

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

----- X  
In Re: NEW YORK CITY ASBESTOS LITIGATION :  
----- X  
: This Document Relates to: : NYCAL  
: :  
: (MENDEZ, J.)  
: RICHARD AQUITATO, As Executor For The Estate Of :  
SALVATORE AQUITATO, And JOHN AQUITATO, : Index No. 190253/15  
Individually, et. al. :  
: :  
Plaintiffs, :  
: :  
-- against -- : **AFFIRMATION IN OPPOSITION**  
: **TO PLAINTIFFS' MOTION FOR**  
: **A JOINT TRIAL**  
AMCHEM, et al., :  
: :  
Defendants. :  
: :  
----- X

Stephen Novakidis, an attorney duly admitted to practice law before the Courts of the State of New York, affirms the following to be true under the penalty of perjury:

1. I am a member of the law firm of Malaby & Bradley, LLC, attorneys for several defendants in these cases<sup>1</sup>. This opposition is also being served on behalf of all other remaining defendants (collectively "Defendants") in the below twenty-two (22) cases.

2. I have prepared this Affirmation upon information and belief, based upon the files for these matter maintained by this office, which I believe to be true and accurate.

3. I respectfully submit this Affirmation, on behalf of Defendants in Opposition to Plaintiffs' Motion for a Joint Trial of the following twenty-two, in various groupings, unrelated cases<sup>2</sup>.

<sup>1</sup> Malaby & Bradley represent the following defendants in this group of cases: Crown Boiler, Roper Pump, Blackmer Pump, Hyster, Sears, Qualitex, Dean Pump, and Superior Boiler Works.

|                                |                     |
|--------------------------------|---------------------|
| 1. SALVATORE AQUITATO (dec)    | Index No. 190253/15 |
| 2. JAMES BISSONETTE (dec)      | Index No. 190321/15 |
| 3. ROGER CARILLI               | Index No. 190252/15 |
| 4. SPYRANGELOS DEBONERAS (dec) | Index No. 190077/15 |
| 5. ERNEST DECURTIS (dec)       | Index No. 190251/15 |
| 6. RICHARD EBANKS (dec)        | Index No. 190320/15 |
| 7. BERT FORMANSKI (dec)        | Index No. 190339/15 |
| 8. THOMAS GALLEN               | Index No. 190343/15 |
| 9. WAYNE GIBSON (dec)          | Index No. 190187/15 |
| 10. ERNEST GILBERT             | Index No. 190198/15 |
| 11. CYRIL GREENE (dec)         | Index No. 190204/15 |
| 12. WILLIAM HEUER (dec)        | Index No. 190205/15 |
| 13. ELSA MARTINEZ (dec)        | Index No. 190208/15 |
| 14. KARL MOELLER (dec)         | Index No. 190314/15 |
| 15. DOMINICK PERILLO (dec)     | Index No. 190264/15 |
| 16. LEON POGACNIK              | Index No. 190340/15 |
| 17. JEROME RALLO               | Index No. 190206/15 |
| 18. DANTE RICCOBONI (dec)      | Index No. 190352/15 |
| 19. ROGER SAHM (dec)           | Index No. 190174/15 |
| 20. DAWN SCOTT (dec)           | Index No. 190305/15 |
| 21. JOANNE SIMONS              | Index No. 190353/15 |
| 22. ROBERT WISSE               | Index No. 190313/15 |

4. Plaintiffs seek to join the above cases into the following seven (7) groups:

Group 1: Carilli, Decurtis (dec), Gallen, Gilbert, Riccoboni (dec), Sahn (dec)

Group 2: Martinez (dec), Scott (dec), Simons

Group 3: Bissonette (dec), Deboneras (dec), Ebanks (dec), Formanski (dec),  
Gibson (dec), Heuer (dec), Moeller (dec)

Group 4: Greene (dec), Rallo

Group 5: Perillo (dec), Wisse

Group 6: Pogacnik

Group 7: Aquitato (dec)

---

<sup>2</sup> It is Defendants position that the First Department's decision setting aside punitive damages until such time as proper procedures for their utilization can be created is still in place and that punitive damages will not be sought in these cases. Should this Court decide otherwise, Defendants would seek leave to brief that issue.

## I. CONSOLIDATION IN THE NEW YORK CITY ASBESTOS LITIGATION

5. In the New York City Asbestos Litigation (“NYCAL”) consolidation of asbestos cases has, quite unfortunately, become all too common. Plaintiffs and courts alike typically cite to conservation of judicial resources, the large caseload of asbestos matters, litigation costs, etc. as reasons for the necessity of consolidation. With consolidation comes jury selection that takes weeks, trials that take months and verdicts that reach eight or even nine figures (almost none of which are actually sustainable) have also become standard. It is important to narrow the issue, it is not Defendants’ position that this Court *cannot* consolidate cases for joint trial, the law, and the appellate courts have made it clear that this Court can consolidate cases. The issue is *should* this Court consolidate these cases? It is Defendants’ position that a close examination of the facts and circumstances surrounding *these cases* leads to the conclusion that this Court ought not grant plaintiff’s motion.

6. There are countless examples of consolidated trial groups that include weeks-long jury selections, that are begun with over a dozen defendants, and that involve asking jurors to sit for months on end. Every Judge that presides over asbestos cases in New York City has had this traveling circus in their courtroom. Every Court has dealt with long and drawn out trials, many of which end up in absurdly high verdicts that judges then, almost universally, must spend their time on post-trial motion practice and lengthy remittitur. Since 2011 there have been approximately twenty-nine (29) asbestos verdicts in New York City. The last six (6) years has seen an increase in the amount of cases reaching verdict. While there are many reasons for this increase, the courts, and the parties involved must reevaluate the process under which these trials are taking place.

7. Time and again Plaintiffs argue that Defense concerns are overstated, that the issues Defendants raise as to the prejudice inherent in consolidation are simply not there. Plaintiffs typically argue the likelihood that all defendants will settle. They argue the unlikely nature of the trial actually getting underway, never mind reaching a verdict. They argue that defendants overestimate how long the process would take, etc. They argue that *occasionally* a consolidated trial ends in a verdict that is “reasonable” and that *occasionally* a single plaintiff trial ends in a very large verdict. Plaintiffs are *occasionally* right. However, as the empirical data shows below, on the whole, in more cases than not, consolidated trials lead to more plaintiff verdicts, and larger verdicts, than single plaintiff trials. These realities are, at this point, self-evident. Does it happen every time? No. Is a 100% prejudice threshold what Defendants must prove to avoid consolidation? Clearly, the answer to that ought to be “no.” On the whole, consolidated trials, clearly, and empirically, favor plaintiffs and prejudice Defendants to an alarming degree.

8. In New York City, recent history has proven a fairly clear and direct correlation between the length of the trial, the number of cases consolidated and the size and manner of the verdict. It is Defendants’ position that the reasons for this correlation are myriad, no one issue alone creating the disparity. Each of the issues addressed in this paper work together to create an undeniable prejudice to Defendants that has resulted in some of the largest asbestos verdicts in the country. While a single plaintiff trial does not guarantee a defense verdict, nor is any defendant seeking any such guarantee, history has shown, with very few exceptions, a consolidated trial all but ensures a plaintiffs verdict, and typically at absurdly high values.

9. When courts consolidate multiple cases for trial one of the first issues encountered is the potential length of the consolidated trial. The adverse effect on the potential jury pool that

occurs when those potential jurors are advised that a trial may take up to three (3) months (as they were told in Assenzio and Bryant), or eight (8) weeks (as they were told in Dummitt), versus one (1) to two (2) weeks (as they were told in Curry, Dietz, Zaug and Benton), is clear, obvious and devastating. Common sense, and firsthand experience, has proven that when a pool of potential jurors is advised that a trial may take up to three months (as opposed to two weeks) there is a thinning of that pool that is stark. A potential juror with a high degree of responsibility at work is lost. A potential juror attending college or graduate school is lost. Even an unemployed juror will be lost due to their inability to conduct a job search.

10. To be clear, even if a consolidated trial group ends up, through settlements or other resolution, with just a single plaintiff, the damage has already been done. The moment the first jury pool is advised that a trial might take eight/ten/fourteen weeks that pool is tainted and the hope of a fair cross section of jurors is lost. A juror lost on day one of a two week selection process, because she could not sit for three months, is lost for good. There is no bringing her back once the case is whittled down to just one plaintiff. The goal of the process, which is clearly frustrated under the current system, should be a jury that is truly representative of the entire population of the County of New York from the unemployed to corporate Chief Executive Officers.

Fig. 1.

| <u>Case</u> | <u>Number Of Cases Originally Consolidated</u> | <u>Length Of Trial</u> | <u>Result</u>   |
|-------------|--|------------------------|-----------------|
| Nemeth      | One (1)  | Six (6) Weeks          | \$16.5 Million  |
| Robaey      | One (1)  | Six (6) Weeks          | \$75 Million    |
| Castorina   | One (1)  | Eight (8) Weeks        | Defense Verdict |

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.