counsel. The Clerk of New York County shall file the original in the NYAL Master File and a copy in the file of each action pending in New York County to which the paper is intended to be applicable.

C. Plaintiffs' Liaison Counsel shall file in the NYAL Master File and serve on defendants a complaint or set of complaints containing standard allegations generally applicable to all claims of a similar nature. Thereafter, plaintiffs may and should, to the maximum extent feasible, serve and file a short form complaint which incorporates by reference all of the allegations contained in the appropriate standard complaint. In the case of previously filed complaints, leave is hereby granted to file such short form complaints as amended complaints.

D. Defendants shall file in the NYAL Master File and serve on plaintiffs' Liaison Counsel a standard answer with affirmative defenses. When such standard set of defenses have been filed, a defendant may serve an acknowledgement of service (Form 2), as annexed hereto, on the plaintiff, by which service defendant will be deemed to have denied all material allegations contained in the plaintiff's complaint, except as stated in such acknowledgment, and to have raised each of the affirmative defenses contained in defendants' standard answer, except as stated in such acknowledgment. Nothing herein shall preclude a defendant from filing an individual answer, if it so chooses.

E. Any plaintiff may, without further leave of the Court, which is hereby granted, amend his or her complaint to add claims based on survivorship, death of the original plaintiff, loss of

consortium or society, to sever any joined claims, or to add additional defendants. Service of such amendments on counsel who have appeared for a defendant shall be considered service on that defendant. Such amendments may incorporate by reference the allegations of the complaint on file where appropriate. Defendants shall be deemed to have answered as set forth in the preceding paragraph. Other amendments to the pleadings shall be made in compliance with C.P.L.R. Sec. 3025. However, the parties are encouraged to consent to such amendments where appropriate in light of New York State's recognition that leave to amend is to be freely granted.

VII. Liaison Counsel

A. Liaison Counsel and Steering Committee

Appointment of Liaison Counsel to act on behalf of plaintiffs' counsel and on behalf of defendants' counsel after appropriate consultation where necessary will facilitate communications among the Court and counsel, minimize duplication of effort, coordinate joint positions, and provide for the efficient progress and control of this litigation.

B. Subject to the right of any party to present individual or divergent positions or to take individual actions, Liaison Counsel are vested by the Court with the following responsibilities and duties:

- (1) to coordinate the briefing of motions;
- (2) to coordinate the argument of motions;

(3) to coordinate the conduct of discovery procedures, including but not limited to coordination of the preparation of joint written interrogatories, joint requests to admit, and joint requests for the production of documents, where applicable;

(4) to coordinate the examination of witnesses in depositions;

(5) to coordinate the selection of counsel to act as spokespersons at pretrial conferences;

(6) to call meetings of counsel for plaintiffs and defendants respectively for the purpose of proposing joint actions, including but not limited to responses to questions and suggestions of the Court or of adversaries with regard to orders, schedules, briefs, and stipulations of the facts.

C. Co-Liaison Counsel for the plaintiffs shall be the firm of Wilentz Goldman & Spitzer and the firm of Rheingold & McGowan. There shall be a steering committee consisting of the Co-Liaison Counsel and representatives of (1) Levy, Phillips & Konigsberg, (2) the law firm of Morris J. Eisen, and (3) Kriendler and Kriendler.

D. Liaison Counsel for the defendants shall be the firm of Anderson, Russell, Kill & Olick, P.C. and Carter, Ledyard and Milburn. There shall be a steering committee consisting of Co-Liaison Counsel and representatives of (1) Barry McTiernan & Moore, (2) Bower & Gardner and (3) Alexander, Ash, Schwartz & Cohen.

E. Each plaintiff's counsel shall inform plaintiffs' and defendants' Liaison Counsel of all asbestos cases currently pending or hereafter filed in the Supreme Court, New York County in which such counsel has appeared within thirty (30) days of the filing of this Order or of the complaint in such action, whichever is later, by supplying Liaison Counsel with a short form that sets forth the caption and index number.

F. Liaison Counsel are authorized to receive orders, notices, correspondence, and telephone calls from the Court and the Clerk of the Court on behalf of all defendants and plaintiffs and shall be responsible for notifying all counsel of all communications received from the Court.

G. Notwithstanding the appointment of Liaison Counsel, each counsel shall have the right to participate in all proceedings before the Court as fully as such counsel deems necessary.

H. Liaison Counsel shall not have the right to bind any party except Liaison Counsel's own respective clients as to any matter without the consent of counsel for any other party.

I. Plaintiffs' Liaison Counsel and defendants' Liaison Counsel shall be reimbursed periodically but not less than every six months by counsel for plaintiffs and counsel for defendants respectively for their necessary and reasonable expenses actually incurred in performing their tasks pursuant to this Order and shall keep records of such expenses in reasonable detail for examination by counsel. Liaison Counsel shall be paid by each plaintiff's and defendant's counsel on an equitable basis to be agreed upon by the parties or fixed by the Court with each

plaintiff and defendant having to pay a proportionate share of the costs incurred by its respective Liaison Counsel in representing its interests.

J. Liaison Counsels' invoices for services of Liaison Counsel pursuant to this Order shall be due and payable when submitted. Interest shall be computed at the rate applicable to judgments starting thirty (30) days of the date of their submission.

K. When a case has been totally or partially resolved, defendants' counsel and plaintiffs' counsel shall advise Liaison Counsel of the fact of such resolution within ten (10) days of such resolution.

VIII. Time Line for Handling Cases Commenced
Before and After July 30, 1987

In order to efficiently and expeditiously manage the large number of cases commenced before July 30, 1987 ("window cases"), and hereafter ("post-window cases"), a special procedure is essential and the following procedure is adopted.

A. A plaintiff's statement (Form 1) shall be prepared for each separate plaintiff's case, filed with the Court, and served on plaintiffs' and defendants' Liaison Counsel within forty-five (45) days of the filing of this Order or within fifteen (15) days of the serving of the complaint, if the complaint is not yet served.

B. The cases will be clustered or grouped by plaintiffs' Liaison Counsel and defendants' Liaison Counsel for processing in accordance with the clusters and schedule set forth in paragraph

VIII(D) hereof. In grouping the cases, Liaison Counsel shall group the cases by the exposure category and jobsite set forth above and with a fair cross section of single filed and double filed* cases. In the event the parties are unable expeditiously to agree on clusters, they shall be fixed by the Court. The identity of the cases in each cluster shall be determined by Liaison Counsel not later than twenty (20) days before the date of entry of the cluster into the time line schedule set forth below (the "initiation date"). The identity of the cases in the first cluster shall be determined by Liaison Counsel on or before May 10, 1988, or if not then determined will be determined by the Court.

C. The following schedule shall be followed by each cluster:

(1) At or shortly after the initiation date, the Court shall fix a definite date for trial which shall be within one year after the initiation date, shall determine that a judge is available to try the case if it is not otherwise resolved, and that the judge will try the case on the date fixed for trial.

(2) Within thirty (30) days after the initiation date, plaintiff shall answer defendants' standard set of interrogatories and produce all medical, personnel, earnings, social security or tax records in his or her possession and provide defendants with authorizations to obtain any other such

* A related action is pending in the Southern or Eastern District Federal Court.

records not in his or her possession which are requested in defendants' standard document requests. It is the responsibility of plaintiffs' counsel to distribute this disclosure material directly to all appropriate defendants' counsel.

(3) Within ninety (90) days after the initiation date, depositions of plaintiff and plaintiff's spouse shall be conducted.

(4) Within sixty (60) days after the initiation date, defendants shall set a firm date for a consolidated physical examination of plaintiff, if any defendant desires such an examination. Within one hundred (100) days of the initiation date, defendants shall have completed any such consolidated physical examination and served a copy of the report of the examination and the results of any scientific tests taken in connection therewith on the plaintiff.

(5) Within one hundred (100) days of the initiation date, the Court will fix a date for a settlement conference.

(6) If the case is not settled at the conclusion of the settlement conference, all other discovery will be completed pursuant to notice within ninety (90) days of the conference's termination. Such discovery may include supplemental non-repetitive interrogatories and document requests of plaintiffs' initial interrogatories and document requests; requests for admission of defendants; depositions of non-party witnesses and defendants; and depositions of medical experts in the event expert reports are of such generality as to make such depositions necessary.

(7) Plaintiffs are directed to file Notes of Issue within two hundred forty (240) days of the initiation date as set forth below.

(8) Within thirty (30) days prior to the date fixed for trial, the parties shall engage in a final settlement conference before the undersigned.

(9) No later than ten (10) days before trial, plaintiffs and defendants shall exchange and file with the Court in each case within the cluster voir dire requests, motions in limine or addressed to anticipated evidentiary issues, depositions suitably marked in the margin to indicate the portions intended to be introduced at trial by each side and the objections, if any, to their introduction, witness and exhibit lists, requests to charge, and proposed verdict forms.

(10) Failure of any party to adhere to the time line set forth herein shall not justify any other party's departure from the time line and shall be called to the Court's attention immediately for remedy. Remedies may include, in addition to monetary sanctions, loss of discovery rights, preclusion, default or dismissal.

D. The cases will be clustered or grouped in the following order:

Cluster Number	Number of Cases in Cluster	Initiation Date	Settlement Conference Dates	Note of Issue Before	Trial Before
1	25	5/31/88	9/19/88	2/89	5/89
2	25	6/15/88	10/7/88	3/89	6/89
3	25	7/15/88	11/14/88	4/89	7/89
4	25	8/15/88	12/19/88	5/89	8/89
5	25	9/15/88	1/16/89	4/89	9/89
6	25	10/15/88	1/16/89	7/89	10/89
7	40	11/15/88	2/20/89	8/89	11/89
8	40	12/15/88	4/17/89	9/89	12/89
9	40	1/15/89	5/15/89	10/89	1/90
10	40	2/15/89	6/19/89	11/89	2/90

The clusters for months 11 through 14 shall consist of up to 50 cases per month, and thereafter each cluster shall consist of up to 75 cases until all window and post-window cases have been settled.

IX. Settlement Conferences

(1) At least twenty (20) days prior to a settlement conference, plaintiff shall serve on defendants a demand that contains its best settlement offer containing the information required in the attached Plaintiff's Settlement Demand form. At the settlement conference, the parties shall discuss:

- (a) the possibility of settlement;
- (b) the possible use of alternative dispute resolution procedures to resolve the case;
- (c) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;
- (d) the possibility of obtaining admissions of fact and as to the admissibility of documents and stipulations

and as to the admissibility of documents and stipulations regarding the authenticity of documents;

(e) the avoidance of unnecessary proof and of cumulative evidence;

(f) the identification of witnesses and documents and the setting of a schedule for completion of all other pretrial matters;

(g) such other matters as may aid in the disposition of the action.

(2) At least ten (10) days prior to a settlement conference defendants shall serve on plaintiffs a settlement offer containing the information required in the attached defendant's settlement offer form.

(3) At the settlement conference, counsel for each party shall have authority or shall be accompanied by or be able to be in immediate telephone contact with a client with such authority to settle the case and to enter into stipulations and make admissions regarding all matters that the participants should reasonably anticipate may be discussed.

X. Standard Consolidated Discovery ("CDR")

A. Standard Interrogatories (Rule 33, Fed. R. Civ. P.) and Notices for Discovery and Inspection of Documents (C.P.L.R. Sec. 3120) shall be utilized as set forth herein and shall be designated CDR's. The Court on its own motion hereby permits the use of interrogatories in addition to depositions pursuant to C.P.L.R. Sec. 3130.

B. Defendants shall develop a single, standard joint set of interrogatories to plaintiffs which shall be filed with the County Clerk under the index number 40000 and provided to plaintiffs' Liaison Counsel.

(1) Plaintiffs shall file with the County Clerk responses to defendants' standard set of interrogatories under appropriate individual index numbers in accordance with the time line set forth herein.

(2) After the standard set of interrogatories are answered, any defendant may file with the County Clerk supplemental, non-repetitive interrogatories in any case it deems appropriate in accordance with the time line. Defense counsel are admonished to exercise the utmost good faith in determining the necessity for such further interrogatories.

(3) Once filed, the defendants' standard set of interrogatories shall be deemed to apply to all cases, without the necessity of further filing and service of such interrogatories in individual cases. Any standard interrogatories filed in cases pending in the Federal Court, Eastern District of New York are deemed to apply to all cases pending before this Court without the necessity of further filing and service in the state actions. In the case of a new plaintiff not represented by any attorney who has previously appeared for some other plaintiff, defendants' Liaison Counsel will serve a copy of the interrogatories on such counsel.

(4) Copies of any records obtained by any defendant pursuant to authorization of a plaintiff shall be made

available to plaintiff's counsel by notice of receipt mailed to plaintiff's counsel within ten (10) days of receipt.

C. Plaintiffs shall develop a single, standard joint set of interrogatories designed to obtain general liability information.

(1) Each defendant shall be permitted to file in the Master File under index number 40000 a single set of responses which shall be applicable to all coordinated actions. Responses by defendants to this set of interrogatories shall be served on plaintiffs' Liaison Counsel and when so served shall be deemed served in each case. In the event that a defendant not previously named in these actions is named by the plaintiff, the plaintiff's counsel will so inform plaintiff's Liaison Counsel, who will serve a set of standard interrogatories on such defendant. Responses by such defendant shall be due, in accordance with the time line, within thirty (30) days of the termination of the initial settlement conference. Defendants may designate, file, and serve interrogatories and their answers to such interrogatories which have been filed in other actions as their standard interrogatory answers pursuant to this section, where such designation is agreed to by plaintiffs' Liaison Counsel.

(2) After the standard set of interrogatories are answered, plaintiffs may, in accordance with the time line, file with the County Clerk and serve non-repetitive, supplemental interrogatories in any case they deem appropriate. Plaintiffs' counsel are admonished to exercise the utmost good faith in determining the need for such further interrogatories.

D. Document Requests

(1) General Guidelines

(a) The provisions of C.P.L.R. Sec. 3120 shall govern all requests for documents. The requesting party shall specify a reasonable time, place, and manner for making the inspection. The request will describe each item with reasonable particularity.

(b) Counsel are directed to exercise the utmost good faith in making requests for production and in responding to requests. Counsel are directed to exercise their best efforts to resolve on an informal basis disputes arising out of the document requests and responses and objections thereto.

(2) Defendants' Requests for Documents

(a) Counsel for the defendants shall develop a standard document request to the plaintiffs. Once filed with the County Clerk under index number 40000, the defendants' standard request shall be deemed to apply to all cases, without the necessity of further filing and service of the request in individual cases, except that defendants' Liaison Counsel shall serve a set of standard document requests upon a plaintiff's counsel who has not previously appeared on behalf of some other plaintiff who requests such service.

(b) In producing documents, each plaintiff shall serve one set of the requested documents on defendants' Liaison Counsel and when so served shall be deemed served in each case. If any of the requested documents are not in plaintiff's possession, custody, or control, the plaintiff shall provide a

mutually agreed upon records retrieval service with the necessary authorizations to obtain such records from other persons, the costs of which shall be part of the costs taxed in the action.

(c) After the standard set of document requests is responded to, defendants may, in accordance with the time line, file with the County Clerk and serve supplemental, non-repetitive requests for documents in any case as they deem appropriate. Defendants' counsel are admonished to exercise utmost good faith in determining the need for such further document requests.

(3) Plaintiffs' Requests for Documents

(a) Plaintiffs shall develop a single, standard document request to the defendants.

(b) Each defendant shall produce or arrange for production of documents pursuant to plaintiffs' standard document requests within thirty (30) days of the end of the initial conference, subject to agreement about the specific time and place between plaintiffs' Liaison Counsel and the particular defendant's counsel and on a reasonable schedule for production. Each defendant shall produce documents by serving one set of the requested documents on plaintiffs' Liaison Counsel, who will permit other plaintiffs' counsel to inspect and copy such documents as they desire, or by arranging for production of such documents at a document depository.

(c) After the standard set of document requests is responded to, plaintiffs may file with the County Clerk and

serve supplemental, non-repetitive document requests in any case they deem appropriate. Counsel are directed to exercise the utmost good faith in making requests for discovery and in responding to such requests.

(4) General Discovery Provisions

(a) Disputes with regard to discovery shall be called immediately to the Court's attention for resolution by the Court or law assistant and shall not be relied upon by any party as a justification for not adhering to the time line.

(b) Document production shall be in such form as will make clear the request to which the document is responsive.

(c) Objections based on privilege shall clearly identify the privilege claimed and sufficient information concerning (i) the basis for the claim of privilege to establish prima facie the validity of the claim, and (ii) the privileged information to permit identification of the information or document as to which privilege is claimed. If not so identified, the privilege shall be deemed waived. The parties shall negotiate in an effort to preserve the confidentiality of trade secrets.

(d) Responses to requests calling for business or medical records shall state whether the record is or is not a record made in the course of a regularly conducted activity so as to be admissible hearsay within the meaning of C.P.L.R Sec. 4518. If not so described, the document shall be deemed admissible under the rule.

(e) Any objection to discovery based on burdensomeness shall describe the burden with reasonable particularity. Any objection to the time, place, or manner of production or as to burdensomeness shall state any reasonably available alternative as a counterproposal.

(f) Any response that a document cannot be located or information not determined shall state with reasonable particularity the efforts made to obtain the requested document or information .

E. Previously Produced Documents

(1) Any document produced by a party in any other asbestos personal injury or death case shall be deemed produced in these cases, and any representations made by any defendant with respect to such document shall be deemed made in these cases. .

(2) Plaintiffs may submit to each defendant one or more lists of exhibits of previously produced documents they intend in good faith to use at trial. Such list or lists shall be promptly reviewed by the respective defendants and, subject to any objection as to relevancy which objection is reserved to the time of trial, each defendant so served shall respond within forty-five (45) days and state whether it objects to the admissibility of any document listed and, if so, the specific grounds for such objection.

XI. Medical Examinations of Plaintiffs

A. Defendants shall have an opportunity, if they desire, to obtain a single medical examination of the plaintiff in accordance with C.P.L.R. Sec. 3121 in accordance with the time line. A report of the medical examination together with copies of all tests shall be provided to plaintiff in accordance with the time line.

B. All reports and copies of tests following medical examinations taken by defendants in the federal actions pending in the Eastern and Southern Districts of New York shall be made available to litigants in cases pending in this Court.

XII. Depositions

A. All depositions shall be taken in accordance with C.P.L.R. 3107. All depositions of parties shall be held in the New York area unless otherwise ordered by the Court or agreed to by Liaison Counsel.

B. All counsel shall avoid unnecessary and repetitive questioning of witnesses. Unless all parties otherwise agree, all objections, except as to the form of the question, shall be reserved until the time of trial. Any objection as to form shall be clearly stated with the reasons given in order to enable the questioner to amend or change the question or correct any possible error as to form. All questions shall be answered except where a claim of privilege or burdensomeness is made, which claim, if not resolved, shall be forthwith brought before the Court or a law assistant for resolution.

C. All counsel may attend any desposition. Counsel may notice any deposition to apply to more than one case and shall use best efforts to ensure that appropriate depositions are noticed to apply to all appropriate cases or clusters.

D. Questioning by plaintiffs' counsel shall begin with interrogation by plaintiffs' Liaison Counsel or if he or she agrees, by the plaintiff's counsel who noticed the deposition, followed by interrogation by other plaintiffs' counsel in an order agreed upon among them or as decided by plaintiffs' Liaison Counsel where such agreement cannot be reached. Questioning by defendants' counsel shall begin with interrogation by defendants' Liaison Counsel followed by interrogation by other defendants' counsel, in an order agreed among defendants' counsel or as decided by defendants' Liaison Counsel where such agreement cannot be reached. When the deponent is a present or former official or employee of a defendant, the defendant's counsel shall examine first, followed by defendants' Liaison Counsel and then other defendants' counsel in the order described above.

E. A notice of deposition of a witness who is not a party shall designate the areas of expected interrogation by the noticing counsel. If any other counsel desires to interrogate a witness on different matters, such counsel shall serve a cross-notice of deposition and designate the areas of reasonably expected interrogation. Such areas shall be considered direct examination by that party, and as to such areas the cost of deposition shall be borne by that party. This shall be without

prejudice to any party's right of examination as set forth in the next paragraph.

F. All depositions shall be conducted with due regard for the physical and emotional condition, health, and disability of the deponent. Where the deponent is in extremis, there shall be filed with the notice of deposition a detailed medical affidavit indicating with specificity the deponent's present diagnosis, prognosis, and prescribed medication, if any, that would, in any way, affect the deponent's mental faculties, and an opinion as to the deponent's present physical and mental ability to understand and respond to questioning.

G. Depositions of Plaintiffs

Depositions of plaintiffs shall be limited to depositions of plaintiff, plaintiff's spouse, and up to four co-workers, unless plaintiff intends to call more than those four co-workers as witnesses at trial. No other depositions of plaintiff, members of plaintiff's family, or co-workers shall be had except by order of the Court.

H. Depositions of Defendants

The parties shall make every effort to use depositions as well as other discovery obtained from defendants in the preparation of other cases both in this State and throughout the country for all purposes as if taken in each action in these cases in accordance with paragraph XIV of this Order. No other depositions of defendants shall be taken in these cases except by order of the Court.

I. Multi-jurisdictional Depositions

Any party may, with leave of the Court, conduct multi-jurisdictional depositions, either within or without this State in connection with other asbestos litigation, with respect to the following categories or witnesses:

(1) any witness having charge of records of associations, trade organizations, Worker's Compensation commissions, insurance company records, or any other group or entity whose records contain documents or whose personnel have knowledge of facts or evidence common to all pending asbestos cases;

(2) state of the art experts;

(3) corporate officials of the defendants.

XIII. Videotape Depositions

A. Videotape Depositions of Seriously Ill Plaintiffs

A videotape deposition of a seriously or terminally ill plaintiff whose availability for trial may reasonably be doubted may be promptly taken on notice and without further order of the Court if plaintiff's counsel certifies as to plaintiff's medical condition. Plaintiff shall provide such medical and employment records as may be in plaintiff's or his/her attorney's possession prior to the videotape deposition. In no event shall the taking of the videotape deposition be delayed more than fourteen (14) days from the date of receipt of plaintiff's counsel's certification and notice to take the videotape deposition except

by order of the Court. Plaintiffs shall permit defendants to take an off camera discovery deposition at their expense immediately prior to the videotape deposition.

B. Procedures as to Videotape Depositions

(1) Videotaped depositions may be taken by any party upon service of proper notice of deposition, for any use permitted by the C.P.L.R.

(2) Videotaped depositions of deponents who have not been previously deposed and who are not terminally ill may not be taken sooner than fifteen (15) days after the date of the taking of the witness' deposition by off-camera stenographic method ("discovery deposition") unless otherwise agreed to by counsel. Videotape depositions of deponents who have been previously deposed may be taken the day following the completion of the discovery deposition, if such discovery deposition was requested, unless otherwise agreed to by counsel.

(3) When a party taking a deposition, in addition to having the testimony taken stenographically and transcribed, also desires to have the testimony videotaped, the party shall include notice of the videotaping of the deposition in the written notice required.

(4) The videotape deposition shall be taken before a notary public, who will swear the witness.

(5) At the beginning of the deposition and prior to the witness being sworn, the videotape operator shall record an identification sign. As the sign is being recorded, the

operator shall, in addition, vocally record the information on the sign. The identification sign shall indicate the caption of the action, the index number of the action, the name of the deponent, the date, the time, and the name of the notary public before whom the videotaped deposition is being taken. After the identification sign has been recorded, each participant shall identify himself or herself on camera, stating clearly the name, the address, and the role of the participant.

(6) After the identification required by paragraph XIII(B)(5) has been completed, the witness shall be sworn. The swearing shall be on camera.

(7) After the witness has been sworn, testimony shall be taken in accordance with the provisions herein. The taking of such testimony shall be videotaped in its entirety.

(8) During the taking of a videotape deposition, the operator before whom the deposition is taken shall assure that the videotape records the witness in a standard fashion at all times during the deposition, unless all counsel agree otherwise or unless, on motion before the Court, the Court directs otherwise. The operator shall limit the use of videotape camera techniques such as close-up views of the witness or other similar techniques to vary the head and shoulders view which is being recorded for presentation in the courtroom to an initial viewing of the witness and the background and up to two (2) close-up views to demonstrate physical injuries unless otherwise agreed upon or ordered by the Court. As an exception to the foregoing, the operator shall, at the request of the attorney questioning

the witness, cause a close-up view of a deposition exhibit to be taken while the witness is being questioned concerning the exhibit.

(9) When a videotape deposition has been taken, the videotape shall be shown immediately to the witness for examination, unless such showing and examination are waived by the witness and the parties.

(10) The notary public before whom a videotape deposition is taken shall cause to be attached to the original videotape recording a certification that the witness was sworn by him or her and that the videotape recording is a true record of the testimony given by the witness. If the witness has not waived his or her right to a showing and examination of the videotape deposition, the witness also shall sign the certification. If the witness has exercised his or her right pursuant to paragraph XIII(B)(9) to examine the videotape and, having done so, refuses to certify that the videotape recording is a true record of his testimony, the notary public before whom the videotape deposition was taken shall so note on the certification form and shall further state the reasons given by the witness for refusing to certify that the videotape recording is a true record of his or her testimony. The operator who videotaped a deposition pursuant to the provisions of this Order shall execute the following written certification prior to the beginning of the videotape deposition:

"I _____ hereby affirm that I am familiar with the provisions of the New York Asbestos Litigation Case Management Order pertaining to videotape depositions and will ensure that the videotaping of this deposition is done in compliance with these provisions and in an impartial manner."

(11) Upon payment of reasonable charges therefor, the operator before whom the deposition was taken shall furnish a copy of the videotape deposition in the form of a videotape or an audio recording to any party or to the deponent.

(12) The party taking the deposition shall be responsible for ensuring that the necessary equipment for videotaping the deposition is present at the time the deposition is taken. The party desiring to use the videotape deposition for any purpose subsequent to the taking of the deposition shall be responsible for ensuring that the necessary equipment for playing the videotape deposition back is available when the videotape deposition is to be used. When a videotape deposition is used during a hearing, a trial, or any other court proceeding, the party first using the videotape deposition in whole or in part shall ensure the availability of the same or comparable videotape playback equipment to any other party for such other party's use in further showing the videotape deposition during the hearing, the trial, or other court proceeding in question.

(13) The cost of the videotape as a material shall be borne by the party taking the videotape deposition. The cost of recording the deposition testimony on videotape shall be borne by the party taking the videotape deposition. The ownership of the videotape used in recording testimony shall remain with the party taking the videotape deposition.

(14) A party wishing to take a further videotape deposition, not covered herein, must make application to the Court.

XIV. Use of Discovery and Depositions from Other Cases

A. Various employees of parties, former employees of parties, and witnesses with knowledge have been deposed in other cases involving alleged asbestos-related personal injuries, and there has been extensive document discovery conducted in other cases involving alleged asbestos-related personal injuries. To avoid undue expense, duplication and unnecessary imposition on counsel, the parties, and the witnesses, parties may utilize depositions taken in other State and federal jurisdictions and cases where a party or a predecessor in interest had notice and opportunity to attend and participate as provided in C.P.L.R. Sec. 3117.

B. Each defendant and each third-party defendant shall file with the County Clerk under index number 40000 within sixty (60) days of the date hereof a list of all depositions taken of its present or former officials and employees, the caption and index/and or docket number of the case, the jurisdiction where the case was pending, and the date of each deposition. Each defendant and third-party defendant shall make such deposition available to other counsel for inspection or copying any such transcript at its expense and at reasonable cost.

C. Any party seeking to use any portion of such prior deposition as substantive evidence at trial may, at any time,

advise counsel for any defendant against whom a deposition may be used of the deposition he intends to offer as substantive evidence. Any party objecting to use of the deposition shall file a statement setting forth the specific objections and grounds within thirty (30) days. Such depositions can be used as if noticed and taken in these cases against those parties or their successors in interest. If objection is made, the objecting party shall make an appropriate in limine motion setting forth the grounds it asserts for excluding the use of the deposition.

D. All deposition testimony and testimony obtained and admissible in the federal trials pending in the Eastern and Southern Districts of New York shall be admissible in the state actions pending in this Court.

XV. Miscellaneous

The Court recognizes that cooperation among counsel and parties is essential for the orderly and expeditious resolution of this litigation. The communication of information among the plaintiffs' counsel, among defense counsel, and among defendants shall not be deemed a waiver of the attorney-client privilege, the protection afforded by the attorney work-product doctrine, or any other privilege to which a party may be entitled. Any cooperative efforts described above shall not, in any way, be used against any of the parties, shall not constitute evidence of conspiracy, concerted action, or any wrongful conduct, and shall not be communicated to the jury. The exchange

of information or documents by counsel will not, by itself,
render such information or documents privileged.

The Clerk is directed to mail a copy of the within to
all counsel who have appeared in these actions.

SO ORDERED

Dated: New York, New York
March 25, 1988

Helen E. Freedman
J.S.C.

SUPREME COURT : ALL COUNTIES
WITHIN THE CITY OF NEW YORK

- - - - - X

IN RE NEW YORK CITY
ASBESTOS LITIGATION

NYAL
PLAINTIFF'S
STATEMENT
(Form 1)

This Documentation Relates To:
All Cases

Index No. 40000

- - - - - X

Please state for yourself (for each plaintiff):

1. Full Name: _____
2. Date of Birth: _____
3. Address: _____
4. Social Security Number: _____

Please State for decedent (where appropriate):

5. Full Name: _____
6. Date of Birth: _____
7. Address: _____
8. Social Security Number: _____

9. Indicate which of the following types of activity resulted in plaintiff's/decedent's alleged exposure to asbestos:

(1) Shipyard (indicate name of shipyard) _____

(2) Insulating trade _____

(3) Boiler trade (indicate trade, e.g., pipecoverer, boilermaker, etc.) _____

(4) Construction trade (indicate trade, e.g., painter, taper, etc.) _____

(5) Plant worker (indicate plant(s)) _____

(6) Brake lining or friction worker _____

(7) Seaman (indicate ship(s)) _____

(8) Railroad employee (indicate railroad(s)) _____

(9) Non-occupational (indicate site(s)) _____

(10) Other (describe) _____

10. Nature of alleged claim or condition:

Mesothelioma	_____	Lung Cancer	_____
Asbestosis	_____	Other Cancer	_____
Pleural Changes	_____		
Other (Describe)	_____		

11. Date of Diagnosis: _____

12. Wrongful Death _____ Personal Injury _____
Date of Death _____

13. Date of first exposure and date of last exposure: _____

14. Prior asbestos actions:

Court: _____

Docket Number: _____

Pending or resolved: _____

15. Asbestos-containing products allegedly exposed to, including name of manufacturer and jobsite:

16. Has plaintiff/decedent ever smoked cigarettes?

Yes _____ No _____

If so, set forth number of packs per day and number of years of plaintiff's/decedent's smoking: _____

SUPREME COURT : ALL COUNTIES
WITHIN THE CITY OF NEW YORK

- - - - -X

IN RE NEW YORK CITY
ASBESTOS LITIGATION

- - - - -X

NYAL
ACKNOWLEDGEMENT
OF SERVICE
(Form 2)

This Document Relates To:
All Cases

Index No. 40000

- - - - -X

Defendant(s) _____

hereby acknowledge(s) receipt of a summons and a copy of
plaintiff's complaint in this action.

Defendant(s): *(a) adopt(s) the model
 cross-claim of defendants

 *(b) do(es) not adopt the model
 cross-claim of defendants

Dated:

Respectfully submitted,
COUNSEL FOR DEFENDANT(S)

By: _____

* Circle appropriate letter

SUPREME COURT : ALL COUNTIES
WITHIN THE CITY OF NEW YORK

-----X

IN RE NEW YORK CITY
ASBESTOS LITIGATION

-----X

NYAL PLAINTIFF'S
SETTLEMENT DEMAND

This Documentation Relates To:
All Cases

Index No. 40000

-----X

Please state for yourself (for each plaintiff):

1. Full name: _____
2. Age: _____
3. Current Medical
Condition: _____

4. Lost earnings per year
with starting date: _____
5. Medical Expenses: _____
6. List and amount of liens: _____

7. Settlement demand: _____

Please state for decedent:

1. Full Name _____
2. Date and age at Death: _____
3. Cause of Death: _____
4. Name, Age and Relationship
of Surviving Beneficiaries: _____

5. Pecuniary Loss: _____
6. Medical Expenses: _____
7. List and amount of liens: _____

8. Settlement Demand: _____

Dated:

Respectfully submitted,

By: _____

SUPREME COURT : ALL COUNTIES
WITHIN THE CITY OF NEW YORK

- - - - -X

IN RE NEW YORK CITY
ASBESTOS LITIGATION

- - - - -X

This Document Relates To:
All Cases

NYAL DEFENDANT'S
SETTLEMENT OFFER

Index No. 40000

- - - - -X

Please state in answer to each plaintiff/
decedent's settlement demand:

1. Full name of defendant: _____
2. Name of plaintiff/decedent whose
demand you are answering: _____

3. Nature of Defense: _____

4. Date last physical held: _____
5. Insurance Coverage: _____
6. Reinsurance coverage: _____
7. Medical Records requested
and not received: _____

8. Settlement Offer: _____

Dated:

Respectfully submitted,

By: _____

Exhibit 3

SUPREME COURT OF THE STATE OF NEW YORK
ALL COUNTIES WITHIN THE CITY OF NEW YORK

-----	x	
IN RE: NEW YORK CITY	:	New York City
ASBESTOS LITIGATION	:	Asbestos Litigation
	:	(NYCAL)
-----	x	
	:	Index No. 40000/88
This Document Relates To:	:	
	:	AMENDED CASE
All Cases	:	MANAGEMENT ORDER
	:	September 20, 1996
-----	x	

I. Applicability of This Order

This Order applies to all pretrial procedures involving all asbestos personal injury and wrongful death cases now or hereafter assigned to the undersigned, except as otherwise directed by the Court upon motion and for cause shown by the party seeking to have this Order declared inapplicable, and supersedes all previous case management orders and amendments thereto entered in the asbestos litigation previously pending in all counties in the City of New York, Supreme Court.

II. Objectives

It is the objective of the Court to encourage and bring about the fair, expeditious, and inexpensive resolution of these cases. In an effort to achieve this goal, a case management plan ("CMP"), drafted by a steering committee including the Special Master, plaintiffs' and defendants' counsel, is established to allow the parties to obtain reasonably necessary documents and information without imposing undue burdens in order to permit the parties to evaluate the

cases, reach early settlements, and prepare unsettled cases for trial. The essential components of the CMP include, to the extent feasible:

1. standardization of pleadings and discovery so that the parties can obtain the necessary information to evaluate cases for settlement or to prepare them for trial at minimum cost;
2. conducting early pretrial conferences to explore settlement opportunities, to resolve pretrial management problems, and to establish discovery cut-off dates;
3. grouping, ordering, and firm scheduling of cases for pretrial procedures and trial; and
4. coordination of discovery, the use and compensation of Liaison Counsel, the appointment and compensation of a Special Discovery Master/ Referee, and other orders as necessary to avoid duplication, contain costs, and expedite disposition through settlement or trial.

III. Special Discovery Master/Referee

A. The Court reappoints Michael K. Rozen, Esq. as Special Discovery Master/Referee ("Special Master") in these cases. Mr. Rozen's duties as Special Master shall continue to be in addition to his ongoing duties as Special Settlement Master (pursuant to a joint appointment by this Court and Senior United States District Judge Jack B. Weinstein on January 27, 1994). The Special Master shall supervise compliance with discovery and, when necessary, make recommended rulings for the Court's consideration on all discovery disputes, shall convene and conduct mandatory settlement conferences as necessary and in accordance with the time line herein, and shall have such other duties as specified herein.

B. Any party objecting to a ruling by the Special Master on discovery issues must notify the Special Master and all other interested parties of its intention to raise an objection (by fax) within three (3) business days of receiving the Special Master's written recommendation. Thereafter, said objection must be raised with the Court within seven (7) days of the receipt (by fax) of the Special Master's written recommendation. If notification of a party's intention to challenge the Special Master's written recommendation is not given within three (3) business days, the Court may adopt the recommended ruling as its order on the disputed issue. Any and all motions made by the parties pursuant to this Amended Case Management Order must reference the paragraph(s) of this Order under which relief is sought, if applicable.

C. The parties have agreed to compensate Michael K. Rozen, Esq. for his services as Special Discovery Master/Referee at the flat rate of \$270,000 per year plus \$5,000 per year for expenses. These fees shall be borne, jointly, 30% by plaintiffs and, jointly, 70% by defendants. Allocations among plaintiffs (for their 30% share) and defendants (for their 70% share) shall be submitted to the Special Master, under seal, on or before July 22, 1996. Thereafter, all parties

to whom a share has been allocated shall make payment in full of their allocated share to the offices of the Special Master on or before August 7, 1996.

D. The reappointment of the Special Master, the amount of the Special Master's compensation and the allocation of his fees as among plaintiffs and defendants will be the subject of a separate yearly order of the Court.

IV. Filing Procedures

A. Files

A master file, known as New York City Asbestos Litigation ("NYCAL") Master file, has been established in the Office of the Clerk of New York County for all asbestos cases assigned to the undersigned for coordinated pretrial proceedings, whether such cases were commenced in New York, Kings, Queens, Bronx or Richmond County. Entries on the NYCAL file shall be applicable to each asbestos case assigned to the undersigned for coordinated pretrial proceedings.

The original of this Order shall be filed by the County Clerk in the Master File previously established, and a copy shall be deemed to be part of the record of each coordinated action.

A separate file shall also be maintained under a separate Index Number for each individual action and each individual plaintiff in the Office of the Clerk of New York County, and entries shall be made therein in accordance with this Order.

B. Captions of Cases

Every document filed in these coordinated actions, that has general application to all cases, shall bear a caption as follows:

SUPREME COURT OF THE STATE OF NEW YORK
ALL COUNTIES WITHIN THE CITY OF NEW YORK

-----	x	
	:	
IN RE: NEW YORK CITY	:	NYCAL
ASBESTOS LITIGATION	:	(Title of Document)
	:	
-----	x	Index No. 40000

C. Filing of Papers

1. When a paper has general application to all cases, the caption shall bear index number 40000 and the Clerk of New York County shall file such a paper in the Master File. No further copies of the papers need to be filed. Any document so filed shall be deemed to have been filed in each case to which this Order applies and shall constitute part of the record of each such case.

2. When a paper, like a Plaintiff's Initial Fact Sheet ("PIFS") or a motion, is applicable only to an individual case, the attorney submitting such paper for filing shall supply a cover sheet containing the caption, name and index number to which the paper is applicable. The Clerk of New York County shall not file such a paper in the Master File; rather, after receipt by the Clerk, the Clerk shall file the original in the individual case file under the appropriate index number.

3. When a paper is filed that is applicable to two or more but less than all of these coordinated actions, the captions shall state the case names and separate index numbers of the actions to which that paper is applicable. The Clerk of New York County shall file a copy

in the separate file bearing the index number so identified to which the paper is intended to be applicable.

4. It shall be the responsibility of the attorney submitting such paper for filing to supply a cover sheet containing the captions, names and index numbers of all cases to which the paper is applicable and supply the County Clerk with sufficient copies of any such paper to facilitate compliance with the directions of this paragraph.

V. Rules of Procedure

The Civil Practice Law and Rules and the Local Rules of the Supreme Court of the State of New York, New York County together with the express provisions of this Order shall govern all proceedings herein.

VI. Pleadings

A. Plaintiff's Initial Fact Sheet ("PIFS"), annexed hereto as Exhibit "A," shall be included with the complaint or served upon the defendants within sixty (60) days after filing of the complaint. The PIFS shall be filed by the Clerk of New York County in the file of the individual action pending in New York County to which the PIFS applies.

B. To the extent not previously done, plaintiffs' counsel shall file in the NYCAL Master File and serve on defendants a complaint or set of complaints containing standard allegations generally applicable to all claims of a similar nature. Thereafter, plaintiffs may and should, to the maximum extent feasible, serve and file a short form complaint which incorporates by reference all of the allegations contained in the appropriate standard complaint. In the case of

previously filed complaints, leave is hereby granted to file such short form complaints as amended complaints filed by that firm.

C. Defendants shall file in the NYCAL Master File and serve on plaintiffs' Liaison Counsel a standard answer with affirmative defenses. When such standard set of defenses has been filed, a defendant may serve an acknowledgment of service, annexed hereto as Exhibit "B," on the plaintiff, by which service defendant will be deemed to have denied all material allegations contained in the plaintiff's complaint, except as stated in such acknowledgment, and to have raised each of the affirmative defenses contained in defendants' standard answer, except as stated in such acknowledgment. If a defendant adopts the model cross-claim of defendants by its acknowledgment of service, all co-defendants to which the cross-claim may apply will be deemed to have denied all material allegations contained in the cross-claim. Nothing herein shall preclude a defendant from filing an individual answer, if it so chooses.

D. Any plaintiff may, without further leave of the Court, amend his or her complaint to: add claims based on survivorship; death of the original plaintiff; change of the disease alleged; loss of consortium or society; to sever any joined claims; or to add additional defendants. Service of such amendments on counsel who have appeared in the action for a defendant shall be considered service on that defendant. Such amendments may incorporate by reference the allegations of the complaint on file where appropriate. Defendants who have previously answered shall be deemed to have answered the amended complaint as set forth in the preceding paragraph. Other amendments to the pleadings shall be made in compliance with C.P.L.R. § 3025. However, the parties are encouraged to consent to such amendments where appropriate in light of New York State's recognition that leave to amend is to be freely granted.

VII. Liaison Counsel

A. Appointment of Liaison Counsel to act on behalf of plaintiffs' counsel and on behalf of defendants' counsel after appropriate consultation where necessary will facilitate communications among the Court and counsel, minimize duplication of effort, coordinate joint positions, and provide for the efficient progress and control of this litigation.

B. Subject to the right of any party to present individual or divergent positions or to take individual actions, Liaison Counsel are vested by the Court with the following responsibilities and duties:

- 1. to coordinate the briefing of motions;**
- 2. to coordinate the argument of motions;**
- 3. to coordinate the conduct of discovery procedures, including but not limited to coordination of the preparation of joint written interrogatories, joint requests to admit, and joint requests for the production of documents, where applicable;**
- 4. to coordinate the examination of witnesses in depositions;**
- 5. to coordinate the selection of counsel to act as spokespersons at pretrial conferences; and**
- 6. to call meetings of counsel for plaintiffs and defendants respectively for the purpose of proposing joint actions, including but not limited to responses to questions and suggestions of the Court or of adversaries with regard to orders, schedules, briefs, and stipulations of the facts.**

C. Co-Liaison Counsel for the plaintiffs shall be the firm of Wilentz Goldman & Spitzer and the firm of Weitz & Luxenberg.

D. Co-Liaison Counsel for the defendants shall be the firm of Anderson Kill & Olick, P.C. and Carter, Ledyard and Milburn.

E. Liaison Counsel are authorized to receive orders, notices, correspondence, and telephone calls from the Court, the Special Master and the Clerk of the Court on behalf of all defendants and plaintiffs and shall be responsible for notifying all counsel of all communications received from the Court.

F. Notwithstanding the appointment of Liaison Counsel, each counsel shall have the right to participate in all proceedings before the Court as fully as such counsel deems necessary.

G. Liaison Counsel shall not have the right to bind any party except Liaison Counsel's own respective clients as to any matter without the consent of counsel for any other party.

H. Plaintiffs' Liaison Counsel and defendants' Liaison Counsel shall be reimbursed periodically but not less than every six months by counsel for plaintiffs and counsel for defendants respectively for their necessary and reasonable expenses actually incurred in performing their tasks pursuant to this Order and shall keep records of such expenses in reasonable detail for examination by counsel. Liaison Counsel shall be paid by each plaintiff's and defendant's counsel on an equitable basis to be agreed upon by the parties or fixed by the Court with each plaintiff and defendant having to pay a proportionate share of the costs incurred by its respective Liaison Counsel in representing its interests.

I. Liaison Counsels' invoices for services as Liaison Counsel pursuant to this Order shall be due and payable when submitted. Interest shall be computed at the rate applicable to judgments starting thirty (30) days after the date of their submission.

VIII. Standard Consolidated Discovery

A. Interrogatories

Standard Interrogatories (C.P.L.R. § 3120) and Requests for Production of Documents (C.P.L.R. § 3120) shall be utilized as set forth herein. The Court on its own motion hereby permits the use of interrogatories in addition to depositions pursuant to C.P.L.R. § 3130.

1. Defendants' Interrogatories

a. Defendants have developed a single, standard joint set of interrogatories to plaintiffs which has been filed with the County Clerk under the index number 40000 and provided to plaintiffs' Liaison Counsel. These standard interrogatories are captioned Defendants' Third Amended Standard Set of Interrogatories and Requests for Production of Documents and a copy is annexed hereto as Exhibit "C."

b. Plaintiffs shall file with the County Clerk under appropriate individual index numbers and serve upon all defendants in the action responses to defendants' standard set of interrogatories in accordance with the time line set forth herein. The interrogatories shall be answered in full and verified by each individual plaintiff according to the C.P.L.R.

c. After the standard set of interrogatories are answered, any defendant may file with the County Clerk supplemental, non-repetitive interrogatories upon application with notice to and approval from the Special Master. Defense counsel are admonished to exercise the utmost good faith in determining the necessity for such further interrogatories.

d. Defendants' Third Amended Standard Set of Interrogatories and Requests for Production of Documents shall be deemed to apply to all cases, without the necessity of further filing and service of such interrogatories in individual cases. Any standard interrogatories served and answered in cases pending in the Federal Court, Eastern and Southern

Districts of New York, are deemed to apply to all cases pending before this Court without the necessity of further filing and service in the state actions. In the case of a new plaintiff not represented by any attorney who has previously appeared for some other plaintiff in this litigation, defendants' Liaison Counsel will serve a copy of the interrogatories on such counsel.

e. Copies of any records obtained by any defendant pursuant to authorization of a plaintiff, other than those records which are obtained through a mutually agreed upon records retrieval service, shall be made available to plaintiff's counsel by notice of receipt mailed to plaintiff's counsel within ten (10) days of receipt.

2. Plaintiffs' Interrogatories

a. Plaintiffs have developed a single, standard joint set of interrogatories designed to obtain general liability information. A copy is annexed hereto as Exhibit "D."

b. To the extent not previously done, each defendant shall file in the Master File under index number 40000 a single set of responses which shall be applicable to all coordinated actions. Responses by defendants to this set of interrogatories shall be served on plaintiffs' Liaison Counsel and when so served shall be deemed served in each case. In the event that a defendant not previously named in these actions is named by the plaintiff, the plaintiff's counsel will so inform plaintiff's Liaison Counsel, who will serve a set of standard interrogatories on such defendant. Response by such defendant shall be due within thirty (30) days of service. If plaintiff's Liaison Counsel agrees, defendants may designate, file, and serve interrogatories and their answers to such interrogatories which have been filed in other actions as their standard interrogatory answers pursuant to this section.

c. After the standard set of interrogatories is answered, plaintiffs may, upon application to and approval of the Special Master, in accordance with the time line, serve non-repetitive and/or previously not responded to interrogatories or requests for production of non-product identification documents to individual defendants. Plaintiffs' counsel are admonished to exercise the utmost good faith in determining the need for such further interrogatories. Any defendant may object thereto within thirty (30) days. Copies of any objections shall be filed with the Special Master. The Special Master will then issue a recommended ruling on the defendant's objections.

d. Plaintiffs may submit to individual defendants standard product identification interrogatories with respect to particular worksites. A copy of these standard product identification interrogatories is annexed hereto as Exhibit "E." Defendants' objections to any such interrogatories shall be brought before the Special Master within seven (7) days after receipt of the proposed product identification interrogatories. The Special Master shall issue recommended rulings on the objections in an omnibus manner, if possible. Thereafter, unless a further ruling is sought from the Court, those interrogatories shall be answered in full by defendants to whom they are directed according to the C.P.L.R.

B. Document Requests

1. General Guidelines

a. Subject to Paragraph B.2. below, the provisions of C.P.L.R. § 3120 shall govern all requests for documents. The requesting party shall specify a reasonable time, place, and manner for making the inspection. The request will describe each item with reasonable particularity.

b. Counsel are directed to exercise the utmost good faith in making requests for production and in responding to requests. Counsel are directed to exercise their best efforts to resolve on an informal basis disputes arising out of the document requests and responses and objections thereto.

2. Defendants' Requests for Documents

a. Counsel for the defendants have developed a standard document request to the plaintiffs which is captioned Defendants' Third Amended Standard Set of Interrogatories and Requests for Production of Documents, annexed hereto as Exhibit "C." This discovery request has been filed with the County Clerk under index number 40000 and is deemed to apply to all cases without the necessity of further filing and service of the request in individual cases, except that defendants' Liaison Counsel shall serve a set of standard document requests upon a plaintiff's counsel who has not previously appeared on behalf of some other plaintiff in this litigation who requests such service.

b. Plaintiffs shall file with the County Clerk under appropriate individual index numbers and serve upon all defendants in the action the requested documents in accordance with the time line set forth herein. If any of the requested documents are not in plaintiff's possession, custody, or control, the plaintiff shall provide a mutually agreed upon records retrieval service with the necessary authorizations to obtain such records from other persons, the costs of which shall be borne by each party receiving a copy of such records.

c. After the standard set of document requests is responded to, defendants may, in accordance with the time line, file with the County Clerk and serve supplemental, non-repetitive requests for documents in any case as they deem appropriate. Defendants' counsel are admonished to exercise the utmost good faith in determining the need for such further

document requests.

3. Plaintiffs' Requests for Documents

a. Plaintiffs have developed a single, standard document request to the defendants. A copy is annexed hereto as Exhibit "D."

b. To the extent not previously done, each defendant shall produce or arrange for production of documents pursuant to plaintiffs' standard document requests within thirty (30) days of service, subject to agreement between plaintiffs' Liaison Counsel and the particular defendant's counsel about the specific time and place and on a reasonable schedule for production. Each defendant shall produce documents by serving one set of the requested documents on plaintiffs' Liaison Counsel, who will permit other plaintiffs' counsel to inspect and copy such documents as they desire, or by arranging for production of such documents at a document depository.

c. After the standard set of document requests is responded to, plaintiffs may file with the County Clerk and serve supplemental, non-repetitive document requests in any case they deem appropriate. Counsel are directed to exercise the utmost good faith in making requests for discovery and in responding to such requests.

C. General Discovery Provisions

1. Disputes with regard to discovery shall be called immediately to the attention of the Special Master for resolution and shall not be relied upon by any party as a justification for not adhering to the time line unless otherwise directed by the Special Master.

2. Document production shall be in such form as will make clear the request to which the document is responsive.

3. Objections based on privilege shall clearly identify the privilege claimed and sufficient information concerning (i) the basis for the claim of privilege to establish *prima facie* the validity of the claim, and (ii) the privileged information to permit identification of the information or document as to which privilege is claimed. If not so identified, the privilege shall be deemed waived. The parties shall negotiate in an effort to preserve the confidentiality of trade secrets.

4. Responses to requests calling for business or medical records shall state whether the record is or is not a record made in the course of a regularly conducted activity so as to be admissible under C.P.L.R. § 4518. If not so described, the document shall be deemed admissible under the rule.

5. Any objection to discovery based on burdensomeness shall describe the burden with reasonable particularity. Any objection to the time, place, or manner of production or as to burdensomeness shall state a reasonably available alternative as a counterproposal.

6. Any response that a document cannot be located or information not determined shall state with reasonable particularity the efforts made to obtain the requested document or information.

7. Any party wishing to propound any discovery on a party in a given case other than that provided herein may do so only upon application to the Special Master or by stipulation with opposing counsel.

D. Previously Produced Documents

1. Upon notice of the time and place of its previous production, any document produced by a party, its predecessor or successor in any other asbestos personal injury or death case shall be deemed produced in these cases, and any representations made by any defendant

with respect to such document shall be deemed made in these cases. This paragraph is not intended to address the ultimate issue of admissibility at trial of any previously produced documents, and expressly leaves this issue for resolution by the trial court.

2. Plaintiffs may submit to each defendant one or more lists of exhibits of previously produced documents they intend in good faith to use at trial. Such list or lists shall be promptly reviewed by the respective defendants and, subject to any objection as to relevancy which objection is reserved to the time of trial, each defendant so served shall respond within forty-five (45) days and state whether it objects to the admissibility of any document listed and, if so, the specific grounds for such objection.

IX. Medical Examinations of Plaintiffs

Defendants shall have an opportunity, if they desire, to obtain a single medical examination of the plaintiff in accordance with C.P.L.R. § 3121 and in accordance with the time line set forth herein. A report of the medical examination together with copies of all tests shall be provided to plaintiff in accordance with the time line.

X. Depositions

A. General Guidelines

1. All depositions shall be taken in accordance with C.P.L.R. § 3107. All depositions of parties shall be held in the New York City area unless otherwise ordered by the Court or agreed to by Liaison Counsel.

2. All counsel shall avoid unnecessary and repetitive questioning of witnesses. Unless all parties otherwise agree, all objections, except as to the form of the question, shall be reserved until the time of trial. Any objection as to form shall be clearly stated, and upon

request, the reasons given in order to enable the questioner to amend or change the question or correct any possible error as to form. All questions shall be answered except where a claim of privilege or burdensomeness is made, which claim, if not resolved, shall be forthwith brought before the Special Master for resolution.

3. It is anticipated that each plaintiff's deposition will be completed within three and one-half (3½) hours, unless otherwise ordered by the Special Master or the Court or agreed upon by the parties. Reasonable requests for additional time will be liberally granted.

4. All counsel may attend any deposition. Counsel may notice any deposition to apply to more than one case and shall use best efforts to ensure that appropriate depositions are noticed to apply to all appropriate cases or clusters.

5. A notice of deposition of a witness who is not a party shall designate the areas of expected interrogation by the noticing counsel. If any other counsel desires to interrogate a witness on different matters, such counsel shall serve a cross-notice of deposition and designate the areas of reasonably expected interrogation. Such areas shall be considered direct examination by that party, and as to such areas the cost of deposition shall be borne by that party. This shall be without prejudice to any party's right of examination as set forth in the next paragraph.

6. All depositions shall be conducted with due regard for the physical and emotional condition, health, and disability of the deponent. If an *in extremis* deposition is noticed to be taken outside of the New York City area contrary to Paragraph X.A.1., the noticing party must provide, together with the notice, medical certification that the deponent is unable to travel due to his present physical condition. Upon application to the Court, plaintiff's counsel may be required to pay the travel expenses of one, but no more than two, defense

counsel incurred in attending any deposition noticed to be taken outside of the New York City area.

B. Depositions of Plaintiffs

Depositions shall be limited to depositions of plaintiff, plaintiff's spouse, and up to four co-workers, unless plaintiff intends to call more than those four co-workers as witnesses at trial. No other depositions of plaintiff, members of plaintiff's family, or co-workers shall be had except by order of the Special Master or the Court.

C. Depositions of Defendants

1. The parties shall make every effort to use depositions as well as other discovery obtained from defendants in the preparation of other cases both in this State and throughout the country for all purposes as if taken in each action in these cases in accordance with Paragraph XII of this Order. No other depositions of defendants shall be taken in these cases except pursuant to Paragraph X.C.2.

2. By request to the Special Master, any plaintiff may seek to serve notice of intent to take nonrepetitive depositions of defendants' representatives pertaining to issues which were not covered or not adequately covered by prior depositions of that defendant. Objections to said depositions shall be brought by the affected defendant before the Special Master who shall issue a recommended ruling. Appeals from rulings of the Special Master shall be to the Court, as provided in Paragraph III.B. hereof. All corporate depositions shall be noticed at a time and place convenient to the witness, taking into account the expense to the defendants' witness.

D. Multi-jurisdictional Depositions

Any party may, with leave of the Court, conduct multi-jurisdictional depositions, either within or without this State in connection with other asbestos litigation, with respect to the following categories of witnesses:

1. any witness having charge of records of associations, trade organizations, Worker's Compensation commissions, insurance company records, or any other group or entity whose records contain documents or whose personnel have knowledge of facts or evidence common to all pending asbestos cases;
2. state of the art experts; or
3. corporate officials of the defendants.

XI. Videotape Depositions

A. Videotape Depositions of Seriously Ill Plaintiffs

A videotape deposition of a seriously or terminally ill plaintiff whose availability for trial may reasonably be doubted may be promptly taken on notice and without further order of the Court if plaintiff's counsel certifies as to plaintiff's medical condition and in accordance with Paragraph X.A.6. of this Order. Plaintiff's counsel should confer with defendants' liaison counsel appointed for the monthly trial group in which plaintiff's case is pending (see Paragraph XIV.B. below) to schedule the deposition with reasonable notice, giving due consideration to plaintiff's medical condition. Plaintiff shall provide to all defendants medical verification of the disease alleged and such medical and employment records as may be in plaintiff's or his/her attorney's possession prior to the videotape deposition. If notice of the deposition is given seven (7) days or less prior to the date when the deposition is to be taken, notice must be served by fax. In no event shall the taking of the videotape deposition be delayed more than ten (10) days

from the date of receipt of plaintiff's counsel's certification and notice to take the videotape deposition except by order of the Court. Plaintiffs shall permit defendants to take an off camera discovery deposition at defendants' expense immediately prior to the videotape deposition.

B. Procedures as to Videotape Depositions

1. Videotaped depositions may be taken by any party upon service of proper notice of deposition for any use permitted by the C.P.L.R.

2. Videotaped depositions of deponents who have not been previously deposed and who are not terminally ill may not be taken sooner than fifteen (15) days after the date of the taking of the witness' deposition by off-camera stenographic method ("discovery deposition") unless otherwise agreed to by counsel. Videotape depositions of deponents who have been previously deposed may be taken the day following the completion of the discovery deposition, if such discovery deposition was requested, unless otherwise agreed to by counsel.

3. When a party taking a deposition, in addition to having the testimony taken stenographically and transcribed, also desires to have the testimony videotaped, the party shall include notice of the videotaping of the deposition in the written notice required.

4. The videotape deposition shall be taken before a notary public, who will swear the witness.

5. At the beginning of the deposition and prior to the witness being sworn, the videotape operator shall record an identification sign. As the sign is being recorded, the operator shall, in addition, vocally record the information on the sign. The identification sign shall indicate the caption of the action, the date, the time, and the name of the notary public before whom the videotaped deposition is being taken. After the identification sign has been

recorded, each participant shall identify himself or herself on camera, stating clearly the name, the address, and the role of the participant.

6. After the identification required by Paragraph XI.B.5. has been completed, the witness shall be sworn. The swearing shall be on camera.

7. After the witness has been sworn, testimony shall be taken in accordance with the provisions herein. The taking of such testimony shall be videotaped in its entirety.

8. During the taking of a videotape deposition, the operator before whom the deposition is taken shall assure that the videotape records the witness in a standard fashion at all times during the deposition, unless all counsel agree otherwise or unless, on motion before the Court, the Court directs otherwise. The operator shall limit the use of videotape camera techniques such as close-up views of the witness or other similar techniques to vary the head and shoulders view which is being recorded for presentation in the courtroom to an initial viewing of the witness and the background and up to two (2) close-up views to demonstrate physical injuries unless otherwise agreed upon or ordered by the Court. As an exception to the foregoing, the operator shall, at the request of the attorney questioning the witness, cause a close-up view of a deposition exhibit to be taken while the witness is being questioned concerning the exhibit.

9. When a videotape deposition has been taken, the videotape shall be shown immediately to the witness for examination, unless such showing and examination are waived by the witness and the parties.

10. The notary public before whom a videotape deposition is taken shall cause to be attached to the original videotape recording a certification that the witness was sworn by him or her and that the videotape recording is a true record of the testimony given by the

witness. If the witness has not waived his or her right to a showing and examination of the videotape deposition, the witness also shall sign the certification. If the witness has exercised his or her right pursuant to Paragraph XI.B.9. to examine the videotape and, having done so, refuses to certify that the videotape recording is a true record of his testimony, the notary public before whom the videotape deposition was taken shall so note on the certification form and shall further state the reasons given by the witness for refusing to certify that the videotape recording is a true record of his or her testimony. The operator who videotaped a deposition pursuant to the provisions of this Order shall execute the following written certification prior to the beginning of the videotape deposition:

I _____ hereby affirm that I am familiar with the provisions of the New York City Asbestos Litigation Case Management Order pertaining to videotape depositions and will ensure that the videotaping of this deposition is done in compliance with these provisions and in an impartial manner.

11. Upon payment of reasonable charges therefor, the operator before whom the deposition was taken shall furnish a copy of the videotape deposition in the form of a videotape or an audio recording to any party or to the deponent.

12. The party taking the deposition shall be responsible for ensuring that the necessary equipment for videotaping the deposition is present at the time the deposition is taken. The party desiring to use the videotape deposition for any purpose subsequent to the taking of the deposition shall be responsible for ensuring that the necessary equipment for playing the videotape deposition back is available when the videotape deposition is to be used. When a videotape deposition is used during a hearing, a trial, or any other court proceeding, the party first using the videotape deposition in whole or in part shall ensure the availability of the same or comparable videotape playback equipment to any other party for such other party's use in

further showing the videotape deposition during the hearing, the trial, or other court proceeding in question.

13. The cost of the videotape as a material shall be borne by the party taking the videotape deposition. The cost of recording the deposition testimony on videotape shall be borne by the party taking the videotape deposition. The ownership of the videotape used in recording testimony shall remain with the party taking the videotape deposition.

14. A party wishing to take a further videotape deposition, not covered herein, must make application to the Court.

XII. Use of Discovery and Depositions from Other Cases

A. Various employees of parties, former employees of parties, and witnesses with knowledge have been deposed in other cases involving alleged asbestos-related personal injuries, and there has been extensive document discovery conducted in other cases involving alleged asbestos-related personal injuries. To avoid undue expense, duplication and unnecessary imposition on counsel, the parties, and the witnesses, parties may utilize depositions taken in other state and federal jurisdictions and cases where a party or a predecessor or successor in interest had notice and opportunity to attend and participate as provided in C.P.L.R. § 3117. The issue of the admissibility of this deposition testimony at trial against a particular defendant is expressly left for resolution by the trial court.

B. Any party seeking to use any portion of such prior deposition as substantive evidence at trial may, at any time, advise counsel for any defendant against whom a deposition may be used of the deposition he intends to offer as substantive evidence. Any party objecting to use of the deposition shall file a statement setting forth the specific objections and grounds within

thirty (30) days. Such depositions can be used as if noticed and taken in these cases against those parties or their successors-in-interest. If objection is made, the objecting party shall make an appropriate in limine motion setting forth the grounds it asserts for excluding the use of the deposition.

C. All deposition testimony and testimony obtained and admissible in the federal trials pending in the Eastern and Southern Districts of New York shall be admissible in the state actions pending in this Court.

XIII. Case Lists

A. Within fourteen (14) days of the entry of this Order, each of the plaintiffs' firms having asbestos cases pending in the Supreme Court of New York, New York County, shall file with the Special Master a current chronological list of each and every active asbestos personal injury/wrongful death case pending under this Court's jurisdiction. The cases shall be listed by filing date. Plaintiffs in any multi-plaintiff complaint filed under a single index number shall be listed alphabetically under that index number.

B. These case lists shall be periodically updated by each plaintiffs' firm on the 15th of January in each subsequent year in which this Order remains in force and effect. The plaintiffs' firms shall also provide to defendants a chronological inventory of active cases. Within fourteen (14) days thereafter, each defendant shall provide to plaintiffs' firms a list of all known cases not included on the inventories. Plaintiffs shall have seven (7) days thereafter to amend their inventories to include any of those cases. Copies of the amended final list for each plaintiffs' firm shall be forwarded to the law firm of Tucker & Goldstein for distribution to all defendants.

C. Plaintiffs are not required to list on their inventories any cases in which only bankrupt defendants remain. Rather, a list of these cases shall be separately provided to the Court and the Special Master, and, thereafter, the Court will establish a "bankrupt" docket to group together and account for these cases.

D. All cases pending in the Supreme Court of New York, New York County, presently included in the New York Asbestos Litigation Master File which are not on plaintiffs' case lists or any amendments thereto are hereby dismissed without prejudice. Any case being dismissed pursuant to this paragraph may be reinstated to its chronological position on this Court's asbestos calendar (and deemed filed as of its original date of filing) upon plaintiff's counsel notifying the Court, the Special Master and the parties that the failure to list a particular case on a particular firm's inventory filed with this Order was due to inadvertence, mistake, or other good cause.

XIV. Monthly Trial Groups

A. Composition

1. Cases will be assigned to monthly trial groups chronologically by filing date ("FIFO"), except as otherwise modified by Section XV. herein (concerning the procedure for clustering *in extremis* cases).

2. The monthly FIFO trial groups shall be assigned to plaintiffs' firms in a manner consistent with the number and age of each firm's backlog. However, the Court shall attempt to ensure that all plaintiffs' firms have cases assigned for trial on a regular basis, keeping in mind the goal of reducing the backlog of "old" cases.

3. It is the Court's intention to have each monthly FIFO trial group list eighty (80) cases and to allow fifteen (15) months for discovery. The January, February, March and

April 1997 monthly trial groups shall consist of sixty (60) cases each. All subsequent monthly trial groups shall consist of eighty (80) cases each.

4. FIFO trial groups will be assigned to commence jury selection on the first

Monday of:

January
February
March
April
June
July
September
October
December

5. The first monthly trial group designated pursuant to this Order shall commence trial on January 13, 1997.

B. Defense Discovery and Medical Liaison Counsel

1. Defendants shall appoint a liaison counsel for discovery for each monthly trial group. Defendants may appoint separate liaison counsel for fact discovery and medical discovery in the same monthly trial group. These counsel will be identified by letter to the Special Master, with a copy to plaintiffs' counsel and all defense counsel in a particular monthly trial group, within seven (7) days of the publication of the list of remaining defendants for that monthly trial group.

2. The purpose of the appointment of liaison counsel for defendants in a monthly trial group is to facilitate implementation of this Order and to minimize the number of disputes which require adjudication by the Special Master and the Court. Defendants' liaison counsel shall be responsible for communication with plaintiffs' counsel on discovery issues including accommodation of unforeseen problems and scheduling of discovery as necessary outside of the

discovery order. Liaison counsel shall have the authority to extend deadlines for the plaintiffs' compliance with discovery deadlines subject to the approval of the Special Master.

3. Plaintiffs' counsel shall deliver to defense medical liaison counsel all radiology and pathology materials for cases in the monthly trial group in accordance with the discovery schedule.

C. Trial Preparation Case Selection

1. Eleven (11) months prior to the trial date, the Special Master shall select sixteen (16) representative cases from the eighty (80) cases in the monthly FIFO trial group for trial preparation purposes only. The sixteen (16) selected cases shall be designated as Trial Preparation Cases ("TP Cases"). [For the monthly FIFO trial groups through April 1997, twelve (12) cases shall be selected as TP Cases, as there are a total of sixty (60) cases in these monthly trial groups. The selection of these representative cases for the monthly FIFO trial groups through April 1997 shall be made by the Special Master within ten (10) days of the signing of this Order.]

2. Any party objecting to the selection by the Special Master of the particular TP Cases shall notify the Special Master and opposing counsel in writing by fax within five (5) business days of receipt of the list of TP Cases. The Special Master will rule on any such objections within three (3) business days of receipt of the objection.

3. Subject to the provisions of this Order and the time lines set forth herein, there shall be no restriction or limitation on the trial preparation by the parties of the TP Cases.

4. In all cases in the monthly FIFO trial group, plaintiffs shall provide full and complete interrogatory responses, including medical verification of the disease alleged, and properly executed medical and document authorizations.

5. Upon receipt of interrogatory responses in the non-TP Cases in the monthly FIFO trial group, any defendant can submit an "informal" summary judgment motion based upon lack of product identification in any particular non-TP Case pursuant to the procedure set forth in Paragraph XVI.B. below. If plaintiff's counsel's opposition to the motion is based solely upon plaintiff's anticipated testimony, the moving defendant shall, upon application to and approval of the Special Master, have the opportunity to notice the deposition (with notice to all parties who may attend and cross-examine) of the plaintiff forthwith upon the limited issue of product identification.

6. Except by Order of the Special Master or the Court or upon agreement of counsel, plaintiffs in the non-TP Cases shall not have their depositions taken prior to the trial date set for the applicable monthly FIFO trial group other than pursuant to the procedure set forth in Paragraph XIV.C.5. above. Furthermore, in the non-TP Cases there shall be no further medical discovery or trial preparation in advance of the trial date set for the applicable monthly FIFO trial group other than that set forth in Paragraph XIV.C.4. above and collection of the medical records via the authorizations provided.

7. If any plaintiff in a TP Case misses any deadline set in the discovery schedule published pursuant to Paragraph XIV.D. below, unless excused by the Special Master in writing within ten (10) days of the deadline for good cause shown or agreed to by defense discovery and/or medical liaison counsel, plaintiff's case shall be dismissed with prejudice upon application to the Special Master by any defendant.

8. None of the provisions in this section XIV.C. shall apply to the January 1997 trial group. All cases in the January 1997 trial group shall be fully prepared pursuant to the applicable discovery schedule and Section XIV.D. below.

D. Discovery Schedules (Time Lines) and Sanctions

1. With the exception of the 1997 trial groups, monthly FIFO trial groups and discovery schedules for subsequent years will be published by the Special Master in October of the year two years prior to the subsequent year in which trial of these cases will occur (i.e., 1998 monthly FIFO trial groups and discovery schedules will be published in October 1996). The discovery order applicable to a particular monthly trial group will be based upon the time line set forth in the model schedule annexed hereto as Exhibit "F." Thirty (30) business days after the publication of a monthly trial group, plaintiffs shall provide to defendants in these cases a list of all remaining defendants in the cases.

2. Each case in each monthly trial group will be prepared strictly in accordance with the discovery order entered for those cases. Any failure to comply with a deadline in the discovery order for a monthly trial group, unless excused by the Special Master in writing within ten (10) days of the deadline for good cause shown or agreed to by liaison counsel and plaintiff's counsel, shall be deemed to be a willful failure to disclose within the meaning of C.P.L.R. § 3126. The parties will be subject to the sanctions provided herein for failure to comply with the discovery order. The following sanctions will apply, if the sanctions set forth in Paragraph XIV.C.7. do not apply, unless good cause is shown for a failure to comply:

a. Plaintiffs' failure to answer defendants' standard set of interrogatories or respond to defendants' standard requests for production of documents or provide properly executed document authorizations on or before the date provided in the discovery order shall result in those cases in which said material has not been provided being removed from the monthly trial group. Any such case will not be again placed on a calendar for trial any sooner than twenty-four (24) months from the original trial date for that case.

b. Failure to fully answer interrogatories, such as failure to identify lay witnesses (including their last known addresses), or failure to provide the names and addresses, if known, of treating physicians on or before the dates that information is required pursuant to the discovery order will result in preclusion of the witness, except as permitted by Subparagraph XIV.D.2.c. hereof. Similarly, fact witnesses and parties timely noticed for depositions who are not made available for deposition prior to the closure date set forth in the discovery order shall be precluded, and depositions of fact witnesses who have not been properly identified in interrogatory answers shall not be admissible, except as permitted by Subparagraph XIV.D.2.c. hereof.

c. All parties shall retain the right to file amended answers to interrogatories up to thirty (30) days prior to commencement of jury selection as to information not known or knowable upon reasonable inquiry by the parties or their counsel at the time they initially responded to interrogatories. However, all parties may upon motion to the Special Master add additional fact witnesses upon a showing of good cause and the showing that the addition shall not be to the opposing parties' prejudice.

d. Depositions of plaintiffs or plaintiffs' fact witnesses not noticed for dates on or before the closure dates designated in the discovery order will not be taken, except as provided in Subparagraph XIV.D.2.c. hereof.

e. The defendants must file with the Clerk of the Court any third-party complaint pursuant to the deadline established in the discovery order applicable to a particular monthly trial group (as described in Subparagraph XIV.D.1. hereof. Within three (3) business days of the filing of any third-party complaint, the third-party plaintiff must deliver to the third-party defendant's counsel, if known, a copy of the third-party complaint, the plaintiff's

complaint, the plaintiff's interrogatory responses and, if counsel has not previously appeared in the NYCAL, then third-party plaintiff also will provide a copy of this Order. At the third-party defendant's request, the third-party plaintiff shall provide a copy of the plaintiff's deposition transcript at the expense of the third-party defendant. Within three (3) business days of the filing of any third-party complaint, the third-party plaintiff shall deliver to plaintiff's counsel a copy of the third-party complaint. Failure to provide timely notice of the third-party action to the third-party defendant's counsel or to plaintiff's counsel may result in dismissal of the third-party action. Nothing contained in this paragraph shall alter or alleviate any obligation of the third-party plaintiff regarding service of process as set forth in the C.P.L.R. The third-party plaintiff, however, must deliver to the third-party defendant or its agent any materials necessary to effect service within five (5) business days of the filing of any third-party complaint.

f. Third-party complaints not filed on or before the filing deadline set forth in the discovery order may only be filed upon motion and with permission of the Special Master or the Court after appeal of a ruling by the Special Master. Any motion to file a third-party complaint after the filing deadline shall be made upon notice to all remaining parties and putative third-parties. The motion must include an affidavit stating when the information used to substantiate the filing of the third-party complaint became available and that such information was not reasonably available prior to the filing deadline.

g. A defendant's failure to answer plaintiffs' standard and case specific product identification interrogatories and request for production of documents within the deadlines imposed by the discovery order, or a defendant's failure to produce a witness for a permitted deposition of that defendant, shall result in that defendant having all of its defenses stricken as to each plaintiff for whom it fails to provide said discovery.

h. The testimony of an expert witness whose report and any supporting x-rays and pathology materials reviewed by the expert have not been provided by the deadline in the discovery order is hereby precluded and any report by the expert may not be used for any purpose at trial. Production to defendants of x-rays and pathology materials provided to plaintiffs' experts is ultimately the responsibility of plaintiffs' counsel.

i. Any previously undeposed (in whole or in part) expert who does not submit to deposition pursuant to timely notice in accordance with the discovery order shall be precluded from testifying in that case.

j. Any witnesses or exhibits (presuming earlier provisions of the discovery order have been complied with) not identified on or before the discovery order deadline for filing witness and exhibit lists shall be precluded.

k. Any plaintiff not made available on reasonable notice for independent medical examination at least two weeks prior to the discovery order deadline for defendants' production of expert witness reports will be removed from the monthly trial group. No plaintiff shall be required to submit to more than one medical examination at defendants' request within the same discovery period.

l. Any plaintiff who intends to file a proof of claim form with the Johns-Manville Settlement Trust shall do so no later than ten (10) days after plaintiff's case is designated in a monthly trial group, except in the in extremis cases which shall be filed no later than ninety (90) days before trial.

m. Each plaintiff must purchase a Request for Judicial Intervention ("RJI") within one (1) month of the time the case is listed in a monthly FIFO trial group. As to those cases in an Accelerated Trial Cluster, as set forth in Section XV. herein, plaintiff must

purchase an RJI no later than three (3) months prior to the trial date set in the discovery order applicable to plaintiff's case. Failure to timely file an RJI will result in removal of the case from the monthly FIFO trial group (or Accelerated Trial Cluster). Any such case will not be again placed on a calendar for trial any sooner than twenty-four (24) months from the original trial date for that case.

n. All Notes of Issue must be filed no later than three months prior to the scheduled trial date.

3. Any party wishing to avail themselves of the sanctions provided herein shall make a written application, on notice, to the Special Master. Opposing papers shall be served within five (5) days of receipt of the application. The Special Master will issue a ruling within five (5) days thereafter. Said ruling shall be the law of the case unless relief therefrom is granted by the Court pursuant to an Order to Show Cause.

E. Settlement Conferences

1. The Special Master will convene and conduct mandatory settlement negotiations within ten (10) days after the deadline for filing answers to interrogatories in accordance with the discovery order. The negotiator representing each party at the mandatory settlement conferences must have full authority to negotiate and commit his/her client(s) to settlement or sanctions will be levied.

2. All parties are encouraged and directed to conduct good faith settlement negotiations of an entire monthly trial group and not solely individual cases or groups within a particular monthly trial group.

3. All parties will negotiate all cases assigned to that particular monthly trial group as if they were actually going to trial. Any plaintiffs' attorney who refuses to negotiate

all cases assigned to that monthly trial group, in good faith, shall be subject to a recommendation of the Special Master and an order of this Court removing from the trial group those cases which were assigned to that monthly trial group, but not settled. Any such case will not be again placed on a calendar for trial any sooner than twenty-four (24) months from the original trial date for that case. Any defendant who refuses to negotiate all cases assigned to that month's calendar, in good faith, shall be subject to a recommendation of the Special Master and an order of this Court consolidating all cases for that month and any other cases the Court deems appropriate for trial as to that defendant (or those defendants).

F. Trial Case Selection

At the close of discovery for all monthly trial groups -- in a period no more than fourteen (14) but no less than ten (10) days before the commencement of jury selection -- the Special Master shall recommend and the Court shall, in accordance with applicable provisions of the C.P.L.R., select a total of no more than ten cases from the group of Trial Preparation Cases to be assigned to commence trial. No more than ten cases shall be drawn for each trial judge who is available to conduct a trial of asbestos cases during that month. Any cases which settle as to all parties before commencement of jury selection shall be replaced -- subject to a recommendation by the Special Master and an order of this Court -- with other cases from that month's group of Trial Preparation Cases.

XV. Accelerated Trial Clusters

A. The Court, having in mind the directions of, and its discretion under, the provisions of C.P.L.R. § 3407, will assign for trial on the first Monday in May and the first Monday in November of each calendar year a special Accelerated Trial Cluster of living plaintiffs. The Accelerated Trial Cluster will be designated on the first Thursday of the preceding December (for May group) and June (for November group). Letter applications for assignment to the Accelerated Trial Cluster shall be provided to the Court, the Special Master and defendants (by fax or FedEx) by no earlier than the third Thursday of the preceding September (for May group) and March (for November group), and no later than ten (10) days before the designation date. Such letter applications will be accompanied by a statement that the plaintiff is terminally ill, the nature of the illness, and plaintiff's life expectancy, if known. Unless plaintiffs' counsel seeks an extension of time from the Special Master, counsel must provide to defendants the following information at the time the letter application for assignment to the Accelerated Trial Cluster is made:

1. answers to interrogatories in the form approved by the Special Master;
2. responses to standard requests for production; and
3. signed authorizations for medical, employment, social security, disability, workers compensation, union, military and tax records to a mutually agreed upon records retrieval service.

Defendants shall file any objections with the Court and the Special Master, and serve upon plaintiffs (by fax or FedEx) by the first Wednesday of each December and June.

B. The Accelerated Trial Cluster will be limited to plaintiffs living at the time the application for assignment (accompanied by all appropriate support materials as required by this paragraph) is received by the Special Master.

C. Any plaintiff who has failed to file an application and supporting materials for inclusion in a particular Accelerated Trial Cluster within the time periods specified above may make special application to the Special Master for an exception to the provisions of this section in the interest of justice and for good cause shown. The presumption, however, shall be that no cases shall be approved for a given Accelerated Trial Cluster if timely application has not been made, as provided herein. Upon a finding of exceptional circumstances, the Special Master may make recommendations to the Court for inclusion of additional *in extremis* cases in a given Accelerated Trial Cluster.

D. The method of trial of cases assigned to the May and November Accelerated Trial Clusters will be determined by the Court in light of all applicable legal considerations.

E. Each case in the Accelerated Trial Cluster will be prepared strictly in accordance with the discovery order entered for those cases. The discovery order applicable to each particular Accelerated Trial Cluster will be based upon the time line set forth in the model schedule annexed hereto as Exhibit "G." The particular discovery order applicable to a specific Accelerated Trial Cluster will be published by the Special Master together with the list of cases to be included in the cluster.

F. Failure to meet a deadline in accordance with the applicable discovery order, unless excused by the Special Master in writing within ten (10) days of the deadline for good cause shown, will result in sanctions upon the offending party as set forth in Section XIV. herein.

XVI. Summary Judgment Motions

1. Defendants' "formal" motions for summary judgment based on lack of product identification should not be filed in a particular case until (1) the case has been assigned to a monthly FIFO trial group, (2) that defendant has responded to the plaintiffs' product identification discovery, if served, and (3) until ten (10) days after that defendant has made a request for dismissal pursuant to a letter directed to the plaintiffs' counsel. If plaintiffs' counsel fails to reply to the request for dismissal by letter, said defendant shall be free to file a "formal" motion for summary judgment based on product identification grounds. Such motions also shall be served on the Special Master, who may make a non-dispositive recommendation at or prior to the time set for oral argument before the Court.

A. Defendants may submit "informal" summary judgment motions to the Special Master in any case filed after the date of this Order. An informal summary judgment motion shall be made at any time thirty (30) days or more after the receipt of Plaintiff's Initial Fact Sheet in that particular case. An informal motion for summary judgment shall be made in the form of a letter to the Special Master averring that a telephonic request for voluntary dismissal has been made to plaintiff's counsel and has been refused or not acted upon within ten (10) days, and also setting forth the reasons that said defendant is entitled to summary judgment in that case. Service of a copy of the letter to the Special Master shall be made upon the plaintiff's counsel who shall then have ten (10) days to submit a written response. Plaintiff's response to defendant's informal summary judgment motion shall also be in the form of a letter to the Special Master and shall state that the plaintiff has a good faith basis for suing the defendant in that case. If the informal summary judgment motion is being made pursuant to Paragraph

XIV.C.5., plaintiff's response shall include the basis of the alleged product identification against the defendant. If such statement is presented by plaintiff to the Special Master, the Special Master shall deny the defendant's informal summary judgment motion. However, if it is later determined by the Special Master or the Court that the plaintiff knew or should have known that a good faith basis did not exist for initially including the defendant in the lawsuit or for continuing the action against said defendant after the "informal" motion for summary judgment has been made by that defendant, the plaintiff may be sanctioned by the Court upon recommendation of the Special Master and may be required to reimburse defendant's counsel for all reasonable costs incurred in prosecuting the "informal" and "formal" summary judgment motions. Likewise, if it is later determined that the defendant knew or should have known that it was properly sued in a particular case, that defendant may be sanctioned by the Court upon recommendation of the Special Master and may be required to reimburse plaintiff's counsel for all reasonable costs incurred in responding to the "informal" and/or "formal" motions for summary judgment.

B. Formal motions for summary judgment on any grounds other than product identification may be made at any time as provided by C.P.L.R.

C. When a plaintiff discontinues an action against a defendant, such defendant shall serve written notice of the discontinuance upon all parties to the action and shall thereafter be deleted from the lawsuit unless, within thirty (30) days of service of the notice, a co-defendant serves a written objection to the deletion on the ground that it intends to pursue a cross-claim against that defendant.

XVII. Punitive Damages

Counts for punitive damages are deferred until such time as the Court deems otherwise, upon notice and hearing.

XVIII. Miscellaneous

The Court recognizes that cooperation among counsel and parties is essential for the orderly and expeditious resolution of this litigation. The communication of information among the plaintiffs' counsel, among defense counsel, and among defendants shall not be deemed a waiver of the attorney-client privilege, the protection afforded by the attorney work-product doctrine, or any other privilege to which a party may be entitled. Any cooperative efforts described above shall not, in any way, be used against any of the parties, shall not constitute evidence of conspiracy, concerted action, or any wrongful conduct, and shall not be communicated to the jury. The exchange of information or documents by counsel will not, by itself, render such information or documents privileged.

Liaison Counsel for plaintiffs and defendants are hereby directed to mail a copy of this Order to all counsel who have appeared in these actions.

SO ORDERED.

Dated: September 26, 1996
New York, New York

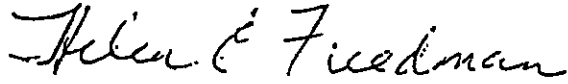

Helen E. Freedman, J.S.C.

Exhibit 4

SUPREME COURT OF THE STATE OF NEW YORK
ALL COUNTIES WITHIN THE CITY OF NEW YORK

-----X	:	New York City
IN RE: NEW YORK CITY	:	Asbestos Litigation
ASBESTOS LITIGATION	:	(NYCAL)
	:	
-----X	:	Index No. 40000/88
	:	
This Document Relates To:	:	AMENDED CASE
	:	MANAGEMENT ORDER
	:	
All Cases	:	September 20, 1996,
	:	Amended as of February 19, 2003
-----X	:	

I. Applicability of This Order

This Order applies to all pretrial procedures involving all asbestos personal injury and wrongful death cases now or hereafter assigned to the undersigned, except as otherwise directed by the Court upon motion and for cause shown by the party seeking to have this Order declared inapplicable, and supersedes all previous case management orders and amendments thereto entered in the asbestos litigation previously pending in all counties in the City of New York, Supreme Court.

II. Objectives

It is the objective of the Court to encourage and bring about the fair, expeditious, and inexpensive resolution of these cases. In an effort to achieve this goal, a case management plan ("CMP"), drafted by a steering committee including the Special Master, plaintiffs' and defendants' counsel, and supplemented by Order of this Court, is established to allow the parties to obtain reasonably necessary documents and information without imposing undue burdens in order to permit the parties to evaluate the cases, reach early settlements, and prepare unsettled cases for trial. The essential components of the CMP include, to the extent feasible:

- A. Standardization of pleadings and discovery so that the parties can obtain the necessary information to evaluate cases for settlement or to prepare them for trial at minimum cost;
- B. Conducting early pretrial conferences to explore settlement opportunities, to resolve pretrial management problems, and to establish discovery cut-off dates;
- C. Grouping, ordering, and firm scheduling of cases for pretrial procedures and trial; and
- D. Coordination of discovery, the use and compensation of Liaison Counsel, the appointment and compensation of a Special Discovery Master/Referee, and other orders as necessary to avoid duplication, contain costs, and expedite disposition through settlement or trial.

III. Special Discovery Master/Referee

- A. The Court appoints Laraine Pacheco, Esq. as Special Discovery Master/Referee (“Special Master”) in these cases. The Special Master shall supervise compliance with discovery and, when necessary, make recommended rulings for the Court’s consideration on all discovery disputes, shall convene and conduct mandatory settlement conferences as necessary and in accordance with the timeline contained in the CMO, and shall have such other duties as specified by the CMO. Upon agreement of both parties, an independent settlement master may be retained and separately compensated to assist in the possible settlement and/or resolution of a particular case or group of cases.
- B. Any party objecting to a ruling by the Special Master on discovery issues must notify the Special Master and all other interested parties of its intention to raise an objection

(by fax) within three (3) business days of receiving the Special Master's written recommendation. Thereafter, said objection must be raised with the Court within seven (7) days of the receipt (by fax) of the Special Master's written recommendation. If notification of a party's intention to challenge the Special Master's written recommendation is not given within three (3) business days, the Court may adopt the recommended ruling as its order on the disputed issue. Any and all motions made by the parties pursuant to this Amended Case Management Order must reference the paragraph(s) of this Order under which relief is sought, if applicable.

C. The parties have agreed to compensate Laraine Pacheco, Esq. for her services as Special Master at the flat rate of \$368,000 per year. These fees shall be borne, jointly, 40% by plaintiffs and, jointly, 60% by defendants. Allocations among plaintiffs (for their 40% share) and defendants (for their 60% share) shall be submitted to the Special Master, under seal, on or before February 1 of each year. Thereafter, all parties to whom a share has been allocated shall make payment in full of their allocated share to the offices of the Special Master on or before April 15 of that year.

D. The reappointment of the Special Master, the amount of the Special Master's compensation and the allocation of her fees as among plaintiffs and defendants will be annually reviewed and the subject of a separate yearly order of the Court.

E. This appointment of Laraine Pacheco, Esq. will extend from February 1, through January 31 of the following year for each year this Order is in force and effect.

IV. Filing Procedures

A. Files

A master file, known as New York City Asbestos Litigation (“NYCAL”) Master File, has been established in the Office of the Clerk of New York County for all asbestos cases assigned to the undersigned for coordinated pretrial proceedings, whether such cases were commenced in New York, Kings, Queens, Bronx or Richmond County. Entries on the NYCAL Master File shall be applicable to each asbestos case assigned to the undersigned for coordinated pretrial proceedings.

The original of this Order shall be filed by the County Clerk in the NYCAL Master File previously established, and a copy shall be deemed to be part of the record of each coordinated action.

A separate file shall also be maintained under a separate Index Number for each individual action and each individual plaintiff in the Office of the Clerk of New York County, and entries shall be made therein in accordance with this Order.

B. Captions of Cases

Every document filed in these coordinated actions that has general application to all cases shall bear a caption as follows:

SUPREME COURT OF THE STATE OF NEW YORK
ALL COUNTIES WITHIN THE CITY OF NEW YORK

-----X	:	
	:	
IN RE: NEW YORK CITY	:	NYCAL
ASBESTOS LITIGATION	:	(Title of Document)
	:	Index No. 40000
-----X		

C. Filing of Papers

1. When a paper has general application to all cases, the caption shall bear index number 40000 and the Clerk of New York County shall file such a paper in the Master File. No further copies of the papers need to be filed. Any document so filed shall be deemed to have been filed in each case to which this Order applies and shall constitute part of the record of each such case.

2. When a paper, like a Plaintiffs Initial Fact Sheet ("PIFS") or a motion, is applicable only to an individual case, the attorney submitting such paper for filing shall supply a cover sheet containing the caption, name and index number to which the paper is applicable. The Clerk of New York County shall not file such a paper in the NYCAL Master File; rather, after receipt by the Clerk, the Clerk shall file the original in the individual case file under the appropriate index number.

3. When a paper is filed that is applicable to two or more but less than all of these coordinated actions, the captions shall state the case names and separate index numbers of the actions to which that paper is applicable. The Clerk of New York County shall file a copy in the separate file bearing the index number so identified to which the paper is intended to be applicable.

4. It shall be the responsibility of the attorney submitting such paper for filing to supply a cover sheet containing the captions, names and index numbers of all cases to which the paper is applicable and supply the County Clerk with sufficient copies of any such paper to facilitate compliance with the directions of this paragraph.

V. Rules of Procedure

The Civil Practice Law and Rules and the Local Rules of the Supreme Court of the State of New York, New York County together with the express provisions of this Order shall govern all proceedings herein.

VI. Pleadings

A. Plaintiffs Initial Fact Sheet ("PIFS"), annexed hereto as Exhibit "A," shall be included with the complaint or served upon the defendants within sixty (60) days after filing of the complaint. The PIFS shall be filed by the Clerk of New York County in the file of the individual action pending in New York County to which the PIFS applies. Multi-party complaints are not permitted.

B. To the extent not previously done, plaintiffs' counsel shall file in the NYCAL Master File and serve on defendants a complaint or set of complaints containing standard allegations generally applicable to all claims of a similar nature. Thereafter, plaintiffs may and should, to the maximum extent feasible, serve and file a short form complaint which incorporates by reference all of the allegations contained in the appropriate standard complaint. In the case of previously filed complaints, leave is hereby granted to file such short form complaints as amended complaints filed by that firm.

C. In any case commenced after the date of this order, the complaint must allege and include the requisite documentation of minimum criteria for activation, as set forth in Paragraph XV herein, in order to be placed on the Active Docket.

D. Defendants shall file in the NYCAL Master File and serve on plaintiffs' Liaison Counsel a standard answer with affirmative defenses. When such standard set of defenses has been filed, a defendant may serve an acknowledgment of service on the plaintiff, by which service defendant will be deemed to have denied all material allegations contained in the plaintiff's complaint, except as stated in such acknowledgment, and to have raised each of the affirmative defenses contained in defendants' standard answer, except as stated in such acknowledgment. All co-defendants to which any cross-claims may apply will be deemed to have denied all material allegations contained in the cross-claims. Nothing herein shall preclude a defendant from filing an individual answer, if it so chooses.

E. Any plaintiff may, without further leave of the Court, amend his or her complaint: to add claims based on survivorship, death of the original plaintiff, change of the

disease alleged, loss of consortium or society; to sever any joined claims; or to add additional defendants. Service of such amendments on counsel who have appeared in the action for a defendant shall be considered service on that defendant. Such amendments may incorporate by reference the allegations of the complaint on file where appropriate. Defendants who have previously answered shall be deemed to have answered the amended complaint as set forth in the preceding paragraph. Other amendments to the pleadings shall be made in compliance with CPLR 3025. However, the parties are encouraged to consent to such amendments where appropriate in light of New York State's recognition that leave to amend is to be freely granted.

F. If a plaintiff in an Accelerated Trial Cluster (see Paragraph XIV) amends his or her complaint to add an additional defendant(s) during the sixty-day period before May 1 for the May Cluster and November 1 for the November Cluster, at the request of the late-added defendant, that plaintiff's action shall be automatically removed from the cluster and shall be put into the next succeeding Accelerated Trial Cluster, except for extraordinary cause shown by plaintiff. Automatic removal shall not preclude application by defendants for any other relief to which they may be entitled for other reasons.

G. If a plaintiff in an Accelerated Trial Cluster amends his or her complaint to add an additional defendant(s) on or after May 1 for the May Cluster and November 1 for the November Cluster, at the request of the late-added defendant, that plaintiff's action shall be automatically removed from the cluster and added to the chronological list of cases from which cases are assigned to the active docket, except for extraordinary cause shown by plaintiff. However, if the plaintiff is still living at the time the window for the next Accelerated Trial

Cluster opens, plaintiff may reapply for inclusion in that cluster if the plaintiff is alive at the time of application.

VII. Liaison Counsel

A. Appointment of Liaison Counsel to act on behalf of plaintiffs' counsel and on behalf of defendants' counsel after appropriate consultation where necessary will facilitate communications among the Court and counsel, minimize duplication of effort, coordinate joint positions, and provide for the efficient progress and control of this litigation.

B. Subject to the right of any party to present individual or divergent positions or to take individual actions, Liaison Counsel are vested by the Court with the following responsibilities and duties:

1. to coordinate the briefing of motions;
2. to coordinate the argument of motions;
3. to coordinate the conduct of discovery procedures, including but not limited to coordination of the preparation of joint written interrogatories, joint requests to admit, and joint requests for the production of documents, where applicable;
4. to coordinate the examination of witnesses in depositions;
5. to coordinate the selection of counsel to act as spokespersons at pretrial conferences; and
6. to call meetings of counsel for plaintiffs and defendants respectively for the purpose of proposing joint actions, including but not limited to responses to

questions and suggestions of the Court or of adversaries with regard to orders, schedules, briefs, and stipulations of the facts.

C. Co-Liaison Counsel for the plaintiffs shall be the firm of Wilentz Goldman & Spitzer and the firm of Weitz & Luxenberg.

D. Co-Liaison Counsel for the defendants shall be the firm of Anderson Kill & Olick, P.C. and the firm of Malaby, Carlisle & Bradley, LLC.

E. Liaison Counsel are authorized to receive orders, notices, correspondence, and telephone calls from the Court, the Special Master and the Clerk of the Court on behalf of all defendants and plaintiffs and shall be responsible for notifying all counsel of all communications received from the Court.

F. Notwithstanding the appointment of Liaison Counsel, each counsel shall have the right to participate in all proceedings before the Court as fully as such counsel deems necessary.

G. Liaison Counsel shall not have the right to bind any party except Liaison Counsel's own respective clients as to any matter without the consent of counsel for any other party.

H. Plaintiffs' Liaison Counsel and defendants' Liaison Counsel shall be reimbursed periodically but not less than every six months by counsel for plaintiffs and counsel for defendants respectively for their necessary and reasonable expenses actually incurred in performing their tasks pursuant to this Order and shall keep records of such expenses in reasonable detail for examination by counsel. Liaison Counsel shall be paid by each plaintiff's

and defendant's counsel on an equitable basis to be agreed upon by the parties or fixed by the Court with each plaintiff and defendant having to pay a proportionate share of the costs incurred by its respective Liaison Counsel in representing its interests.

I. Liaison Counsels' invoices for services as Liaison Counsel pursuant to this Order shall be due and payable when submitted. Interest shall be computed at the rate applicable to judgments starting thirty (30) days after the date of their submission.

VIII. Standard Consolidated Discovery

A. Interrogatories

Standard Interrogatories (CPLR 3130) and Requests for Production of Documents (CPLR 3120) shall be utilized as set forth herein. The Court on its own motion hereby permits the use of interrogatories in addition to depositions pursuant to CPLR 3130.

1. Defendants' Interrogatories

a. Defendants have developed a single, standard joint set of interrogatories to plaintiffs which has been filed with the County Clerk under the index number 40000 and provided to plaintiffs' Liaison Counsel. These standard interrogatories are captioned Defendants' Third Amended Standard Set of Interrogatories and Requests for Production of Documents and a copy is annexed hereto as Exhibit "C."

b. Plaintiffs shall serve upon all defendants in the action responses to defendants' standard set of interrogatories in accordance with the time line set forth herein. The

interrogatories shall be answered in full and verified by each individual plaintiff according to the CPLR.

c. After the standard set of interrogatories is answered, any defendant may serve supplemental, non-repetitive interrogatories upon application with notice to and approval from the Special Master. Defense counsel are admonished to exercise the utmost good faith in determining the necessity for such further interrogatories.

d. Defendants' Third Amended Standard Set of Interrogatories and Requests for Production of Documents shall be deemed to apply to all cases, without the necessity of further filing and service of such interrogatories in individual cases. Any standard interrogatories served and answered in cases pending in any federal court or in any judicial district in the State of New York, are deemed to apply to all cases pending before this Court without the necessity of further service in the state actions. In the case of a new plaintiff not represented by any attorney who has previously appeared for some other plaintiff in this litigation, defendants' Liaison Counsel will serve a copy of the interrogatories on such counsel.

e. Copies of any records obtained by any defendant pursuant to authorization of a plaintiff, other than those records which are obtained through a mutually agreed upon records retrieval service, shall be made available to plaintiff's counsel by notice of receipt mailed to plaintiff's counsel within ten (10) days of receipt.

2. Plaintiffs' Interrogatories

a. Plaintiffs have developed a single, standard joint set of interrogatories designed to obtain general liability information. A copy is annexed hereto as Exhibit "D."

Plaintiffs are permitted to reword the standard interrogatories, as appropriate, to conform to the class of defendant to whom they are directed (e.g., premises owner, contractor).

b. To the extent not previously done, each defendant shall file in the NYCAL Master File under index number 40000 a single set of responses which shall be applicable to all coordinated actions. Responses by defendants to this set of interrogatories shall be served on plaintiffs' Liaison Counsel and when so served shall be deemed served in each case. In the event that a defendant not previously named in these actions is named by the plaintiff, the plaintiff's counsel will so inform plaintiffs' Liaison Counsel, who will serve a set of standard interrogatories on such defendant. Response by such defendant shall be due within thirty (30) days of service. If plaintiffs' Liaison Counsel agrees, defendants may designate and serve interrogatories and their answers to such interrogatories which have been filed in other actions as their standard interrogatory answers pursuant to this section.

c. After the standard set of interrogatories is answered, plaintiffs may, upon application to and approval of the Special Master, in accordance with the time line, serve non-repetitive and/or previously not responded to interrogatories or requests for production of non-product identification documents to individual defendants. Plaintiffs' counsel are admonished to exercise the utmost good faith in determining the need for such further interrogatories. Any defendant may object thereto within thirty (30) days. Copies of any objections shall be filed with the Special Master. The Special Master will then issue a recommended ruling on the defendant's objections.

d. Plaintiffs may submit to individual defendants standard product identification interrogatories with respect to particular worksites. A copy of these standard product identification interrogatories is annexed hereto as Exhibit "E." Defendants' objections to any such interrogatories shall be brought before the Special Master within seven (7) days after receipt of the proposed product identification interrogatories. The Special Master shall issue recommended rulings on the objections in an omnibus manner, if possible. Thereafter, unless a further ruling is sought from the Court, those interrogatories shall be answered in full by defendants to whom they are directed according to the CPLR.

B. Document Requests

1. General Guidelines

a. Subject to Paragraph B.2. below, the provisions of CPLR 3120 shall govern all requests for documents. The requesting party shall specify a reasonable time, place, and manner for making the inspection. The request will describe each item with reasonable particularity.

b. Counsel are directed to exercise the utmost good faith in making requests for production and in responding to requests. Counsel are directed to exercise their best efforts to resolve on an informal basis disputes arising out of the document requests and responses and objections thereto.

2. Defendants' Requests for Documents

a. Counsel for the defendants have developed a standard document request to the plaintiffs which is captioned Defendants' Third Amended Standard Set of Interrogatories and

Requests for Production of Documents, annexed hereto as Exhibit "C." This discovery request has been filed with the County Clerk under index number 40000 and is deemed to apply to all cases without the necessity of further filing and service of the request in individual cases, except that defendants' Liaison Counsel shall serve a set of standard document requests upon a plaintiffs' counsel who has not previously appeared on behalf of some other plaintiff in this litigation who requests such service.

b. Plaintiffs shall serve upon all defendants in the action the requested documents in accordance with the time line set forth herein. If any of the requested documents are not in plaintiffs' possession, custody, or control, the plaintiffs shall provide a mutually agreed upon records retrieval service with the necessary authorizations to obtain such records from other persons, the costs of which shall be borne by each party receiving a copy of such records.

c. After the standard set of document requests is responded to, defendants may, in accordance with the time line, serve supplemental, non-repetitive requests for documents in any case as they deem appropriate. Defendants' counsel are admonished to exercise the utmost good faith in determining the need for such further document requests.

3. Plaintiffs' Requests for Documents

a. Plaintiffs have developed a single, standard document request to the defendants. A copy is annexed hereto as Exhibit "D." Plaintiffs are permitted to reword the standard document requests, as appropriate, to conform to the class of defendant to whom they are directed (e.g., premises owner, contractor).

b. To the extent not previously done, each defendant shall produce or arrange

for production of documents pursuant to plaintiffs' standard document requests within thirty (30) days of service, subject to agreement between plaintiffs' Liaison Counsel and the particular defendant's counsel about the specific time and place and on a reasonable schedule for production. Each defendant shall produce documents by serving one set of the requested documents on plaintiffs' Liaison Counsel, who will permit other plaintiffs' counsel to inspect and copy such documents as they desire, or by arranging for production of such documents at a document depository.

c. After the standard set of document requests is responded to, plaintiffs may serve supplemental, non-repetitive document requests in any case they deem appropriate. Counsel are directed to exercise the utmost good faith in making requests for discovery and in responding to such requests.

C. General Discovery Provisions

1. Disputes with regard to discovery shall be called immediately to the attention of the Special Master for resolution and shall not be relied upon by any party as a justification for not adhering to the time line unless otherwise directed by the Special Master.

2. Document production shall be in such form as will make clear the request to which the document is responsive.

3. Objections based on privilege shall clearly identify the privilege claimed and sufficient information concerning (i) the basis for the claim of privilege to *establish prima facie* the validity of the claim, and (ii) the privileged information to permit identification of the information or document as to which privilege is claimed. If not so identified, the privilege shall

be deemed waived. The parties shall negotiate in an effort to preserve the confidentiality of trade secrets.

4. Responses to requests calling for business or medical records shall state whether the record is or is not a record made in the course of a regularly conducted activity so as to be admissible under CPLR 4518. If not so described, the document shall be deemed admissible under the rule.

5. Any objection to discovery based on burdensomeness shall describe the burden with reasonable particularity. Any objection to the time, place, or manner of production or as to burdensomeness shall state a reasonably available alternative as a counterproposal.

6. Any response that a document cannot be located or information not determined shall state with reasonable particularity the efforts made to obtain the requested document or information.

7. Any party wishing to propound any discovery on a party in a given case other than that provided herein may do so only upon application to the Special Master or by stipulation with opposing counsel.

D. Previously Produced Documents

1. Upon notice of the time and place of its previous production, any document produced by a party, its predecessor or successor in any other asbestos personal injury or death case shall be deemed produced in these cases, and any representations made by any defendant with respect to such document shall be deemed made in these cases. This paragraph is not intended to address the ultimate issue of admissibility at trial of any previously produced

documents, and expressly leaves this issue for resolution by the trial court.

2. Plaintiffs may submit to each defendant one or more lists of exhibits of previously produced documents they intend in good faith to use at trial. Such list or lists shall be promptly reviewed by the respective defendants and, subject to any objection as to relevancy which objection is reserved to the time of trial, each defendant so served shall respond within forty-five (45) days and state whether it objects to the admissibility of any document listed and, if so, the specific grounds for such objection.

IX. Medical Examinations of Plaintiffs

Defendants shall have an opportunity, if they desire, to obtain a single medical examination of the plaintiff in accordance with CPLR 3121 and in accordance with the time line set forth herein. A report of the medical examination together with copies of all tests shall be provided to plaintiff in accordance with the time line.

X. Depositions

A. General Guidelines

1. All depositions shall be taken in accordance with CPLR 3107. All depositions of parties shall be held in the New York City area unless otherwise ordered by the Court or agreed to by Liaison Counsel.

2. All depositions must be scheduled through Liaison Counsel.

3. All counsel shall avoid unnecessary and repetitive questioning of witnesses. Unless all parties otherwise agree, all objections, except as to the form of the

question, shall be reserved until the time of trial. Any objection as to form shall be clearly stated, and upon request, the reasons given in order to enable the questioner to amend or change the question or correct any possible error as to form. All questions shall be answered except where a claim of privilege or burdensomeness is made, which claim, if not resolved, shall be forthwith brought before the Special Master for resolution.

4. It is anticipated that each plaintiff's deposition will be completed within three and one-half (3½) hours, unless otherwise ordered by the Special Master or the Court or agreed upon by the parties. Reasonable requests for additional time will be liberally granted.

5. All counsel may attend any deposition. Counsel may notice any deposition to apply to more than one case and shall use best efforts to ensure that appropriate depositions are noticed to apply to all appropriate cases or clusters.

6. A notice of deposition of a witness who is not a party shall designate the areas of expected interrogation by the noticing counsel. If any other counsel desires to interrogate a witness on different matters, such counsel shall serve a cross-notice of deposition and designate the areas of reasonably expected interrogation. Such areas shall be considered direct examination by that party, and as to such areas the cost of deposition shall be borne by that party. This shall be without prejudice to any party's right of examination as set forth in the next paragraph.

7. All depositions shall be conducted with due regard for the physical and emotional condition, health, and disability of the deponent. If an *in extremis* deposition is noticed to be taken outside of the New York City area contrary to Paragraph X.A.1., the noticing

party must provide, together with the notice, medical certification that the deponent is unable to travel due to his/her present physical condition. Upon application to the Court, plaintiff's counsel may be required to pay the travel expenses incurred by one, but no more than two, defense counsel in attending any deposition noticed to be taken outside of the New York City area.

B. Depositions of Plaintiffs

Depositions shall be limited to depositions of plaintiff, plaintiff's spouse, and up to four co-workers, unless plaintiff intends to call more than those four co-workers as witnesses at trial. No other depositions of plaintiff, members of plaintiff's family, or co-workers shall be had except by order of the Special Master or the Court.

C. Depositions of Defendants

1. The parties shall make every effort to use depositions as well as other discovery obtained from defendants in the preparation of other cases both in this State and throughout the country for all purposes as if taken in each action in these cases in accordance with Paragraph XII of this Order. No other depositions of defendants shall be taken in these cases except pursuant to Paragraph X.C.2.

2. By request to the Special Master, any plaintiff may seek to serve notice of intent to take nonrepetitive depositions of defendants' representatives pertaining to issues which were not covered or not adequately covered by prior depositions of that defendant. Objections to said depositions shall be brought by the affected defendant before the Special Master who shall issue a recommended ruling. Appeals from rulings of the Special Master shall be to the Court, as

provided in Paragraph III.B. hereof. All corporate depositions shall be noticed at a time and place convenient to the witness, taking into account the expense to the defendants' witness.

D. Multi-jurisdictional Depositions

Any party may, with leave of the Court, conduct multi-jurisdictional depositions, either within or without this State in connection with other asbestos litigation, with respect to the following categories of witnesses:

1. any witness having charge of records of associations, trade organizations, Worker's Compensation commissions, insurance company records, or any other group or entity whose records contain documents or whose personnel have knowledge of facts or evidence common to all pending asbestos cases;
2. state of the art experts; or
3. corporate officials of the defendants.

XI. Videotape Depositions

A. Videotape Depositions of Seriously Ill Plaintiffs

A videotape deposition of a seriously or terminally ill plaintiff whose availability for trial may reasonably be doubted may be promptly taken on notice and without further order of the Court if plaintiff's counsel certifies as to plaintiff's medical condition and in accordance with Paragraph X.A.6. of this Order. Plaintiff's counsel should confer with defendants' liaison counsel appointed for the trial cluster in which plaintiff's case is pending to schedule the deposition with reasonable notice, giving due consideration to plaintiff's medical condition.

Plaintiff shall provide to all defendants medical verification of the disease alleged and such medical and employment records as may be in plaintiff's or his/her attorney's possession prior to the videotape deposition. If notice of the deposition is given seven (7) days or less prior to the date when the deposition is to be taken, notice must be served by fax. In no event shall the taking of the videotape deposition be delayed more than ten (10) days from the date of receipt of plaintiff's counsel's certification and notice to take the videotape deposition except by order of the Court. Plaintiffs shall permit defendants to take an off camera discovery deposition at defendants' expense immediately prior to the videotape deposition.

B. Procedures as to Videotape Depositions

1. Videotaped depositions may be taken by any party upon service of proper notice of deposition for any use permitted by the CPLR.

2. Videotaped depositions of deponents who have not been previously deposed and who are not terminally ill may not be taken sooner than fifteen (15) days after the date of the taking of the witness' deposition by off-camera stenographic method ("discovery deposition") unless otherwise agreed to by counsel. Videotape depositions of deponents who have been previously deposed may be taken the day following the completion of the discovery deposition, if such discovery deposition was requested, unless otherwise agreed to by counsel.

3. When a party taking a deposition, in addition to having the testimony taken stenographically and transcribed, also desires to have the testimony videotaped, the party shall include notice of the videotaping of the deposition in the written notice required.

4. The videotape deposition shall be taken before a notary public, who will put the witness on oath.

5. At the beginning of the deposition and prior to the witness taking the oath, the videotape operator shall record an identification sign. As the sign is being recorded, the operator shall, in addition, vocally record the information on the sign. The identification sign shall indicate the caption of the action, the date, the time, and the name of the notary public before whom the videotaped deposition is being taken. After the identification sign has been recorded, each participant shall identify himself or herself on camera, stating clearly the name, the address, and the role of the participant.

6. After the identification required by Paragraph XI.B.5. has been completed, the witness shall take the oath on camera.

7. After the witness has taken the oath, testimony shall be taken in accordance with the provisions herein. The taking of such testimony shall be videotaped in its entirety.

8. During the taking of a videotape deposition, the operator before whom the deposition is taken shall assure that the videotape records the witness in a standard fashion at all times during the deposition, unless all counsel agree otherwise or unless, on motion before the Court, the Court directs otherwise. The operator shall limit the use of videotape camera techniques such as close-up views of the witness or other similar techniques to vary the head and shoulders view which is being recorded for presentation in the courtroom to an initial viewing of the witness and the background and up to two (2) close-up views to demonstrate physical injuries

unless otherwise agreed upon or ordered by the Court. As an exception to the foregoing, the operator shall, at the request of the attorney questioning the witness, cause a close-up view of a deposition exhibit to be taken while the witness is being questioned concerning the exhibit.

9. When a videotape deposition has been taken, the videotape shall be shown immediately to the witness for examination, unless such showing and examination are waived by the witness and the parties.

10. The notary public before whom a videotape deposition is taken shall cause to be attached to the original videotape recording a certification that the witness was sworn by him or her and that the videotape recording is a true record of the testimony given by the witness. If the witness has not waived his or her right to a showing and examination of the videotape deposition, the witness also shall sign the certification. If the witness has exercised his or her right pursuant to Paragraph XI.B.9. to examine the videotape and, having done so, refuses to certify that the videotape recording is a true record of his testimony, the notary public before whom the videotape deposition was taken shall so note on the certification form and shall further state the reasons given by the witness for refusing to certify that the videotape recording is a true record of his or her testimony. The operator who videotaped a deposition pursuant to the provisions of this Order shall execute the following written certification prior to the beginning of the videotape deposition:

I _____ hereby affirm that I am familiar with the provisions of the New York City Asbestos Litigation Case Management Order pertaining to videotape depositions and will ensure that the videotaping of this deposition is done in compliance with these provisions and in an impartial manner.

11. Upon payment of reasonable charges therefor, the operator before whom the deposition was taken shall furnish a copy of the videotape deposition in the form of a videotape or an audio recording to any party or to the deponent.

12. The party taking the deposition shall be responsible for ensuring that the necessary equipment for videotaping the deposition is present at the time the deposition is taken. The party desiring to use the videotape deposition for any purpose subsequent to the taking of the deposition shall be responsible for ensuring that the necessary equipment for playing the videotape deposition back is available when the videotape deposition is to be used. When a videotape deposition is used during a hearing, a trial, or any other court proceeding, the party first using the videotape deposition in whole or in part shall ensure the availability of the same or comparable videotape playback equipment to any other party for such other party's use in further showing the videotape deposition during the hearing, the trial, or other court proceeding in question.

13. The cost of the videotape and the cost of recording the deposition testimony on videotape shall be borne by the party taking the videotape deposition. The ownership of the videotape used in recording testimony shall remain with the party taking the videotape deposition.

14. A party wishing to take a further videotape deposition, not covered herein, must make application to the Court.

XII. Use of Discovery and Depositions from Other Cases

A. Various employees of parties, former employees of parties, and witnesses with knowledge have been deposed in other cases involving alleged asbestos-related personal injuries, and there has been extensive document discovery conducted in other cases involving alleged asbestos-related personal injuries. To avoid undue expense, duplication and unnecessary imposition on counsel, the parties, and the witnesses, parties may utilize depositions taken in other state and federal jurisdictions and cases where a party or a predecessor or successor in interest had notice and opportunity to attend and participate as provided in CPLR 3117. The issue of the admissibility of this deposition testimony at trial against a particular defendant is expressly left for resolution by the trial court.

B. Any party seeking to use any portion of such prior deposition as substantive evidence at trial may, at any time, advise counsel for any party against whom a deposition may be used of the deposition it intends to offer as substantive evidence. Any party objecting to the use of the deposition shall file a statement setting forth the specific objections and grounds within thirty (30) days. Such depositions can be used as if noticed and taken in these cases against those parties or their successors-in-interest. If objection is made, the objecting party shall make an appropriate *in limine* motion setting forth the grounds it asserts for excluding the use of the deposition.

C. All deposition testimony and testimony obtained and admissible in any New York federal court or in any judicial district in the State of New York shall be admissible in the state actions pending in this Court.

XIII. Docket Lists and Trial Clusters

A. There will be three dockets: an Accelerated Docket, an Active Docket and a Deferred Docket. Actions will be set for trial in accordance with Paragraphs XIV ("Accelerated Trial Clusters") and XV ("FIFO Cases") of this Order.

1. Pursuant to Paragraph XIV of this Order, the Accelerated Docket will be comprised of actions brought by plaintiffs who are terminally ill from an asbestos-related disease with a life expectancy of less than one year. Cases on the Accelerated Docket will be set for trial in accordance with Paragraph XIV ("Accelerated Trial Clusters"). All other cases will be assigned to the Active Docket or the Deferred Docket.

2. Pursuant to Paragraph XV of this Order, the Active Docket will be comprised of all actions brought by or on behalf of plaintiffs who have a functional impairment sufficient to warrant trial and meet the minimum criteria set forth in Paragraph XV.A.6. of this Order. Cases on the Active Docket will be set for trial in accordance with Paragraph XV of this Order ("FIFO Cases").

3. Pursuant to Paragraph XV of this Order, the Deferred Docket will be comprised of all actions brought by or on behalf of plaintiffs who do not meet the minimum criteria set forth in Paragraph XV.A.6. of this Order.

B. On or before May 1, 2003, counsel for plaintiffs shall submit to the Special Master and to Special Liaison Counsel, for all remaining cases bearing 1997 and 1998 index numbers, complete lists of (1) the inventory of cases on the Deferred Docket and (2) the inventory of cases on the Active Docket, specifying for each the disease alleged and filing date. The FIFO order date for any case bearing a 1997 or 1998 index number that is certified for an

Active Docket by May 1, 2003 shall be determined by its filing date. The FIFO order date for any such case that is certified for an Active Docket after May 1, 2003, shall be determined by its certification date. The Special Master shall set forth additional certification deadlines for all FIFO cases bearing index numbers from 1999 and afterwards.

C. On the 31st of August in each year in which this Order remains in force and effect, or at the request of the Special Master, each of the plaintiffs' firms having asbestos cases pending in the Supreme Court of New York, New York County, shall file with the Special Master a current chronological list of each and every active asbestos personal injury/wrongful death case pending under this Court's jurisdiction. The cases shall be listed by filing date, or, where appropriate, certification date. Plaintiffs in any multi-plaintiff complaint filed under a single index number shall be listed alphabetically under that index number. Copies of the case lists shall be posted on the NYCAL website.

D. Plaintiffs are not required to list on their inventories any cases in which only bankrupt defendants remain. Rather, a list of these cases shall be separately provided to the Court and the Special Master, and, thereafter, the Court will establish a "bankrupt" docket to group together and account for these cases.

E. All cases pending in the Supreme Court of New York, New York County, presently included in the NYCAL Master File which are not on plaintiffs' case lists or any amendments thereto are hereby dismissed without prejudice. Any case being dismissed pursuant to this paragraph may be reinstated to its chronological position on this Court's asbestos calendar (and deemed filed as of its original date of filing) upon plaintiffs' counsel notifying the Court,

the Special Master and the parties that the failure to list a particular case on a particular firm's inventory filed with this Order was due to inadvertence, mistake, or other good cause.

XIV. Accelerated Trial Clusters

A. The Court, having in mind the directions of, and its discretion under, the provisions of CPLR 3407, will assign for trial on the first Monday in May and the first Monday in November of each calendar year a special Accelerated Trial Cluster of living plaintiffs. The Accelerated Trial Cluster will be designated on the first Thursday of the preceding December (for May cluster) and June (for November cluster). Letter applications for assignment to the Accelerated Trial Cluster shall be provided to the Court, the Special Master and defendants (by fax or FedEx) by no earlier than the third Thursday of the preceding September (for May cluster) and March (for November cluster), and no later than ten (10) days before the designation date. Such letter application will be accompanied by a statement that the plaintiff is terminally ill, the nature of the illness, and the plaintiff's life expectancy, if known. To be eligible for inclusion in an Accelerated Trial Cluster, a plaintiff must be alive and have a pending lawsuit at the time of application. Unless plaintiffs' counsel seeks an extension of time from the Special Master, counsel must provide to defendants the following information at the time the letter application for assignment to the Accelerated Trial Cluster is made:

1. answers to interrogatories in the form approved by the Special Master;
2. responses to standard request for production; and

3. signed authorizations for medical, employment, social security, disability, workers compensation, union, military and tax records to a mutually agreed upon records retrieval service.

Defendants shall file any objections with the Court and the Special Master, and serve upon plaintiffs (by fax or FedEx) by the first Wednesday of each December and June.

B. Any plaintiff who has failed to file an application and supporting materials for inclusion in a particular Accelerated Trial Cluster within the time periods specified above may make special application to the Special Master for an exception to the provisions of this section in the interest of justice and for good cause shown. The presumption, however, shall be that no cases shall be approved for a given Accelerated Trial Cluster if timely application has not been made, as provided herein. Upon a finding of exceptional circumstances, the Special Master may make recommendations to the Court for inclusion of additional *in extremis* cases in a given Accelerated Trial Cluster.

C. The method of trial of cases assigned to the May and November Accelerated Trial Clusters will be determined by the Court in light of all applicable legal considerations.

D. Each case in an Accelerated Trial Cluster will be prepared strictly in accordance with the discovery order entered for those cases. The discovery order applicable to each particular Accelerated Trial Cluster will be based upon the time line set forth in the model schedule annexed hereto as Exhibit "G." The particular discovery order applicable to a specific Accelerated Trial Cluster will be published by the Special Master together with the list of cases to be included in the cluster.

E. Failure to meet a deadline in accordance with the applicable discovery order, unless excused by the Special Master in writing within ten (10) days of the deadline for good cause shown, will result in sanctions upon the offending party as set forth in Paragraph XV.E. herein.

XV. FIFO Cases

A. FIFO Trial Clusters

Only cases that are on the Active Docket shall be assigned to FIFO Trial Clusters. In order for a case to be placed on the Active Docket it must meet the medical criteria set forth below. For purposes of this Order, the following definitions apply:

1. A “board-certified pulmonary specialist” or “board-certified internist” means a physician currently actively licensed to practice medicine in one or more of the States of the United States who is currently actively certified by the American Board of Internal Medicine in the Subspecialty of Pulmonary Medicine (pulmonary specialist) or the American Board of Internal Medicine (internist).

2. A “currently certified B-reader” shall refer to an individual who has successfully completed the NIOSH-sponsored X-ray interpretation course and whose NIOSH-certification is up-to-date.

3. “ILO grade” shall refer to the radiological ratings of the International Labor Office set forth in “Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses” (1980).

4. "Chest X-rays" means chest films taken in four views (PA, Lateral, Left and Right Oblique) that are graded quality 1 for reading according to the ILO criteria.

5. "Pulmonary Function Testing" shall refer to spirometry, lung volume testing and diffusing capacity testing which conform to quality criteria established by the American Thoracic Society (ATS) and is performed on equipment which meets ATS standards for technical quality and calibration, all as set forth in 20 C.F.R. 718.103 and Appendix B thereto or in the ATS guidelines in 144 *American Review of Respiratory Disease* 1202-18 (1991). Each subject must be tested with and without inhaled bronchodilators, with best values taken. Predicted values for spirometry and lung volumes shall be those published by Morris, *Clinical Pulmonary Function Testing*, 2d ed., Intermountain Thoracic Society (1984).

6. The "minimum criteria for activation" shall be defined as follows:

Non-Malignant Changes Shown By Testing

(a) Chest X-rays which, in the opinion of a currently certified B-reader, show small irregular opacities of ILO grade 1/0; and pulmonary function testing that, in the opinion of a board-certified pulmonary specialist or internist, shows either:

(i) $FVC \leq 80\%$ of predicted value with $FEV-1/FVC \geq 68\%$ (actual value), or

(ii) $TLC \leq 80\%$ of predicted value;

or

- (b) Chest X-rays which, in the opinion of a currently certified B-reader, show small irregular opacities of ILO grade 1/1 or greater; *and* Pulmonary function testing that, in the opinion of a board-certified pulmonary specialist or internist, shows either:
 - (i) $FVC \leq 80\%$ of predicted value with $FEV-1/FVC \geq 65\%$ (actual value), *or*
 - (ii) $TLC \leq 80\%$ of predicted value;

or
- (c) Chest X-rays which, in the opinion of a currently certified B-reader, to a reasonable degree of medical certainty, demonstrate bilateral asbestos-related pleural thickening which has an ILO grade B2 or greater *and* with pulmonary function testing that, in the opinion of a board certified pulmonary specialist or internist, to a reasonable degree of medical certainty shows either
 - (i) $FVC \leq 80\%$ of predicted value with $FEV-1/FVC \geq 68\%$ (actual value), *or*
 - (ii) $TLC \leq 80\%$ of predicted value, *and* with a statement by a board-certified pulmonary specialist or internist that, based upon a complete review of the claimant's entire medical record, to a reasonable degree of medical certainty, the asbestos-related changes are a substantial contributing factor to the pulmonary function changes;

or

Non-Malignant Changes Shown by Pathology

- (d) In the case of a claim brought on behalf of a decedent, if representative lung tissue of the decedent is available, a report by a board-certified pathologist, stating that, to a reasonable degree of medical probability, more than one representative section of lung tissue that is unaffected by any other process (e.g., cancer or emphysema) demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies, and that there is no other more likely explanation for the presence of the fibrosis;

or

Diagnosis of Cancer

- (e) A diagnosis of cancer, which is demonstrated by a medical report of a board-certified internist, pulmonary specialist, oncologist or pathologist showing the diagnosis as a primary cancer, which states to a reasonable degree of medical certainty that the cancer in question is caused by asbestos exposure.

B. Active Docket

1. A case on the Active Docket shall be clustered and scheduled for trial strictly in FIFO order, except for the first Active Docket cluster described below. For a case on the Active Docket, FIFO order is determined by the date that the action was commenced, *except that*, for any case that

- (a) is commenced after the date of this Order which initially is on the Deferred Docket, and which is later placed on the Active Docket by stipulation or order of the Court granting leave to amend the complaint.

or

- (b) was commenced before the date of this Order but not transferred to the Active Docket by timely stipulation or motion, pursuant to Paragraph B.2, the FIFO order shall be determined by the date of said stipulation or order.

2. The first Active Docket cluster shall consist of the first 75 cancer cases (not asbestosis) on the Active Docket, selected in strict FIFO order, and shall begin trial on February 2, 2004.

3. Thereafter, two annual clusters of 150 Active Docket cases shall be clustered to begin trial on the first Monday of each February and August, beginning with August 2, 2004.

C. Deferred Docket

1. The Deferred Docket consists of all actions brought by or on behalf of claimants who do not meet the minimum criteria for activation. All proceedings with respect to cases on the Deferred Docket are stayed, except for stipulations (as described below) to transfer cases to the Active Docket, as hereinafter defined, and motions for leave to amend the complaint (as described below), until further order of the Court.

2. Any case that, as of the date of this Order, has been commenced but not assigned to either an Accelerated Trial Cluster or a FIFO Trial Cluster is deemed to be on the Deferred Docket, *unless*

- (a) on or before April 1, 2003, for cases bearing 1997 and 1998 index numbers, plaintiffs and Special Liaison Counsel for the defendants (as described below) stipulate that the party allegedly injured from asbestos exposure satisfies the minimum criteria for activation;

or

- (b) on or before April 15, 2003,
 - (i) the plaintiff(s) (a) move for leave to amend the complaint so as to allege with specificity that the party injured from asbestos exposure satisfies the minimum criteria for activation and (b) annex the requisite documentation to the proposed amended complaint, *and*
 - (ii) the Court grants leave to amend the complaint. Leave to amend shall be denied if the minimum criteria for activation have not been satisfied.

3. Any case that is commenced after the date of this order is deemed to be on the Deferred Docket, *unless* the complaint, as initially filed and served, alleges with specificity that the party claiming injury from asbestos exposure meets the minimum criteria for activation and annexes the requisite documentation as evidence thereof. No plaintiff may file a Request for Judicial Intervention for any Deferred Docket case commenced after the date of this order.

4. Any case that

(a) is commenced after the date of this order and initially deemed to be on the Deferred Docket

or

(b) was commenced before the date of this order but not transferred to the Active Docket by timely stipulation or motion, under the procedures set forth above in Paragraph B.2, shall be removed from it and placed on the “Active Docket,” as described below, *if*

(i) plaintiffs and Special Liaison Counsel for the defendants (as hereinafter defined) stipulate that the party allegedly injured from asbestos exposure now satisfies the minimum criteria for activation,

or

(ii) The plaintiff or plaintiff(s) (a) move for leave to amend the complaint so as to allege with specificity that the party injured from asbestos exposure meets the minimum criteria for activation and (b) annex the requisite documentation to leave to amend the complaint. Leave to amend shall be denied and the case shall remain on the Deferred Docket if the minimum criteria for activation have not been satisfied.

D. Defense Discovery and Medical Liaison Counsel

1. Defendants shall appoint a liaison counsel for discovery for each FIFO Trial Cluster. Defendants may appoint separate liaison counsel for fact discovery and medical

discovery in the same FIFO Trial Cluster. These counsel will be identified by letter to the Special Master, with a copy to plaintiffs' counsel and all defense counsel in a particular FIFO Trial Cluster, within seven (7) days of the publication of the list of remaining defendants for that FIFO Trial Cluster.

2. The purpose of the appointment of liaison counsel for defendants in a FIFO Trial Cluster is to facilitate implementation of this Order and to minimize the number of disputes which require adjudication by the Special Master and the Court. Defendants' liaison counsel shall be responsible for communication with plaintiffs' counsel on discovery issues, including accommodation of unforeseen problems and scheduling of discovery as necessary outside of the discovery order. Liaison counsel shall have the authority to extend deadlines for the plaintiffs' compliance with discovery deadlines subject to the approval of the Special Master.

3. Plaintiffs' counsel shall deliver to defense medical liaison counsel all radiology and pathology materials for cases in the FIFO Trial Cluster in accordance with the discovery schedule.

E. Discovery Schedules (Time Lines) and Sanctions

1. FIFO Trial Clusters and discovery schedules will be published by the Special Master on the first Monday of each May for August clusters of the succeeding calendar year and on the first Monday of each November for February clusters of the second succeeding calendar year (*e.g.*, the August 2005 FIFO Trial Cluster and discovery schedule will be published in May 2004 and the February 2006 FIFO Trial Cluster and discovery schedule will be published in November 2004). The discovery order applicable to a particular FIFO Trial Cluster will be based upon the time line set forth in the model schedule annexed hereto as Exhibit "F." Thirty

(30) days after the publication of a FIFO Trial Cluster, plaintiffs shall provide to defendants in these cases a list of all remaining defendants in the cases.

2. Each case in each FIFO Trial Cluster will be prepared strictly in accordance with the discovery order entered for those cases. Any failure to comply with a deadline in the discovery order for a FIFO Trial Cluster, unless excused by the Special Master in writing within ten (10) days of the deadline for good cause shown or agreed to by liaison counsel and plaintiff's counsel, shall be deemed to be a willful failure to disclose within the meaning of CPLR 3126. The parties will be subject to the sanctions provided herein for failure to comply with the discovery order. The following sanctions will apply, unless good cause is shown for a failure to comply:

a. Plaintiffs' failure to answer defendants' standard set of interrogatories or respond to defendants' standard requests for production of documents or provide properly executed document authorizations on or before the date provided in the discovery order shall result in those cases in which said material has not been provided being removed from the FIFO Trial Cluster. Any such case will not be again placed on a calendar for trial any sooner than twenty-four (24) months from the original trial date for that case.

b. Failure to fully answer interrogatories, such as failure to identify lay witnesses (including their last known addresses), or failure to provide the names and addresses, if known, of treating physicians on or before the dates that information is required pursuant to the discovery order will result in preclusion of the witness, except as permitted by Paragraph XV.E.2.c. hereof. Similarly, fact witnesses and parties timely noticed for depositions who are not made available for deposition prior to the closure date set forth in the discovery order shall be precluded, and depositions of fact witnesses who have not been properly identified

in interrogatory answers shall not be admissible, except as permitted by Paragraph XV.E.2.c. hereof.

c. All parties shall retain the right to file amended answers to interrogatories up to thirty (30) days prior to commencement of jury selection as to information not known or knowable upon reasonable inquiry by the parties or their counsel at the time they initially responded to interrogatories. However, all parties may upon motion to the Special Master add additional fact witnesses upon a showing of good cause and the showing that the addition shall not be to the opposing parties' prejudice.

d. Depositions of plaintiffs or plaintiffs' fact witnesses not noticed for dates on or before the closure dates designated in the discovery order will not be taken, except as provided in Paragraph XV.E.2.c. hereof.

e. The defendants must file with the Clerk of the Court any third-party complaint pursuant to the deadline established in the discovery order applicable to a particular FIFO trial (as described in Paragraph XV.E.1. hereof). Within three (3) business days of the filing of any third-party complaint, the third-party plaintiff must deliver to the third-party defendant's counsel, if known, a copy of the third-party complaint, the plaintiff's complaint, the plaintiff's interrogatory responses and, if counsel has not previously appeared in the NYCAL, then third-party plaintiff also will provide a copy of this Order. At the third-party defendant's request, the third-party plaintiff shall provide a copy of the plaintiff's deposition transcript at the expense of the third-party defendant. Within three (3) business days of the filing of any third-party complaint, the third-party plaintiff shall deliver to plaintiff's counsel a copy of the third-party complaint. Failure to provide timely notice of the third-party action to the third-party defendant's counsel or to plaintiff's counsel may result in dismissal of the third-party action.

Nothing contained in this paragraph shall alter or alleviate any obligation of the third-party plaintiff regarding service of process as set forth in the CPLR. The third-party plaintiff, however, must deliver to the third-party defendant or its agent any materials necessary to effect service within five (5) business days of the filing of any third-party complaint.

f. Third-party complaints not filed on or before the filing deadline set forth in the discovery order may only be filed upon motion and with permission of the Special Master or the Court after appeal of a ruling by the Special Master. Any motion to file a third-party complaint after the filing deadline shall be made upon notice to all remaining parties and putative third-parties. The motion must include an affidavit stating when the information used to substantiate the filing of the third-party complaint became available and that such information was not reasonably available prior to the filing deadline.

g. A defendant's failure to answer plaintiffs' standard and case specific product identification interrogatories and request for production of documents within the deadlines imposed by the discovery order, or a defendant's failure to produce a witness for a permitted deposition of that defendant, shall result in that defendant having all of its defenses stricken as to each plaintiff for whom it fails to provide said discovery.

h. The testimony of an expert witness whose report and any supporting x-rays and pathology materials reviewed by the expert have not been provided by the deadline in the discovery order is hereby precluded and any report by the expert may not be used for any purpose at trial. Production to defendants of x-rays and pathology materials provided to plaintiffs' experts is ultimately the responsibility of plaintiffs' counsel.

i. Any previously undeposed (in whole or in part) expert who does not submit to deposition pursuant to timely notice in accordance with the discovery order shall be precluded from testifying in that case.

j. Any witnesses or exhibits (presuming earlier provisions of the discovery order have been complied with) not identified on or before the discovery order deadline for filing witness and exhibit lists shall be precluded.

k. Any plaintiff not made available on reasonable notice for independent medical examination at least two weeks prior to the discovery order deadline for defendants' production of expert witness reports will be removed from the FIFO Trial Cluster. No plaintiff shall be required to submit to more than one medical examination at defendants' request within the same discovery period.

l. Any plaintiff who intends to file a proof of claim form with any bankrupt entity or trust shall do so no later than ten (10) days after plaintiff's case is designated in a FIFO Trial Cluster, except in the *in extremis* cases in which the proof of claim form shall be filed no later than ninety (90) days before trial.

m. Each plaintiff must purchase a Request for Judicial Intervention ("RJI") within one (1) month of the time the case is listed in a FIFO Trial Cluster. As to those cases in an Accelerated Trial Cluster, as set forth in Paragraph XIV herein, plaintiff must purchase an RJI no later than three (3) months prior to the trial date set in the discovery order applicable to plaintiff's case. Failure to timely file an RJI will result in removal of the case from the FIFO Trial Cluster (or Accelerated Trial Cluster). Any such case will not be again placed on a calendar for trial any sooner than twenty-four (24) months from the original trial date for that case.

n. All Notes of Issue must be filed no later than three months prior to the scheduled trial date.

3. Any party wishing to avail itself of the sanctions provided herein shall make a written application, on notice, to the Special Master. Opposing papers shall be served within five (5) days of receipt of the application. The Special Master will issue a ruling within five (5) days thereafter. Said ruling shall be the law of the case unless relief therefrom is granted by the Court pursuant to an Order to Show Cause.

F. Settlement Conferences

1. The Special Master will convene and conduct mandatory settlement negotiations as in her discretion are needed. The negotiator representing each party at the mandatory settlement conferences must have full authority to negotiate and commit his/her client(s) to settlement or sanctions will be levied.

2. All parties are encouraged and directed to conduct good faith settlement negotiations of an entire trial cluster and not solely individual cases or groups within a particular trial cluster.

3. All parties will negotiate all cases assigned to that particular trial cluster as if they were actually going to trial. Any plaintiffs' attorney who refuses to negotiate all cases assigned to that trial cluster, in good faith, shall be subject to a recommendation of the Special Master and an order of this Court removing from the trial cluster those cases which were assigned to that trial cluster, but not settled. Any such case will not be again placed on a calendar for trial any sooner than twenty-four (24) months from the original trial date for that case. Any defendant who refuses to negotiate all cases assigned to that trial cluster, in good faith, shall be subject to a recommendation of the Special Master and an order of this Court

consolidating all cases for that cluster and any other cases the Court deems appropriate for trial as to that defendant (or those defendants).

XVI. Summary Judgment Motions

1. Defendants' "formal" motions for summary judgment based on lack of product identification should not be filed in a particular case until (1) the case has been assigned to a trial cluster, (2) that defendant has responded to the plaintiffs' product identification discovery, if served, and (3) until ten (10) days after that defendant has made a request for dismissal pursuant to Paragraph XVI. 4.

2. Stipulations of discontinuance should not be served except in connection with settlements.

3. Not later than thirty (30) days after the scheduled date for completion of plaintiffs' depositions in a cluster, plaintiff's counsel in each case shall notify each defendant against whom plaintiff intends to voluntarily discontinue its action.

4. Each defendant seeking a discontinuance by reason of notice from plaintiff or otherwise shall submit to plaintiff's counsel for signature, with notice to all parties, a signed No Opposition Summary Judgment Motion ("NOSJM") in the form annexed as Exhibit "H". The moving defendant shall prepare and retain an affidavit or other proof of service on all parties. No NOSJM shall be served before the scheduled date for the completion of plaintiffs' depositions in a cluster.

5. Upon receipt of a NOSJM, plaintiff's counsel shall promptly (a) sign the NOSJM and mail a copy to defendant's counsel, or (b) advise defendant's counsel in writing, with a copy to the Special Master, of grounds for not signing the NOSJM. If defendant's counsel does not receive a response within ten days, counsel shall send a fax or e-mail reminder to

plaintiff's counsel. If a response is not received within five days thereafter, defendant's counsel shall notify the Special Master by telephone or e-mail.

6. Plaintiffs' counsel shall retain all signed NOSJMs for cases in a cluster in plaintiff order and shall notify the Special Master of each defendant for whom a NOSJM has been signed in each case in a cluster. Plaintiffs' counsel shall make every effort to include all NOSJMs for a cluster in a single timely notification.

7. Within thirty days from the date of service of the NOSJM by the moving defendant, any cross-claimant who opposes summary judgment dismissing the action shall serve on the Special Master and all parties, written notice of opposition stating grounds for opposing the motion. The Special Master shall thereafter schedule and hear argument on the opposition and shall issue an advisory ruling at the conclusion of the hearing. Any party objecting to the Special Master's advisory ruling shall, with five business days, serve written notice of objection on the Special Master and all parties who participated in the hearing. The objection shall be referred by the Special Master to the Court for a de novo hearing.

8. When a case is fully resolved, plaintiffs' counsel shall forward all originally signed NOSJMs in that case to this Court to be "so ordered" and filed.

9. If plaintiffs' counsel fails to reply to the NOSJM request by letter, said defendant shall be free to file a "formal" motion for summary judgment based on product identification grounds.

10. Formal motions for summary judgment on any grounds other than product identification may be made at any time as provided by the CPLR.

11. When a plaintiff discontinues an action against a defendant, such defendant shall serve written notice of the discontinuance upon all parties to the action and shall

thereafter be deleted from the lawsuit unless, within thirty (30) days of service of the notice, a co-defendant serves a written objection to the deletion on the ground that it intends to pursue a cross-claim against that defendant.

XVII. Punitive Damages

Counts for punitive damages are deferred until such time as the Court deems otherwise, upon notice and hearing.

XVIII. Miscellaneous

The Court recognizes that cooperation among counsel and parties is essential for the orderly and expeditious resolution of this litigation. The communication of information among the plaintiffs' counsel, among defense counsel, and among defendants shall not be deemed a waiver of the attorney-client privilege, the protection afforded by the attorney work-product doctrine, or any other privilege to which a party may be entitled. Any cooperative efforts described above shall not, in any way, be used against any of the parties, shall not constitute evidence of conspiracy, concerted action, or any wrongful conduct, and shall not be communicated to the jury. The exchange of information or documents by counsel will not, by itself, render such information or documents privileged.

XIX. Death Of Plaintiff

A. Accelerated and FIFO Trial Clusters

1. Counsel for plaintiff shall notify all defendants of the death of plaintiff within 10 (ten) days of learning of plaintiff's death. Such notice shall be made in writing via facsimile with a copy by e-mail to the NYCAL website webmaster for posting on the NYCAL website.

2. Promptly upon receipt of notice of the appointment of an estate representative ("Notice of Appointment"), counsel for plaintiff shall file and serve an amended complaint.

3. Promptly upon receiving Notice of Appointment, counsel for plaintiff shall cause new medical release authorization forms to be executed by the estate representative. A copy of Letters of Administration or their equivalent, the executed medical authorizations and the death certificate shall be sent to the medical record provider and medical liaison counsel. If an autopsy has been conducted, medical liaison counsel shall be notified.

4. Counsel for plaintiff shall send a copy of the death certificate to all defendants as soon as is practicable.

B. All other FIFO Cases

The service of an amended complaint shall be sufficient notice of the death of plaintiff.

C. All Cases

Where an amended complaint has been filed and served, a motion to substitute parties, pursuant to CPLR § 1015, will be deemed to have been made and granted.

The Special Master is hereby directed to post a copy of this Order on the NYCAL website.

IT IS SO ORDERED

Dated: February 19, 2003
New York, New York

_____/s/_____
Helen E. Freedman, J.S.C.

Exhibit 5

SUPREME COURT OF THE STATE OF NEW
YORK ALL COUNTIES WITHIN THE CITY OF
NEW YORK

IN RE: NEW YORK CITY
ASBESTOS LITIGATION

This Document Relates To:

All Cases

X
:
: New York City
: Asbestos Litigation
: (NYCAL)
:
:

X Index No. 40000/88

:
: AMENDED CASE
: MANAGEMENT ORDER
:
:

: September 20, 1996,
: Amended as of 5.26.11
: , 2011
X

I. Applicability of This Order

This Order applies to all pretrial procedures involving all asbestos personal-injury and wrongful death cases now or hereafter assigned to the undersigned, except as otherwise directed by the Court upon motion and for cause shown by the party seeking to have this Order declared inapplicable, and supersedes all previous case management orders and amendments thereto entered in the asbestos litigation previously pending in all counties in the City of New York, Supreme Court.

II. Objectives

It is the objective of the Court to encourage and bring about the fair, expeditious, and inexpensive resolution of these cases. In an effort to achieve this goal, a case management plan ("CMP"), drafted by a steering committee including the Special Master, plaintiffs' and defendants' counsel, and supplemented by Order of this Court, is established to allow the parties to obtain reasonably necessary documents and information without imposing undue burdens in order to permit the parties to evaluate the cases, reach early settlements, and prepare unsettled cases for trial. The essential components of the CMP include, to the extent feasible:

A. Standardization of pleadings and discovery so that the parties can obtain the necessary information to evaluate cases for settlement or to prepare them for trial at minimum cost;

B. Conducting early pretrial conferences to explore settlement opportunities, to resolve pretrial management problems, and to establish discovery cut-off dates;

C. Grouping, ordering, and firm scheduling of cases for pretrial procedures and trial; and

D. Coordination of discovery, the use and compensation of Liaison Counsel, the appointment and compensation of a Special Discovery Master/Referee, and other orders as necessary to avoid duplication, contain costs, and expedite disposition through settlement or trial.

III. Special Discovery Master/Referee

A. The Court appoints Laraine Pacheco, Esq. as Special Discovery Master/Referee (“Special Master”) in these cases.

The Special Master shall supervise compliance with discovery including, but not limited to, adequacy of the plaintiffs’ and defendants’ standard interrogatory responses, production of documents, the conduct of depositions and other discovery disputes that may arise and, when necessary, make recommended rulings for the Court’s consideration on all discovery disputes.

In the event of a discovery dispute, including but not limited to the failure to provide required discovery, the requesting party shall notify the Special Master without delay and request intervention. No motion to compel discovery from a party may be made without first seeking the assistance of the Special Master to obtain that discovery.

The Special Master shall convene and conduct mandatory settlement conferences as necessary and in accordance with the time line contained in the CMO, and shall have such other duties as specified by the CMO or the Court.

B. Any party objecting to a ruling by the Special Master on discovery issues must notify the Special Master and all other interested parties of its intention to raise an objection (by email) within three (3) business days of receiving the Special Master’s written recommendation. Thereafter, said objection must be raised with the Court within seven (7) days of the receipt (by email) of the Special Master’s written recommendation. If notification of a party’s

intention to challenge the Special Master's written recommendation is not given within three (3) business days, the Court may adopt the recommended ruling as its order on the disputed issue. Any and all motions made by the parties pursuant to this Amended Case Management Order must reference the paragraph(s) of this Order under which relief is sought, if applicable.

C. The parties have agreed to compensate Laraine Pacheco, Esq. for her services as Special Master at the flat rate of \$368,000 per year. These fees shall be borne, jointly, 40% by plaintiffs and, jointly, 60% by defendants. Allocations among plaintiffs (for their 40% share) and defendants (for their 60% share) shall be submitted to the Special Master, under seal, on or before February 1 of each year. Thereafter, all parties to whom a share has been allocated shall make payment in two equal installments. The first installment will be due on or before April 15 and the second installment will be due on or before October 15.

D. The reappointment of the Special Master, the amount of the Special Master's compensation and the allocation of her fees as among plaintiffs and defendants will be semi-annually reviewed and the subject of a separate semi-annual order of the Court.

E. This appointment of Laraine Pacheco, Esq. will extend from February 1 through July 31 and from August 1 through January 31 of the following year for each semi-annual period this Order is in force and effect.

Upon agreement of both parties, an independent settlement master may be retained and separately compensated to assist in the possible settlement

and/or resolution of a particular case or group of cases.

IV. Filing Procedures

A. Files

A master file, known as New York City Asbestos Litigation (“NYCAL”) Master File, has been established in the Office of the Clerk of New York County for all asbestos cases assigned to the undersigned for coordinated pretrial proceedings, whether such cases were commenced in New York, Kings, Queens, Bronx or Richmond County. Entries on the NYCAL Master File shall be applicable to each asbestos case assigned to the undersigned for coordinated pretrial proceedings.

The original of this Order shall be filed by the County Clerk in the NYCAL Master File previously established, and a copy shall be deemed to be part of the record of each coordinated action.

A separate file shall also be maintained under a separate Index Number for each individual action and each individual plaintiff in the Office of the Clerk of New York County, and entries shall be made therein in accordance with this Order.

B. Captions of Cases

Every document filed in these coordinated actions that has general application to all cases shall bear a caption as follows:

SUPREME COURT OF THE STATE OF NEW YORK	
ALL COUNTIES WITHIN THE CITY OF NEW YORK	
-----	X
	:
IN RE: NEW YORK CITY	:
ASBESTOS LITIGATION	:
	:
-----	X

C. Filing of Papers

1. When a paper has general application to all cases, the caption shall bear index number 40000 and the Clerk of New York County shall file such a paper in the Master File. No further copies of the papers need to be filed. Any document so filed shall be deemed to have been filed in each case to which this Order applies and shall constitute part of the record of each such case.

2. When a paper, like a Plaintiffs Initial Fact Sheet ("PIFS") or a motion, is applicable only to an individual case, the attorney submitting such paper for filing shall supply a cover sheet containing the caption, name and index number to which the paper is applicable. The Clerk of New York County shall not file such a paper in the NYCAL Master File; rather, after receipt by the Clerk, the Clerk shall file the original in the individual case file under the appropriate index number.

3. When a paper is filed that is applicable to two or more but

less than all of these coordinated actions, the captions shall state the case names and separate index numbers of the actions to which that paper is applicable. The Clerk of New York County shall file a copy in the separate file bearing the index number so identified to which the paper is intended to be applicable.

4. It shall be the responsibility of the attorney submitting such paper for filing to supply a cover sheet containing the captions, names and index numbers of all cases to which the paper is applicable and supply the County Clerk with sufficient copies of any such paper to facilitate compliance with the directions of this paragraph.

5. Effective September 2, 2009, every NYCAL asbestos case filed must have an 8½ x 11 cover sheet with the words:

THIS IS AN ASBESTOS MATTER

The Clerk's Office will be assigning a special series of index numbers to all NYCAL cases which will enable the Court to keep track of filings.

V. Rules of Procedure

The Civil Practice Law and Rules and the Local Rules of the Supreme Court of the State of New York, New York County together with the express provisions of this Order shall govern all proceedings herein.

VI. Pleadings

A. Plaintiffs Initial Fact Sheet ("PIFS"), annexed hereto as Exhibit "A," shall be included with the complaint or served upon the defendants within sixty

(60) days after filing of the complaint. The PIFS shall be filed by the Clerk of New York County in the file of the individual action pending in New York County to which the PIFS applies. Multi-plaintiff complaints are not permitted.

B. To the extent not previously done, plaintiffs' counsel shall file in the NYCAL Master File and serve on defendants a complaint or set of complaints containing standard allegations generally applicable to all claims of a similar nature. Thereafter, plaintiffs may and should, to the maximum extent feasible, serve and file a short form complaint which incorporates by reference all of the allegations contained in the appropriate standard complaint. In the case of previously filed complaints, leave is hereby granted to file such short form complaints as amended complaints filed by that firm.

C. In any case commenced after the date of this order, the complaint must allege and include the requisite documentation of minimum criteria for activation, as set forth in Paragraph XV herein, in order to be placed on the Active Docket.

D. Defendants shall file in the NYCAL Master File and serve on plaintiffs' Liaison Counsel a standard answer with affirmative defenses. When such standard set of defenses has been filed, a defendant may serve an acknowledgment of service (Exhibit "B") on the plaintiff, by which service defendant will be deemed to have denied all material allegations contained in the plaintiff's complaint, except as stated in such acknowledgment, and to have raised each of the affirmative defenses contained in defendants' standard answer, except as stated in such acknowledgment. All co-defendants to which

any cross-claims may apply will be deemed to have denied all material allegations contained in the cross-claims. Nothing herein shall preclude a defendant from filing an individual answer, if it so chooses.

E. Any plaintiff may, without further leave of the Court, amend his or her complaint: to add claims based on survivorship, death of the original plaintiff, change of the disease alleged, loss of consortium or society; to sever any joined claims; or to add additional defendants. Service of such amendments on counsel who have appeared in the action for a defendant shall be considered service on that defendant. Such amendments may incorporate by reference the allegations of the complaint on file where appropriate. Defendants who have previously answered shall be deemed to have answered the amended complaint as set forth in the preceding paragraph. Other amendments to the pleadings shall be made in compliance with CPLR 3025. However, the parties are encouraged to consent to such amendments where appropriate in light of New York State's recognition that leave to amend is to be freely granted.

F. If a plaintiff in an Accelerated Trial Cluster (see Paragraph XIV) amends his or her complaint to add an additional defendant(s) during the sixty-day period before April 1 for the April Cluster and October 1 for the October Cluster, at the request of the late-added defendant, that plaintiff's action shall be automatically removed from the cluster and shall be put into the next succeeding Accelerated Trial Cluster, except for extraordinary cause shown by plaintiff. Automatic removal shall not preclude application by defendants for any other relief to which they may be entitled for other reasons.

G. If a plaintiff in an Accelerated Trial Cluster amends his or her complaint to add an additional defendant(s) on or after April 1 for the April Cluster and October 1 for the October Cluster, at the request of the late-added defendant, that plaintiff's action shall be automatically removed from the cluster and added to the chronological list of cases from which cases are assigned to the active docket, except for extraordinary cause shown by plaintiff. However, if the plaintiff is still living at the time the window for the next Accelerated Trial Cluster opens, plaintiff may reapply for inclusion in that cluster if the plaintiff is alive at the time of application.

VII. Liaison Counsel

A. Appointment of Liaison Counsel to act on behalf of plaintiffs' counsel and on behalf of defendants' counsel after appropriate consultation where necessary will facilitate communications among the Court and counsel, minimize duplication of effort, coordinate joint positions, and provide for the efficient progress and control of this litigation.

B. Subject to the right of any party to present individual or divergent positions or to take individual actions, Liaison Counsel are vested by the Court with the following responsibilities and duties:

1. to coordinate the briefing of motions;
2. to coordinate the argument of motions;
3. to coordinate the conduct of discovery procedures, including but not limited to coordination of the preparation of joint written interrogatories, joint requests to admit, and joint requests for the production of documents, where

applicable;

4. to coordinate the examination of witnesses in depositions;
5. to coordinate the selection of counsel to act as spokespersons at pretrial conferences;
6. to call meetings of counsel for plaintiffs and defendants respectively for the purpose of proposing joint actions, including but not limited to responses to questions and suggestions of the Court or of adversaries with regard to orders, schedules, briefs and stipulations; and
7. to coordinate objections.

C. Co-Liaison Counsel for the plaintiffs shall be the firm of Weitz & Luxenberg, P.C. and the firm of Belluck & Fox, LLP.

D. Co-Liaison Counsel for the defendants shall be the firm of Malaby & Bradley, LLC and the firm of Reed Smith, LLP.

E. Liaison Counsel are authorized to receive orders, notices, correspondence, and telephone calls from the Court, the Special Master and the Clerk of the Court on behalf of all defendants and plaintiffs and shall be responsible for notifying all counsel of communications received from the Court.

F. Notwithstanding the appointment of Liaison Counsel, each counsel shall have the right to participate in all proceedings before the Court as fully as such counsel deems necessary.

G. Liaison Counsel shall not have the right to bind any party except Liaison Counsel's own respective clients as to any matter without the consent of counsel for any other party.

H. Plaintiffs' Liaison Counsel and defendants' Liaison Counsel shall be reimbursed periodically but not less than every six months by counsel for plaintiffs and counsel for defendants respectively for their necessary and reasonable expenses actually incurred in performing their tasks pursuant to this Order and shall keep records of such expenses in reasonable detail for examination by counsel. Liaison Counsel shall be paid by each plaintiff's and defendant's counsel on an equitable basis to be agreed upon by the parties or fixed by the Court with each plaintiff and defendant having to pay a proportionate share of the costs incurred by its respective Liaison Counsel in representing its interests.

I. Plaintiffs' Liaison Counsel and defendants' Liaison Counsel shall be reimbursed periodically but Liaison Counsels' invoices for services as Liaison Counsel pursuant to this Order shall be due and payable when submitted. Interest shall be computed at the rate applicable to judgments starting thirty (30) days after the date of their submission.

VIII. Standard Consolidated Discovery

A. Interrogatories

Standard Interrogatories (CPLR 3130) and Requests for Production of Documents (CPLR 3120) shall be utilized as set forth herein. The Court on its own motion hereby permits the use of interrogatories in addition to depositions pursuant to CPLR 3130.

1. Defendants' Interrogatories

a. Defendants have developed a single, standard joint

set of interrogatories to plaintiffs which has been filed with the County Clerk under the index number 40000 and provided to plaintiffs' Liaison Counsel. These standard interrogatories are captioned Defendants' Fourth Amended Standard Set of Interrogatories and Requests for Production of Documents and a copy is annexed hereto as Exhibit "C."

b. Plaintiff shall serve upon all defendants in the action responses to Defendants' Standard Set of Interrogatories in accordance with the time line set forth herein. The interrogatories shall be answered in full and verified by each individual plaintiff according to the C.P.L.R.

- i. Defendants' Standard Interrogatory Question 16/26 and/or the Chart "A" referred to therein must be fully and substantially answered. For example, an answer such as "various jobsites in New York City" is not an acceptable response.
- ii. While a party may make minor amendments, additions, modifications and corrections to his or her verified answers to interrogatories prior to the commencement of his/her deposition, it is expected that plaintiff will provide full and substantially complete answers to Defendants' Standard Set of Interrogatories and any significant changes will not be necessary.
- iii. Unless otherwise agreed to by the parties, plaintiff's failure to fully and substantially complete Defendants' Standard Set of Interrogatories pursuant to the timeline provided for the trial cluster to which the case is assigned or any substantial amendments, additions, photographs related to purported asbestos exposure, modifications or corrections to said answers to interrogatories by handwritten list or otherwise that is not served upon defense counsel at least three (3) business days

prior to a scheduled deposition may, upon application to the Special Master, result in the postponement of the deposition.

c. After the standard set of interrogatories is answered, any defendant may serve supplemental, non-repetitive interrogatories upon application with notice to and approval from the Special Master. Defense counsel are admonished to exercise the utmost good faith in determining the necessity for such further interrogatories.

d. Defendants' Fourth Amended Standard Set of Interrogatories and Requests for Production of Documents shall be deemed to apply to all cases, without the necessity of further filing and service of such interrogatories in individual cases. Any standard interrogatories served and answered in cases pending in any federal court or in any judicial district in the State of New York, are deemed to apply to all cases pending before this Court without the necessity of further service in the state actions. In the case of a new plaintiff not represented by any attorney who has previously appeared for some other plaintiff in this litigation, defendants' Liaison Counsel will serve a copy of the interrogatories on such counsel.

e. Copies of any records obtained by any defendant pursuant to authorization of a plaintiff, other than those records which are obtained through a mutually agreed upon records retrieval service, shall be made available to plaintiff's counsel by notice of receipt mailed to plaintiff's counsel within ten (10) days of receipt.

2. Plaintiffs' Interrogatories

a. Plaintiffs have developed a single, standard joint set

of interrogatories designed to obtain general liability information. A copy is annexed hereto as Exhibit "D." Plaintiffs are permitted to reword the standard interrogatories, as appropriate, to conform to the class of defendant to whom they are directed (e.g., premises owner, contractor).

b. To the extent not previously done, each defendant shall file in the NYCAL Master File under index number 40000 a single set of responses which shall be applicable to all coordinated actions. Responses by defendants to this set of interrogatories shall be served on plaintiffs' Liaison Counsel and when so served shall be deemed served in each case. In the event that a defendant not previously named in these actions is named by the plaintiff, the plaintiff's counsel will so inform plaintiffs' Liaison Counsel, who will serve a set of standard interrogatories on such defendant. Response by such defendant shall be due within thirty (30) days of service. If plaintiffs' Liaison Counsel agrees, defendants may designate and serve interrogatories and their answers to such interrogatories which have been filed in other actions as their standard interrogatory answers pursuant to this section.

c. After the standard set of interrogatories is answered, plaintiffs may, upon application to and approval of the Special Master, in accordance with the time line, serve non-repetitive and/or previously not responded to interrogatories or requests for production of non-product identification documents to individual defendants. Plaintiffs' counsel are admonished to exercise the utmost good faith in determining the need for such further interrogatories. Any defendant may object thereto within thirty (30) days.

Copies of any objections shall be filed with the Special Master. The Special Master will then issue a recommended ruling on the defendant's objections.

d. Plaintiffs may submit to individual defendants standard product identification interrogatories with respect to particular worksites. A copy of these standard product identification interrogatories is annexed hereto as Exhibit "E." Defendants' objections to any such interrogatories shall be brought before the Special Master within seven (7) days after receipt of the proposed product identification interrogatories. The Special Master shall issue recommended rulings on the objections in an omnibus manner, if possible. Thereafter, unless a further ruling is sought from the Court, those interrogatories shall be answered in full by defendants to whom they are directed according to the CPLR.

e. Plaintiffs' Standard Interrogatories and Standard Product Identification Interrogatories and Demands to Produce including attachment I. thereto must be fully and substantially answered. For example, answers simply objecting to the interrogatories, stating that the requests are too broad or voluminous, or mere reference to the existence of a document repository are not acceptable.

f. Plaintiffs' Standard Interrogatories and Standard Product Identification Interrogatories and Demands to Produce (if applicable) must be verified as well as fully and substantially answered at least seven (7) days prior to the deposition of a Defendant Corporate Witness or Representative or the service of a No Opposition Summary Judgment Motion or the filing of a

Motion for Summary Judgment where such Interrogatories are required by this document. This includes the identification of all relevant witnesses and the production of all documents demanded.

3. Failure to Comply

Any party's failure to comply with Sections 2.e. and 2.f. above may lead to sanctions as deemed appropriate by the Court, including, but not limited to, the preclusion of evidence.

B. Document Requests

1. General Guidelines

a. Subject to Paragraph B.2. below, the provisions of CPLR 3120 shall govern all requests for documents. The requesting party shall specify a reasonable time, place, and manner for making the inspection. The request will describe each item with reasonable particularity.

b. Counsel are directed to exercise the utmost good faith in making requests for production and in responding to requests. Counsel are directed to exercise their best efforts to resolve on an informal basis disputes arising out of the document requests and responses and objections thereto.

2. Defendants' Requests for Documents

a. Counsel for the defendants have developed a standard document request to the plaintiffs which is captioned Defendants' Fourth Amended Standard Set of Interrogatories and Requests for Production of Documents, annexed hereto as Exhibit "C." This discovery request has been filed with the County Clerk under index number 40000 and is deemed to apply to all

cases without the necessity of further filing and service of the request in individual cases, except that defendants' Liaison Counsel shall serve a set of standard document requests upon a plaintiffs' counsel who has not previously appeared on behalf of some other plaintiff in this litigation who requests such service.

b. Plaintiffs shall serve upon all defendants in the action the requested documents in accordance with the time line set forth herein. If any of the requested documents are not in plaintiffs' possession, custody, or control, the plaintiffs shall provide a mutually agreed upon records retrieval service with the necessary authorizations to obtain such records from other persons, the costs of which shall be borne by each party receiving a copy of such records.

c. After the standard set of document requests is responded to, defendants may, in accordance with the time line, serve supplemental, non-repetitive requests for documents in any case as they deem appropriate. Defendants' counsel are admonished to exercise the utmost good faith in determining the need for such further document requests.

3. Plaintiffs' Requests for Documents

a. Plaintiffs have developed a single, standard document request to the defendants. A copy is annexed hereto as Exhibit "D." Plaintiffs are permitted to reword the standard document requests, as appropriate, to conform to the class of defendant to whom they are directed (e.g., premises owner, contractor).

b. To the extent not previously done, each defendant

shall produce or arrange for production of documents pursuant to plaintiffs' standard document requests within thirty (30) days of service, subject to agreement between plaintiffs' Liaison Counsel and the particular defendant's counsel about the specific time and place and on a reasonable schedule for production. Each defendant shall produce documents by serving one set of the requested documents on plaintiffs' Liaison Counsel, who will permit other plaintiffs' counsel to inspect and copy such documents as they desire, or by arranging for production of such documents at a document depository.

c. After the standard set of document requests is responded to, plaintiffs may serve supplemental, non-repetitive document requests in any case they deem appropriate. Counsel is directed to exercise the utmost good faith in making requests for discovery and in responding to such requests.

C. General Discovery Provisions

1. Disputes with regard to discovery shall be called immediately to the attention of the Special Master for resolution and shall not be relied upon by any party as a justification for not adhering to the time line unless otherwise directed by the Special Master.

2. Document production shall be in such form as will make clear the request to which the document is responsive.

3. Objections based on privilege shall clearly identify the privilege claimed and sufficient information concerning (i) the basis for the claim of privilege to establish *prima facie* the validity of the claim, and (ii) the privileged

information to permit identification of the information or document as to which privilege is claimed. If not so identified, the privilege shall be deemed waived. The parties shall negotiate in an effort to preserve the confidentiality of trade secrets.

4. Responses to requests calling for business or medical records shall state whether the record is or is not a record made in the course of a regularly conducted activity so as to be admissible under CPLR 4518. If not so described, the document shall be deemed admissible under the rule.

5. Any objection to discovery based on burdensomeness shall describe the burden with reasonable particularity. Any objection to the time, place, or manner of production or as to burdensomeness shall state a reasonably available alternative as a counterproposal.

6. Any response that a document cannot be located or information not determined shall state with reasonable particularity the efforts made to obtain the requested document or information.

7. Any party wishing to propound any discovery on a party in a given case other than that provided herein may do so only upon application to the Special Master or by stipulation with opposing counsel.

8. Plaintiffs shall produce to medical defense liaison counsel by the deadline set forth in the discovery schedule, all pathology and radiology materials received, prepared, procured and/or relied upon by plaintiffs' counsel or expert physicians. These materials shall include, but are not limited to: x-rays, PET scans, CAT scans, MRI's, radiological and/or sonographic studies, or

pathology blocks, tissues and slides (both stained and unstained, and including immunohistochemistry staining and controls and cytology), and, where applicable, materials obtained from autopsy. If the plaintiffs' counsel does not intend to obtain these materials, they shall provide an authorization to the defendants to obtain these materials.

If a facility or physician refuses to release these materials to either a plaintiff or defendant, counsel for the party seeking the material shall prepare a Judicial Subpoena and the Court in its discretion, upon notice to all parties, may sign an order or subpoena directing release of these materials.

9. Discovery shall continue after the filing of a Note of Issue pursuant to the uniform Rules for the New York State Trial Courts Section 202.21 upon directive of the Court or of the Special Master.

D. Previously Produced Documents

1. Upon notice of the time and place of its previous production, any document produced by a party, its predecessor or successor in any other asbestos personal-injury or death case shall be deemed produced in these cases, and any representations made by any defendant with respect to such document shall be deemed made in these cases. This paragraph is not intended to address the ultimate issue of admissibility at trial of any previously produced documents, and expressly leaves this issue for resolution by the trial court.

2. Plaintiffs may submit to each defendant one or more lists of exhibits of previously produced documents they intend in good faith to use at trial. Such list or lists shall be promptly reviewed by the respective defendants

and, subject to any objection as to relevancy which objection is reserved to the time of trial, each defendant so served shall respond within forty- five (45) days and state whether it objects to the admissibility of any document listed and, if so, the specific grounds for such objection.

IX. Medical Examinations of Plaintiffs

Defendants shall have an opportunity, if they desire, to obtain a single medical examination of the plaintiff in accordance with CPLR 3121 and in accordance with the time line set forth herein. A report of the medical examination together with copies of all tests shall be provided to plaintiff in accordance with the time line.

X. Depositions

A. General Guidelines

1. All depositions shall be taken in accordance with CPLR 3107. All depositions of parties shall be held in the New York City area unless otherwise ordered by the Court or agreed to by Liaison Counsel.

2. Where the deponent's health permits, notice shall be provided in writing to all named defense counsel a minimum of seven (7) days prior to the deposition. Posting on the NYCAL website does not constitute written notice.

3. The scheduler for Liaison Counsel must be notified prior to the issuance of a deposition notice. It is suggested that no more than six (6) depositions be scheduled for any one day, not including continuations of depositions, and, in any event, the final arbiter of the number of depositions

scheduled for any one day will be the Special Master.

4. All counsel shall avoid unnecessary and repetitive questioning of witnesses. Unless all parties otherwise agree, all objections, except as to the form of the question, shall be preserved until the time of trial. Any objections as to form shall be clearly stated, and upon request, the reasons given in order to enable the questioner to amend or change the question or correct any possible error as to form. All questions shall be answered except where a claim of privilege is made or the question is plainly improper and would, if answered, cause significant prejudice to any person, which claim, if not resolved, shall be forthwith brought to the Special Master for resolution.

5. In FIFO and *in extremis* cases, it is recommended that the deposition of plaintiffs and co-workers who testify in lieu of plaintiff will each be completed within a reasonable amount of time based on, among other things, the number of defendants in the case and the number of work sites. Counsel shall keep in mind the medical condition of the deponent and repetitive questions shall be avoided. Any issues with regard to the deposition shall be raised with the Special Master.

6. Depositions of family members (other than family members who provide product identification) should be postponed until just before trial.

7. Counsel may notice any deposition to apply to more than one case and shall use best efforts to ensure that appropriate depositions are noticed to apply to all appropriate cases or clusters.

8. A notice of deposition of a witness who is not a party shall

designate the areas of expected interrogation by the noticing counsel. For instance, when noticing the deposition of a co-worker of plaintiff, plaintiff's counsel shall indicate where and when the plaintiff and co-worker worked together and their respective job titles for those times. If any other counsel desires to interrogate a witness on different matters, such counsel shall serve a cross-notice of deposition and designate the areas of reasonably expected interrogation. Such areas shall be considered direct examination by that party, and as to such areas the cost of deposition shall be borne by that party. This shall be without prejudice to any party's right of examination as set forth in the next paragraph.

9. All depositions shall be conducted with due regard for the physical and emotional condition, health, and disability of the deponent. If a deposition is noticed to be taken outside of the New York City area contrary to Paragraph X.A.1., the noticing party must provide, together with the notice, medical certification that the deponent is unable to travel due to his/her present physical condition. Upon application to the Court, plaintiff's counsel may be required to pay the travel expenses incurred by one, but no more than two, defense counsel in attending any deposition noticed to be taken outside of the New York City area.

10. No plaintiff, co-worker or family member deposition in an extremis case or a FIFO case shall proceed unless completed plaintiff's standard interrogatory responses have been provided to defense counsel at least seven (7) business days prior to the deposition except with the express permission of

the Special Master. If counsel for plaintiff fails to provide substantially complete interrogatory responses defendants shall notify the Special Master. The failure to provide substantially complete interrogatory responses may result in adjournment of the deposition until plaintiff's counsel is in compliance with this rule.

11. There shall be a lunch break for every deposition of at least 45 minutes unless all counsel and the stenographer agree otherwise.

B. Depositions of Plaintiffs

Depositions shall be limited to depositions of plaintiff, plaintiff's spouse, and up to four co-workers, unless plaintiff intends to call more than those four co-workers as witnesses at trial. No other depositions of plaintiff, members of plaintiff's family, or co-workers shall be had except by order of the Special Master or the Court.

C. Depositions of Defendants

1. The parties shall make every effort to use depositions as well as other discovery obtained from defendants in the preparation of other cases both in this State and throughout the country for all purposes as if taken in each action in these cases in accordance with Paragraph XII of this Order. No other depositions of defendants shall be taken in these cases except pursuant to Paragraph X.C.2.

2. By request to the Special Master, any plaintiff may seek to serve notice of intent to take nonrepetitive depositions of defendants' representatives pertaining to issues which were not covered or not adequately covered by prior depositions of that defendant. Objections to said depositions

shall be brought by the affected defendant before the Special Master who shall issue a recommended ruling. Appeals from rulings of the Special Master shall be to the Court, as provided in Paragraph III.B. hereof. All corporate depositions shall be noticed at a time and place convenient to the witness, taking into account the expense to the defendants' witness.

D. Multi-jurisdictional Depositions

Any party may, with leave of the Court, conduct multi-jurisdictional depositions, either within or without this State in connection with other asbestos litigation, with respect to the following categories of witnesses:

1. any witness having charge of records of associations, trade organizations, Worker's Compensation commissions, insurance company records, or any other group or entity whose records contain documents or whose personnel have knowledge of facts or evidence common to all pending asbestos cases;
2. state of the art experts; or
3. corporate officials of the defendants.

XI. Videotape Depositions

A. Videotape Depositions of Seriously Ill Plaintiffs

1. A videotape deposition of a seriously or terminally ill plaintiff whose availability for trial may reasonably be doubted may be promptly taken on notice and without further order of the Court if plaintiff's counsel certifies as to plaintiff's medical condition and in accordance with Paragraph X.A.6. of this Order. Plaintiff's counsel should confer with defendants' liaison counsel

appointed for the trial cluster in which plaintiff's case is pending to schedule the deposition with reasonable notice, giving due consideration to plaintiff's medical condition.

2. Plaintiff shall provide to all defendants medical verification of the disease alleged and such medical and employment records as may be in plaintiff's or his/her attorney's possession prior to the videotape deposition. If notice of the deposition is given seven (7) days or less prior to the date when the deposition is to be taken, notice must be served by fax. In no event shall the taking of the videotape deposition be delayed more than ten (10) days from the date of receipt of plaintiff's counsel's certification and notice to take the videotape deposition except by order of the Court. Plaintiffs shall permit defendants to take an off camera discovery deposition at defendants' expense immediately prior to the videotape deposition.

B. Procedures as to Videotape Depositions

1. Videotaped depositions may be taken by any party upon service of proper notice of deposition for any use permitted by the CPLR.

2. Videotaped depositions of deponents who have not been previously deposed and who are not terminally ill may not be taken sooner than fifteen (15) days after the date of the taking of the witness' deposition by off-camera stenographic method ("discovery deposition") unless otherwise agreed to by counsel. Videotape depositions of deponents who have been previously deposed may be taken the day following the completion of the discovery deposition, if such discovery deposition was requested, unless otherwise agreed

to by counsel.

3. When a party taking a deposition, in addition to having the testimony taken stenographically and transcribed, also desires to have the testimony videotaped, the party shall include notice of the videotaping of the deposition in the written notice required.

4. The videotape deposition shall be taken before a notary public, who will put the witness on oath.

5. At the beginning of the deposition and prior to the witness taking the oath, the videotape operator shall record an identification sign. As the sign is being recorded, the operator shall, in addition, vocally record the information on the sign. The identification sign shall indicate the caption of the action, the date, the time, and the name of the notary public before whom the videotaped deposition is being taken. After the identification sign has been recorded, each participant shall identify himself or herself on camera, stating clearly the name, the address, and the role of the participant.

6. After the identification required by Paragraph XI.B.5. has been completed, the witness shall take the oath on camera.

7. After the witness has taken the oath, testimony shall be taken in accordance with the provisions herein. The taking of such testimony shall be videotaped in its entirety.

8. During the taking of a videotape deposition, the operator before whom the deposition is taken shall assure that the videotape records the witness in a standard fashion at all times during the deposition, unless all counsel

agree otherwise or unless, on motion before the Court, the Court directs otherwise. The operator shall limit the use of videotape camera techniques such as close-up views of the witness or other similar techniques to vary the head and shoulders view which is being recorded for presentation in the courtroom to an initial viewing of the witness and the background and up to two (2) close-up views to demonstrate physical injuries unless otherwise agreed upon or ordered by the Court. As an exception to the foregoing, the operator shall, at the request of the attorney questioning the witness, cause a close-up view of a deposition exhibit to be taken while the witness is being questioned concerning the exhibit.

9. When a videotape deposition has been taken, the videotape shall be shown immediately to the witness for examination, unless such showing and examination are waived by the witness and the parties.

10. The notary public before whom a videotape deposition is taken shall cause to be attached to the original videotape recording a certification that the witness was sworn by him or her and that the videotape recording is a true record of the testimony given by the witness. If the witness has not waived his or her right to a showing and examination of the videotape deposition, the witness also shall sign the certification. If the witness has exercised his or her right pursuant to Paragraph XI.B.9. to examine the videotape and, having done so, refuses to certify that the videotape recording is a true record of his testimony, the notary public before whom the videotape deposition was taken shall so note on the certification form and shall further state the reasons given by the witness for refusing to certify that the videotape recording is a true record of

his or her testimony. The operator who videotaped a deposition pursuant to the provisions of this Order shall execute the following written certification prior to the beginning of the videotape deposition:

I _____ hereby affirm that I am familiar with the provisions of the New York City Asbestos Litigation Case Management Order pertaining to videotape depositions and will ensure that the videotaping of this deposition is done in compliance with these provisions and in an impartial manner.

11. Upon payment of reasonable charges therefor, the operator before whom the deposition was taken shall furnish a copy of the videotape deposition in the form of a videotape or an audio recording to any party or to the deponent.

12. The party taking the deposition shall be responsible for ensuring that the necessary equipment for videotaping the deposition is present at the time the deposition is taken. The party desiring to use the videotape deposition for any purpose subsequent to the taking of the deposition shall be responsible for ensuring that the necessary equipment for playing the videotape deposition back is available when the videotape deposition is to be used. When a videotape deposition is used during a hearing, a trial, or any other court proceeding, the party first using the videotape deposition in whole or in part shall ensure the availability of the same or comparable videotape playback equipment to any other party for such other party's use in further showing the videotape deposition during the hearing, the trial, or other court proceeding in question.

13. The cost of the videotape and the cost of recording the

deposition testimony on videotape shall be borne by the party taking the videotape deposition. The ownership of the videotape used in recording testimony shall remain with the party taking the videotape deposition.

14. A party wishing to take a further videotape deposition, not covered herein, must make application to the Court.

XII. Use of Discovery and Depositions from Other Cases

A. Various employees of parties, former employees of parties, and witnesses with knowledge have been deposed in other cases involving alleged asbestos-related personal injuries, and there has been extensive document discovery conducted in other cases involving alleged asbestos-related personal injuries. To avoid undue expense, duplication and unnecessary imposition on counsel, the parties, and the witnesses, parties may utilize depositions taken in other state and federal jurisdictions and cases where a party or a predecessor or successor in interest had notice and opportunity to attend and participate as provided in CPLR 3117. The issue of the admissibility of this deposition testimony at trial against a particular defendant is expressly left for resolution by the trial court.

B. Any party seeking to use any portion of such prior deposition as substantive evidence at trial may, at any time, advise counsel for any party against whom a deposition may be used of the deposition it intends to offer as substantive evidence. Any party objecting to the use of the deposition shall file a statement setting forth the specific objections and grounds within thirty (30) days. Such depositions can be used as if noticed and taken in these cases against

those parties or their successors-in-interest. If objection is made, the objecting party shall make an appropriate in limine motion setting forth the grounds it asserts for excluding the use of the deposition.

C. All deposition testimony and testimony obtained and admissible in any New York federal court or in any judicial district in the State of New York shall be admissible in the state actions pending in this Court.

XIII. Docket Lists and Trial Clusters

A. There will be three dockets: an Accelerated Docket, an Active Docket and a Deferred Docket. Actions will be set for trial in accordance with Paragraphs XIV ("Accelerated Trial Clusters") and XV ("FIFO Cases") of this Order.

1. Pursuant to Paragraph XIV of this Order, the Accelerated Docket will be comprised of actions brought by plaintiffs who are terminally ill from an asbestos-related disease with a life expectancy of less than one year. Cases on the Accelerated Docket will be set for trial in accordance with Paragraph XIV ("Accelerated Trial Clusters"). All other cases will be assigned to the Active Docket or the Deferred Docket.

2. Pursuant to Paragraph XV of this Order, the Active Docket will be comprised of all actions brought by or on behalf of plaintiffs who have a functional impairment sufficient to warrant trial and meet the minimum criteria set forth in Paragraph XV.A.6. of this Order. Cases that have been approved for the Active Docket will be set for trial in accordance with Paragraph XV of this Order ("FIFO Cases").

3. Pursuant to Paragraph XV of this Order, the Deferred Docket will be comprised of all actions brought by or on behalf of plaintiffs who do not meet the minimum criteria set forth in Paragraph XV.A.6. of this Order.

B. At the request of the Special Master, each of the plaintiffs' firms having asbestos cases pending in the Supreme Court of New York, New York County, shall file with the Special Master a current chronological list of each and every active docket certified asbestos personal-injury/wrongful death case pending under this Court's jurisdiction. The cases shall be listed by filing date, or, where appropriate, certification date. Copies of the case lists shall be posted on the NYCAL website along with all index numbers associated with that plaintiff.

C. All cases pending in the Supreme Court of New York, New York County, presently included in the NYCAL Master File which are not on plaintiffs' case lists or any amendments thereto are hereby dismissed without prejudice. Any case being dismissed pursuant to this paragraph may be reinstated to its chronological position on this Court's asbestos calendar (and deemed filed as of its original date of filing) upon plaintiffs' counsel notifying the Court, the Special Master and the parties that the failure to list a particular case on a particular firm's inventory filed with this Order was due to inadvertence, mistake, or other good cause.

XIV. Accelerated Trial Clusters

A. The Court, having in mind the directions of, and its discretion under, the provisions of CPLR 3407, will assign for trial on the first Monday in April and the first Monday in October of each calendar year a special Accelerated Trial

Cluster of living plaintiffs. The Accelerated Trial Cluster will be designated on the first Thursday of the preceding November (for April cluster) and May (for October cluster). Letter applications for assignment to the Accelerated Trial Cluster shall be provided to the Court, the Special Master and the defendants (by fax or FedEx) by no earlier than the third Thursday of the preceding August (for April cluster) and February (for October cluster), and no later than ten (10) days before the designation date. Such letter application will be accompanied by a statement that the plaintiff is terminally ill, the nature of the illness, and the plaintiff's life expectancy, if known. To be eligible for inclusion in an Accelerated Trial Cluster, a plaintiff must be alive and have a pending lawsuit at the time of the application. Unless plaintiffs' counsel seeks an extension of time from the Special Master, counsel must provide to defendants the following information at the time the letter application for assignment to the Accelerated Trial Cluster is made:

1. answers to interrogatories in the form approved by the Special Master;
2. responses to standard request for production; and
3. signed authorizations for medical, employment, social security, disability, workers compensation, union, military and tax records to a mutually agreed upon records retrieval service.

Defendants shall file any objections with the Court and the Special Master, and serve upon plaintiffs (by fax or FedEx) by the first Wednesday of each November and May.

B. Any plaintiff who has failed to file an application and supporting materials for inclusion in a particular Accelerated Trial Cluster within the time periods specified above may make special application to the Special Master for an exception to the provisions of this section in the interest of justice and for good cause shown. The presumption, however, shall be that no cases shall be approved for a given Accelerated Trial Cluster if timely application has not been made, as provided herein. Upon a finding of exceptional circumstances, the Special Master may make recommendations to the Court for inclusion of additional in extremis cases in a given Accelerated Trial Cluster.

C. The method of trial of cases assigned to the April and October Accelerated Trial Clusters will be determined by the Court in light of all applicable legal considerations.

D. Each case in an Accelerated Trial Cluster will be prepared strictly in accordance with the discovery order entered for those cases. The discovery order applicable to each particular Accelerated Trial Cluster will be based upon the time line set forth in the model schedule annexed hereto as Exhibit "F." The particular discovery order applicable to a specific Accelerated Trial Cluster will be published by the Special Master together with the list of cases to be included in the cluster.

E. Failure to meet a deadline in accordance with the applicable discovery order, unless excused by the Special Master in writing within ten (10) days of the deadline for good cause shown, will result in sanctions upon the offending party as set forth in Paragraph XV.E. herein.

XV. FIFO Cases

A. FIFO Trial Clusters

Only cases that are on the Active Docket shall be assigned to FIFO Trial Clusters. In order for a case to be placed on the Active Docket it must meet the medical criteria set forth below. For purposes of this Order, the following definitions apply:

1. A “board-certified pulmonary specialist” or “board-certified internist” means a physician currently actively licensed to practice medicine in one or more of the States of the United States who is currently actively certified by the American Board of Internal Medicine in the Subspecialty of Pulmonary Medicine (pulmonary specialist) or the American Board of Internal Medicine (internist).

2. A “currently certified B-reader” shall refer to an individual who has successfully completed the NIOSH-sponsored X-ray interpretation course and whose NIOSH-certification is up-to-date.

3. “ILO grade” shall refer to the radiological ratings of the International Labor Office set forth in “Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses” (1980).

4. “Pulmonary Function Testing” shall refer to spirometry, lung volume testing and diffusing capacity testing which conform to quality criteria established by the American Thoracic Society (ATS) and is performed on equipment which meets ATS standards for technical quality and calibration, all as set forth in 20 C.F.R. 718.103 and Appendix B thereto or in the ATS guidelines in

144 American Review of Respiratory Disease 1202-18 (1991). Each subject must be tested with and without inhaled bronchodilators, with best values taken. Predicted values for spirometry and lung volumes shall be those published by Morris, Clinical Pulmonary Function Testing, 2d ed., Intermountain Thoracic Society (1984).

5. The “minimum criteria for activation” shall be defined as follows:

Non-Malignant Changes Shown By Testing

- a) Chest X-rays which, in the opinion of a currently certified B-reader, show small irregular opacities of ILO grade 1/0; and pulmonary function testing that, in the opinion of a board-certified pulmonary specialist or internist, shows either:
 - (i) $FVC < 80\%$ of predicted value with $FEV_1/FVC > 68\%$ (actual value), or
 - (ii) $TLC < 80\%$ of predicted value;

or
- b) Chest X-rays which, in the opinion of a currently certified B-reader, show small irregular opacities of ILO grade 1/1 or greater; and Pulmonary function testing that, in the opinion of a board-certified pulmonary specialist or internist, shows either:
 - (i) $FVC < 80\%$ of predicted value with FEV_1

1/FVC > 65% (actual value), or

(ii) TLC < 80% of predicted value;

or

c) Chest X-rays which, in the opinion of a currently certified B-reader, to a reasonable degree of medical certainty, demonstrate bilateral asbestos-related pleural thickening which has an ILO grade B2 or greater and with pulmonary function testing that, in the opinion of a board certified pulmonary specialist or internist, to a reasonable degree of medical certainty shows either

(i) FVC < 80% of predicted value with FEV-1/FVC > 68% (actual value), or

(ii) TLC < 80% of predicted value, and with a statement by a board-certified pulmonary specialist or internist that, based upon a complete review of the claimant's entire medical record, to a reasonable degree of medical certainty, the asbestos-related changes are a substantial contributing factor to the pulmonary function changes;

or

Non-Malignant Changes Shown by Pathology

- d) In the case of a claim brought on behalf of a decedent, if representative lung tissue of the decedent is available, a report by a board-certified pathologist, stating that, to a reasonable degree of medical probability, more than one representative section of lung tissue that is unaffected by any other process (e.g., cancer or emphysema) demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies, and that there is no other more likely explanation for the presence of the fibrosis;

or

Diagnosis of Cancer

- e) A diagnosis of cancer, which is demonstrated by a medical report of a board-certified internist, pulmonary specialist, oncologist or pathologist showing the diagnosis as a primary cancer, which states to a reasonable degree of medical certainty that the cancer in question is caused by asbestos exposure.

B. Active Docket

1. A case on the Active Docket shall be clustered and scheduled for trial strictly in FIFO order. For a case on the Active Docket, FIFO order is determined by the date that the action was commenced, except that, for

any case that:

- a) is commenced after the date of this Order which initially is on the Deferred Docket, and which is later placed on the Active Docket by stipulation or order of the Court granting leave to amend the complaint.

or

- b) was commenced before the date of this Order but not transferred to the Active Docket by timely stipulation or motion, pursuant to Paragraph B.2, the FIFO order shall be determined by the date of said stipulation or order.

2. Commencing with the June 2012 FIFO Trial Group, the Special Master shall publish FIFO Trial Groups of sixty (60) cases each, made up of cases from NYCAL's Active Docket. FIFO Trial Groups will be published for each of the following eight (8) months each year:

- 1 February
- 2 March
- 3 May
- 4 June
- 5 August
- 6 September
- 7 November
- 8 December

On an annual basis, the Court may consider increasing or decreasing the size of each FIFO Trial Group or the number of FIFO Trial Groups published

each year depending on the number of cases included on the Active Docket or submitted for inclusion on the Active Docket at that time.

3. Discovery for each Monthly FIFO Trial Group shall comply with the schedule provided in Exhibit “G.”

4. The Monthly FIFO Trial Group will be published by the Special Master at least thirteen (13) months prior to the scheduled trial date.

5. The sixty (60) case Monthly FIFO Trial Groups shall be listed for Trial by date of original filing except by agreement of Plaintiff's and Defendant's Liaison counsel, by recommendation of the Special Master or by Order of the Court.

6. Failure to comply with the schedules established for each FIFO Trial Group may result in dismissal of the Cluster's cases.

C. Deferred Docket

1. The Deferred Docket consists of all actions brought by or on behalf of claimants who do not meet the minimum criteria for activation. All proceedings with respect to cases on the Deferred Docket are stayed, except for stipulations (as described below) to transfer cases to the Active Docket, as hereinafter defined, and motions for leave to amend the complaint (as described below), until further order of the Court.

2. Any case that is commenced after the date of this order is deemed to be on the Deferred Docket, unless the complaint, as initially filed and served, alleges with specificity that the party claiming injury from asbestos exposure meets the minimum criteria for activation and annexes the requisite

documentation as evidence thereof. No party may file a Request for Judicial Intervention for any Deferred Docket case commenced after the date of this order, unless it is for the purpose of filing a motion.

3. Any case that

- a) is commenced after the date of this order and initially deemed to be on the Deferred Docket

or

- b) was commenced before the date of this order but not transferred to the Active Docket by timely stipulation or motion, under the procedures set forth above in Paragraph B.2, shall be removed from it and placed on the "Active Docket," as described below, *if*

- (i) plaintiffs and Special Liaison Counsel for the defendants (as hereinafter defined) stipulate that the party allegedly injured from asbestos exposure now satisfies the minimum criteria for activation,

or

- (ii) The plaintiff or plaintiff(s) (a) move for leave to amend the complaint so as to allege with specificity that the party injured from asbestos exposure meets the minimum criteria for

activation and (b) annex the requisite documentation to leave to amend the complaint. Leave to amend shall be denied and the case shall remain on the Deferred Docket if the minimum criteria for activation have not been satisfied.

D. Defense Discovery and Medical Liaison Counsel

1. Defendants shall appoint a liaison counsel for discovery for each FIFO Trial Cluster. Defendants may appoint separate liaison counsel for fact discovery and medical discovery in the same FIFO Trial Cluster. These counselors will be identified by letter to the Special Master, with a copy to plaintiffs' counsel and all defense counsel in a particular FIFO Trial Cluster, within seven (7) days of the publication of the list of remaining defendants for that FIFO Trial Cluster.

2. The purpose of the appointment of liaison counsel for defendants in a FIFO Trial Cluster is to facilitate implementation of this Order and to minimize the number of disputes which require adjudication by the Special Master and the Court. Defendants' liaison counsel shall be responsible for communication with plaintiffs' counsel on discovery issues, including accommodation of unforeseen problems and scheduling of discovery as necessary outside of the discovery order. Liaison counsel shall have the authority to extend deadlines for the plaintiffs' compliance with discovery deadlines subject to the approval of the Special Master.

3. Plaintiffs' counsel shall deliver to defense medical liaison counsel all radiology and pathology materials for cases in the FIFO Trial Cluster in accordance with the discovery schedule.

E. Discovery Schedules (Time Lines) and Sanctions

1. FIFO Trial Clusters and discovery schedules will be published by the Special Master. The discovery order applicable to a particular FIFO Trial Cluster will be based upon the time line set forth in the model schedule annexed hereto as Exhibit "E." Thirty (30) days after the publication of a FIFO Trial Cluster, plaintiffs shall provide to defendants in these cases a list of all remaining defendants in the cases.

2. Each case in each FIFO Trial Cluster will be prepared strictly in accordance with the discovery order entered for those cases. Any failure to comply with a deadline in the discovery order for a FIFO Trial Cluster, unless excused by the Special Master in writing within ten (10) days of the deadline for good cause shown or agreed to by liaison counsel and plaintiff's counsel, shall be deemed to be a willful failure to disclose within the meaning of CPLR 3126. The parties will be subject to the sanctions provided herein for failure to comply with the discovery order. The following sanctions will apply, unless good cause is shown for a failure to comply:

a. Plaintiffs' failure to answer defendants' standard set of interrogatories or respond to defendants' standard requests for production of

documents or provide properly executed document authorizations on or before the date provided in the discovery order shall result in those cases in which said material has not been provided being removed from the FIFO Trial Cluster. Any such case will not be again placed on a calendar for trial any sooner than twenty-four (24) months from the original trial date for that case.

b. Failure to fully answer interrogatories, such as failure to identify lay witnesses (including their last known addresses), or failure to provide the names and addresses, if known, of treating physicians on or before the dates that information is required pursuant to the discovery order will result in preclusion of the witness, except as permitted by Paragraph XV.E.2.c. hereof. Similarly, fact witnesses and parties timely noticed for depositions who are not made available for deposition prior to the closure date set forth in the discovery order shall be precluded, and depositions of fact witnesses who have not been properly identified in interrogatory answers shall not be admissible, except as permitted by Paragraph XV.E.2.c. hereof.

c. All parties shall retain the right to file amended answers to interrogatories up to thirty (30) days prior to commencement of jury selection as to information not known or knowable upon reasonable inquiry by the parties or their counsel at the time they initially responded to interrogatories. However, all parties may upon motion to the Special Master add additional fact witnesses upon a showing of good cause and the showing that the addition shall not be to the opposing parties' prejudice.

d. Depositions of plaintiffs or plaintiffs' fact witnesses not

noticed for dates on or before the closure dates designated in the discovery order will not be taken, except as provided in Paragraph XV.E.2.c. hereof.

e. The defendants must file with the Clerk of the Court any third-party complaint pursuant to the deadline established in the discovery order applicable to a particular FIFO trial (as described in Paragraph XV.E. 1. hereof). Within three (3) business days of the filing of any third-party complaint, the third-party plaintiff must deliver to the third-party defendant's counsel, if known, a copy of the third-party complaint, the plaintiff's complaint, the plaintiff's interrogatory responses and, if counsel has not previously appeared in the NYCAL, then third-party plaintiff also will provide a copy of this Order. At the third-party defendant's request, the third-party plaintiff shall provide a copy of the plaintiff's deposition transcript at the expense of the third-party defendant. Within three (3) business days of the filing of any third-party complaint, the third-party plaintiff shall deliver to plaintiff's counsel a copy of the third-party complaint. Failure to provide timely notice of the third-party action to the third-party defendant's counsel or to plaintiff's counsel may result in dismissal of the third-party action. Nothing contained in this paragraph shall alter or alleviate any obligation of the third-party plaintiff regarding service of process as set forth in the CPLR. The third-party plaintiff, however, must deliver to the third-party defendant or its agent any materials necessary to effect service within five (5) business days of the filing of any third-party complaint.

f. Third-party complaints not filed on or before the filing deadline set forth in the discovery order may only be filed upon motion and with

permission of the Special Master or the Court after appeal of a ruling by the Special Master. Any motion to file a third-party complaint after the filing deadline shall be made upon notice to all remaining parties and putative third-parties. The motion must include an affidavit stating when the information used to substantiate the filing of the third-party complaint became available and that such information was not reasonably available prior to the filing deadline.

g. A defendant's failure to answer plaintiffs' standard and case specific product identification interrogatories and request for production of documents within the deadlines imposed by the discovery order, or a defendant's failure to produce a witness for a permitted deposition of that defendant, shall result in that defendant having all of its defenses stricken as to each plaintiff for whom it fails to provide said discovery.

h. The testimony of an expert witness whose report and any supporting x-rays and pathology materials reviewed by the expert have not been provided by the deadline in the discovery order is hereby precluded and any report by the expert may not be used for any purpose at trial. Production to defendants of x-rays and pathology materials provided to plaintiffs' experts is ultimately the responsibility of plaintiffs' counsel.

i. Any previously undeposed (in whole or in part) expert who does not submit to deposition pursuant to timely notice in accordance with the discovery order shall be precluded from testifying in that case.

j. Any witnesses or exhibits (presuming earlier provisions of the discovery order have been complied with) not identified on or

before the discovery order deadline for filing witness and exhibit lists shall be precluded.

k. Any plaintiff not made available on reasonable notice for independent medical examination at least two weeks prior to the discovery order deadline for defendants' production of expert witness reports will be removed from the FIFO Trial Cluster. No plaintiff shall be required to submit to more than one medical examination at defendants' request within the same discovery period.

l. Any plaintiff who intends to file a proof of claim form with any bankrupt entity or trust shall do so no later than ten (10) days after plaintiff's case is designated in a FIFO Trial Cluster, except in the in extremis cases in which the proof of claim form shall be filed no later than ninety (90) days before trial.

m. Each plaintiff must purchase a Request for Judicial Intervention ("RJI") within one (1) month of the time the case is listed in a FIFO Trial Cluster. As to those cases in an Accelerated Trial Cluster, as set forth in Paragraph XIV herein, plaintiff must purchase an RJI no later than three (3) months prior to the trial date set in the discovery order applicable to plaintiff's case. Failure to timely file an RJI will result in removal of the case from the FIFO Trial Cluster (or Accelerated Trial Cluster). Any such case will not be again placed on a calendar for trial any sooner than twenty-four (24) months from the original trial date for that case.

n. All Notes of Issue must be filed no later than three

months prior to the scheduled trial date.

3. Any party wishing to avail itself of the sanctions provided herein shall make a written application, on notice, to the Special Master. Opposing papers shall be served within five (5) days of receipt of the application. The Special Master will issue a ruling within five (5) days thereafter. Said ruling shall be the law of the case unless relief therefrom is granted by the Court pursuant to an Order to Show Cause.

F. Settlement Conferences

1. The Special Master will convene and conduct mandatory settlement negotiations as in her discretion are needed. The negotiator representing each party at the mandatory settlement conferences must have full authority to negotiate and commit his/her client(s) to settlement.

2. All parties are encouraged and directed to conduct good faith settlement negotiations of an entire trial cluster and not solely individual cases or groups within a particular trial cluster.

XVI. Summary Judgment Motions

1. Defendants' motions for summary judgment based on lack of product identification may not be filed in a particular case until (1) the case has been assigned to a trial cluster, (2) that defendant has responded to the plaintiffs' product identification discovery, and (3) until after that defendant has made a request for dismissal pursuant to Paragraph XVI. 4, which includes an email request to the Special Master regarding the failure to respond to an NOSJM.

2. Stipulations of discontinuance should not be served except in connection with settlements.

3. Not later than thirty (30) days after the scheduled date for completion of plaintiffs' depositions in a cluster, plaintiff's counsel in each case shall notify each defendant against whom plaintiff intends to voluntarily discontinue its action.

4. Each defendant seeking a discontinuance by reason of notice from plaintiff or otherwise shall submit to plaintiff's counsel for signature, with notice to all parties, a signed No Opposition Summary Judgment Motion ("NOSJM") in the form annexed as Exhibit "H." The moving defendant shall prepare and retain an affidavit or other proof of service on all parties. No NOSJM shall be served before the scheduled date for the completion of plaintiffs' discovery depositions in a cluster or until the plaintiff's discovery deposition is completed, whichever is sooner. With respect to NOSJMs based on lack of product identification, no NOSJM shall be served before defendant has supplied standard NYCAL discovery except with the permission of the Special Master.

5. Upon receipt of a NOSJM, plaintiff's counsel shall promptly (a) sign the NOSJM and mail the original back to defendant's counsel, or (b) advise defendant's counsel in writing of the grounds for not signing the NOSJM. If defendant's counsel does not receive a response within ten days, counsel shall send a fax or e-mail reminder to plaintiff's counsel. If a response is not received within five days thereafter, defendant's counsel shall notify the Special Master by e-mail, copying plaintiff's counsel. It is anticipated that this procedure will result

in no unopposed motions before the Court.

6. When a plaintiff discontinues an action against a defendant, such defendant shall serve written notice of the discontinuance upon all parties to the action and shall thereafter be deleted from the lawsuit unless, within ten (10) days of service of the notice, a co-defendant serves a written objection to the deletion on the ground that it intends to pursue a cross-claim against that defendant.

7. Within twenty (20) days from the date of service of the NOSJM by the moving defendant, any cross-claimant who opposes summary judgment dismissing the action shall serve on the Special Master and all parties, written notice of opposition stating grounds for opposing the motion. The Special Master shall thereafter schedule and hear argument on the opposition and shall issue an advisory ruling at the conclusion of the hearing. Any party objecting to the Special Master's advisory ruling shall, with five business days, serve written notice of objection on the Special Master and all parties who participated in the hearing. The objection shall be referred by the Special Master to the Court for a de novo hearing.

8. Defendants shall deliver fully executed NOSJMS to the Court on Wednesdays to be "so ordered" and filed. No NOSJM will be accepted if the signatures are more than thirty (30) days old.

9. If plaintiff's counsel fails to reply to the NOSJM request or if there is a dispute regarding the basis for plaintiff's refusal to sign the NOSJM, said defendant shall be free to file a motion for summary judgment based on

product identification grounds after consulting the Special Master.

10. Formal motions for summary judgment on any grounds other than product identification may be made at any time as provided by the CPLR.

11. It is anticipated that the number of formal motions to the Court will be few; however, if it becomes necessary to make a formal motion for summary judgment, then defendants shall make such motion as soon as permissible under the guidelines set forth herein to ensure that it will be heard before trial commences.

12. In order to further the expeditious hearing and resolution of all formal summary judgment motions, there shall be no more than two (2) three-week adjournments for the filing and submission of any and all opposition to the motion. A reply is permitted only to the extent that it contains new information or argument not raised in the original moving papers. A reply should never merely restate the original basis for the motion.

XVII. Punitive Damages

Counts for punitive damages are deferred until such time as the Court deems otherwise, upon notice and hearing.

XVIII. Miscellaneous

The Court recognizes that cooperation among counsel and parties is essential for the orderly and expeditious resolution of this litigation. The communication of information among the plaintiffs' counsel, among defense counsel, and among defendants shall not be deemed a waiver of the attorney-client privilege, the protection afforded by the attorney work-product doctrine, or

any other privilege to which a party may be entitled. Any cooperative efforts described above shall not, in any way, be used against any of the parties, shall not constitute evidence of conspiracy, concerted action, or any wrongful conduct, and shall not be communicated to the jury. The exchange of information or documents by counsel will not, by itself, render such information or documents privileged.

XIX. Death Of Plaintiff

A. Accelerated and FIFO Trial Clusters

1. Counsel for plaintiff shall notify all defendants of the death of plaintiff within 10 (ten) days of learning of plaintiff's death. Such notice shall be made in writing via facsimile with a copy by e-mail to the NYCAL website webmaster for posting on the NYCAL website.

2. Promptly upon receipt of notice of the appointment of an estate representative ("Notice of Appointment"), counsel for plaintiff shall file and serve an amended complaint.

3. Promptly upon receiving Notice of Appointment, counsel for plaintiff shall cause new medical release authorization forms to be executed by the estate representative. A copy of Letters of Administration or their equivalent, the executed medical authorizations and the death certificate shall be sent to the medical record provider and medical liaison counsel. If an autopsy has been conducted, medical liaison counsel shall be notified.

4. Counsel for plaintiff shall send a copy of the death certificate

to all defendants as soon as is practicable.

B. All Other FIFO Cases

The service of an amended complaint shall be sufficient notice of the death of plaintiff.


C. All Cases

Where an amended complaint has been filed and served, a motion to substitute parties, pursuant to CPLR § 1015, will be deemed to have been made and granted.

The Special Master is hereby directed to post a copy of this Order on the NYCAL website.

Date: 5-26, 2011
New York, New York

IT IS SO ORDERED:



Sherry Klein Heitler, J.S.C.