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

In Re: NEW YORK CITY ASBESTOS LITIGATION	
This Document Relates to:	NYCAL
ELSIE CHAMBLIN, Individually And DAVID C. CHAMBLIN, As Co-Executors Of The Estate Of SULPICE N. CHAMBLIN, Deceased, et al.,	(SHULMAN, J.) Index No. 190262/13
Plaintiffs,	
-- against –	**AFFIRMATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR A JOINT TRIAL**
3M COMPANY, Individually And As Successor To MINNESOTA MINING And MANUFACTURING COMPANY, et al.,	
Defendants.	

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[1]. This opposition is also being served on behalf of all other remaining defendants (collectively "Defendants") in the below two (2) 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 unrelated cases[2].

[1] Malaby & Bradley represents Qualitex Company in the Sullivan matter.

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4. At the outset, it should be noted that the Chamblin matter has previously been the subject of a consolidation motion before this Court. On August 7, 2014, oral argument was held, before this Court, wherein the Chamblin case was sought to be consolidated with four (4) other cases. After hearing extensive argument from both sides, this Court determined that the Chamblin case had "a unique set of facts" and that it ought to be tried on its own. (Transcript of Oral argument attached hereto as Exhibit A.)

5. The Sullivan matter has also previously been the subject of a consolidation motion before this Court. On March 21, 2016, oral argument was held before this Court, wherein the Sullivan case was sought to be consolidated with (3) three other cases. After hearing argument on the facts of the cases, this Court ordered that Sullivan did not have sufficient commonality to allow it to be joined with the other cases. (Transcript of Oral argument attached hereto as Exhibit B.)

6. Both of the cases currently before this Court, and the subject of Plaintiffs' moving papers, were previously the subject of consolidation motions. In each instance, understanding these were two separate prior motions, the cases at issue here were determined to be unique enough, that they were not joined for trial. It is defendants' position that the instant motion should not be considered as the issue of "consolidation" was previously decided in each case, and therefore, the issue should not be re-litigated. The doctrine of collateral estoppel, which "bars re-litigation of an issue which has necessarily been decided in a prior action and is

[2] 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.

determinative of the issues disputed in the present action, provided that there was a full and fair opportunity to contest the decision now alleged to be controlling" (*Capellupo v. Nassau Health Care Corp.*, 97 A.D.3d 619, 621, 948 N.Y.S.2d 362). "The party invoking the doctrine must show that the identical issue was necessarily decided in the prior action and is determinative in the present action" (*Hoffer v. Bank of Am., N.A.*, 136 A.D.3d 750, 752, 25 N.Y.S.3d 279). To allow a third consolidation motion at this late juncture would open the door to a flood of motions seeking to mix and match amongst the various cases set to be tried alone across the NYCAL.

7. When seeking consolidation of cases for joint trial, plaintiffs typically lean heavily on the concept of "efficiency" and saving the court time and resources. With the current matters, Defendants believe that allowing plaintiffs to take another "bite at the apple," frankly, two additional "bites" at this time ought not to be allowed. To allow plaintiffs, whether in these cases, or any others, the opportunity to repeatedly seek the Court's intervention and seek to consolidate cases over and over until they fine the "right" combination flies in the face of any efficiency arguments. Putting aside, that, on the facts, these two matters simply shouldn't be joined together.

I. CONSOLIDATION IN THE NEW YORK CITY ASBESTOS LITIGATION

8. 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.

9. 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 thirty (30) 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.

10. 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.

11. 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.

12. 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. A defendant

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