

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

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**IN RE NEW YORK CITY ASBESTOS  
LITIGATION**

LENORE A. LOHMAN, a/k/a LENORE  
ASCIANE-LOHMAN, as executrix of the  
Estate of VINCENT ASCIONE, JR.,  
deceased, et al.

Plaintiffs,

v.

ALCOA INC., individually and as successor  
in interest to Tilo Roofing Co., et al.,

Defendants.

NYCAL

Index No.: 190293/2016, et al.

Hon. Martin Shulman

Belluck & Fox April 2017 *in extremis* trial  
group

**DEFENDANTS' AFFIRMATION IN  
OPPOSITION TO PLAINTIFFS MOTION FOR  
JOINT-TRIAL**

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**GRAHAM M. GERING**, an attorney duly admitted to practice before the Courts of the  
State of New York, under penalties of perjury, affirms the following pursuant to C.P.L.R. §  
2106:

1. I am an associate at the firm Barry McTiernan & Moore LLC, attorneys for  
Defendants and, as such, am fully familiar with the facts and circumstances of these cases.

2. Barry McTiernan & Moore LLC (hereinafter "BMM") respectfully submits this  
affirmation in opposition to plaintiffs' Order to Show Cause for Joint Trial Trials, which was filed  
in the above-captioned matter on or before August 16, 2017, on behalf of all defendants in the  
following cases.

|                      |                        |
|----------------------|------------------------|
| RICHARD HUNDERTMARK  | Index No.: 190223/2016 |
| PETER LEPORE         | Index No.: 190263/2016 |
| VESTON LORDE         | Index No.: 190300/2016 |
| SHELDON SCHENKMAN    | Index No.: 190021/2016 |
| VINCENT ASCIONE, JR. | Index No.: 190293/2016 |
| MARCO LEONE          | Index No.: 190324/2016 |

3. Plaintiffs seek to join the above cases into the following two groups:

Group 1: 1. HUNDERTMARK  
2. LEPORE  
3. LORDE  
4. SCHENKMAN

Group 2: 1. ASCIONE  
2. LEONE

### ARGUMENT

#### **I. JOINT TRIALS FAIL TO DELIVER ON THE STATE PURPOSE OF JUDICIAL ECONOMY**

4. The objective of a joint trial is to promote judicial economy by saving the time, trouble and expense to the parties, the court, and the jurors. But the promise of expediting and economizing the costs of litigation through joint trials or consolidation of numerous claims has been proven by experience to be false. Recent joint trials of consolidated and individual asbestos matters establish that joint trials do not promote judicial efficiency.

5. 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 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.

6. 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.

7. 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.

**Figure 1**

| <b>Case</b>                  | <b># Cases Tried Jointly</b> | <b>Length Of Trial</b> | <b>Result</b>          |
|------------------------------|------------------------------|------------------------|------------------------|
| <u>Cooney</u>                | Three (3)                    | Seven (7) Weeks        | \$12 Million           |
| <u>Zammit</u>                | One (1)                      | Four (4) Weeks         | <i>Defense Verdict</i> |
| <u>Gondar</u>                | Two (2)                      | Eight (8) Weeks        | \$22 Million           |
| <u>Geritano</u>              | Three (3)                    | Seven (7) Weeks        | \$6.2 Million          |
| <u>Bartolone</u>             | One (1)                      | Five (5) Weeks         | <i>Defense Verdict</i> |
| <u>Robusto</u>               | One (1)                      | Five (5) Weeks         | \$7 Million            |
| <u>Miller</u>                | One (1)                      | Three (3) Weeks        | \$25 Million           |
| <u>Hillyer</u>               | Two (2)                      | Four (4) Weeks         | \$20 Million           |
| <u>North</u>                 | One (1)                      | Three (3) Weeks        | \$7 Million            |
| <u>Hackshaw/Sweberg</u>      | Four (4)                     | Seven (7) Weeks        | \$25 Million Total     |
| <u>Juni</u>                  | Three (3)                    | Eleven (11) Weeks      | \$11 Million           |
| <u>Carlucci</u>              | Three (3)                    | Eight (8) Weeks        | \$7.3 Million          |
| <u>Brown/McCloskey/Terry</u> | Three (3)                    | Eighteen (18) Weeks    | \$12.5 Million Total   |
| <u>Derogatis</u>             | One (1)                      | Three (3) Weeks        | <i>Defense Verdict</i> |
| <u>Thibodeau</u>             | One (1)                      | Five (5) Weeks         | <i>Defense Verdict</i> |
| <u>Assenzio, et al.</u>      | Five (5)                     | Eleven (11) Weeks      | \$190 Million Total    |
| <u>Vega</u>                  | One (1)                      | Two (2) Weeks          | <i>Defense Verdict</i> |
| <u>Peraica</u>               | Nine (9)                     | Thirteen (13) Weeks    | \$35 Million           |
| <u>McCormick</u>             | One (1)                      | One (1) Week           | \$3.8 Million          |

| Case                      | # Cases Tried Jointly | Length Of Trial | Result               |
|---------------------------|-----------------------|-----------------|----------------------|
| <u>Dummitt/Konstantin</u> | Seven (7)             | Eight (8) Weeks | \$51 Million Total   |
| <u>Paolini/Michalski</u>  | Six (6)               | Five (5) Weeks  | Defense Verdict      |
| <u>Zaug</u>               | One (1)               | Two (2) Weeks   | Defense Verdict      |
| <u>Dietz</u>              | One (1)               | Two (2) Weeks   | Defense Verdict      |
| <u>McCarthy/Koczur</u>    | Six (6)               | Five (5) Weeks  | \$22.1 Million Total |
| <u>Curry</u>              | One (1)               | One (1) Week    | Defense Verdict      |
| <u>Benton</u>             | One (1)               | One (1) Week    | \$2.5 Million        |

8. As set forth in Fig. 1, above, there have been twenty-six (26) asbestos verdicts<sup>1</sup> in New York City from 2011 to 2016. Of those 26 verdicts, thirteen (13) have taken place in single plaintiff cases (as opposed to a consolidated trial) and in those thirteen single plaintiff trials, eight (8) (shaded in Figure 1) have resulted in defense verdicts. Only *one of thirteen* consolidated trials ended in a total defense verdict.

9. In the five single plaintiff cases that did not result in defense verdicts, all but one had total awards of \$7 million dollars or less, with two of those being under \$4 million dollars, with set-offs reducing the amounts even further. Contrast that with the seven week Hackshaw/Sweberg trial with verdicts totaling \$25 million; the eight-week Dummitt/Konstantin trial with verdicts totaling \$51 million dollars; the Assenzio, et al., trial group with verdicts totaling \$190 million dollars; the eight week Gondar trial with a \$22 million dollar verdict; or even the Brown trial group which resulted in “only” \$12.5 million in total verdicts. Since 2011, there have been more than \$450 million dollars awarded by juries in New York City asbestos trials.

10. While Plaintiff’s counsel, and the courts, often cite to “efficiency” as the main driving force in consolidation of asbestos cases, it has become clear that “efficiency” is hardly what the NYCAL currently has. What has happened, time and again in consolidated cases, is a

<sup>1</sup> In the case of a consolidated group of cases, a single verdict is being counted. For example, the Dummitt case had a \$32 Million dollar verdict and the Konstantin case had a \$19 Million dollar verdict, for a total of \$51 Million. But it was a single jury that came to both verdicts.

drawn out jury trial, ending in an unsustainably large verdict, followed by a drawn out process whereby the judges determine what they believe to be a fair verdict. It is hard to see how either party's due process rights are being protected in this scenario. With large, unsustainable verdicts being the norm in consolidated trials and with nearly all of them needing to be remitted substantially, the disconnect between the jury's findings and what is deemed "reasonable" by the courts calls into question other aspects of the jury's findings. The opportunity for prejudice is clear and undeniable.

11. In light of the above, it is clear that for the NYCAL to protect the rights of ALL of its litigants, a wholesale review of the process under which these cases are handled must take place. The data is clear and cannot be ignored or brushed aside. NYCAL must evolve and follow the lead of quite literally all of the largest asbestos dockets and re-examine consolidation in asbestos trials.

## II. JOINT TRIALS ARE INHERENTLY AND INEVITABLY PREJUDICIAL

12. The Fourteenth Amendment to the United States Constitution mandates that no person be deprived "of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The right to a fair trial is a fundamental liberty secured by the due process clause. Indeed, "so basic to our jurisprudence is the right to a fair trial that it has been called 'the most fundamental of all freedoms.'" Bailey v. Sys. Innovation, Inc., 852 F.2d 93, 98 (3d Cir. 1988) (citing Estes v. Texas, 381 U.S. 352, 540, 85 S.Ct. 1628, 1632, 14 L.ed.2d 543 (1965)). Article I, Section 6 of the New York State Constitution mirrors the Fourteenth Amendment's guarantee that a person shall not be deprived of life, liberty, or property without due process of law, which invariably includes the right to a fair trial. 12-16 Arden Assoc. v. Vasquez, 168 Misc. 2d 475, 638 N.Y.S.2d 535 (N.Y. Civ. Ct. N.Y. County 1995) (stating that "it is black letter law that a litigant in a civil action or proceeding is entitled to a fair trial").

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