Altman v Advance Auto Supply
2017 NY Slip Op 31347(U)
June 20, 2017
Supreme Court, New York County
Docket Number: 190012/16
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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IN RE: NEW YORK CITY ASBESTOS LITIGATION

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ROBERT DUANE ALTMAN and NANCY BROWN ALTMAN, *et al.*,

Index No. 190012/16

Plaintiffs,

DECISION AND ORDER

-against-

ADVANCE AUTO SUPPLY, *et al.*,

Defendants.

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By notice of motion, plaintiffs move pursuant to CPLR 602 for an order consolidating the

following in extremis cases for a joint trial in separate trial groups: (1) Robert Duane Altman, Index No. 190012/16; Philip DeStefano, Jr., Index No. 190023/16; John Fox, Index No. 190110/16; and Jerry Lee Hofstetter, Index No. 190115/16, and (2) John Joseph Baginski, Index No. 190127/16; Daniel Nicholas Barber, Index No. 190112/16; John Frank Egri, Index No. 190154/15; and James Moynihan, Index No. 190033/16.

In light of the proposed Case Management Order that is being considered by the Administrative Judge in charge of NYCAL, on May 24, 2017, I directed plaintiffs to revise this motion to reflect proposed trial groups of two or three plaintiffs. By letter dated May 26, 2017, plaintiffs requested the following revisions: (1) that one trial group be composed of the Altman, Destefano, and Hofstetter cases and that it be tried first; (2) that another trial group be composed of the Barber, Egri, and Moynihan cases; and (3) that the Fox and Baginski cases be tried separately. Plaintiffs also request that the Craig Evans case, index no. 190257/2015 be tried separately. I address only the cases that plaintiffs seek to consolidate.

Defendants jointly oppose all consolidations; Certainteed Corporation and J-M Manufacturing, Inc., oppose consolidation of the Destefano case with any other; Lennox Industries, Inc., ECR International, Inc., Cleaver Brooks, Inc., Rheem Manufacturing Co., and Columbia Boiler Company oppose consolidation of the Barber case with any other; Union Carbide Corporation opposes it in the Moynihan case; NAPA, Genuine Parts Company, Domco Products Texas, Inc., Conwed Corporation, and American Biltrite, Inc., oppose in the Egri case; and Pneumo Abex LLC, Mack Trucks, Inc.,Volvo Group North America, Inc., and Ford Motor Co. oppose in the Altman case.

I. PLAINTIFFS

A. Robert Altman

Altman, now 84, suffers from pleural mesothelioma. While serving in the United States Navy as a fireman and engineman from 1951 to 1954, he worked in the engine rooms aboard the USS Hailey, both at sea and at the Brooklyn Navy Yard, where he was allegedly exposed to asbestos while maintaining valves and pumps with asbestos-containing gaskets and packing, and cleaning up after such maintenance. From the 1960s to the 1980s, Altman operated a mechanics business, where he was allegedly exposed to asbestos-laden dust from performing brake and clutch work on trucks. (NYSCEF 329).

There are 27 remaining defendants in his action: Air & Liquid Systems Corp., Alfa Laval, Inc., Atwood & Morrill Co., Inc., Caterpillar, Inc., CBS Corp., Deere & Co., Dresser-Rand Co., Federal-Mogul Asbestos Personal Injury Trust, FMC Corp., Ford Motor Co., Freightliner Corp., Georgia-Pacific Corp., I.T.T. Industries, Inc., IMO Industries, Inc., International Truck and Engine Corp., Kelsey-Hayes, Lipe Automation Corp., Lucas Varity Automotive Holdings Co., Mack Trucks, Inc., Metropolitan Life Insurance Co., Navistar, Inc., Owens Illinois, Inc., Pneumo Abex Corp., Riley Power, Inc., Todd Shipyards Corp., Volvo Trucks North America, Inc., and Warren Pumps, LLC.

Defendants observe that Altman was a resident of Pennsylvania and/or Ohio during the period of his primary exposure to asbestos, and a resident of South Carolina when his disease manifested. (NYSCEF 392). (NYSCEF 372).

B. Philip Destefano

Destefano is 65 years old and suffers from peritoneal mesothelioma. In 1969, he began working for the Electric Boat division of General Dynamics as an apprentice electrician and

helper. He then worked aboard the USS James Madison, where he was allegedly exposed to asbestos from work performed in his presence on pumps with asbestos-containing gaskets. He also worked on electrical components, including panel boxes, switches, and circuits, which produced asbestos-containing dust. Destefano also worked for Consolidated Edison as a foreman in meter operations, where he accompanied meter readers into building basements, which exposed him to asbestos dust from boiler repair work including insulation. His promotion to chief construction inspector further exposed him to jobsites where transite pipe was destroyed and replaced. Destefano also performed home renovation projects which involved sanding asbestos-containing joint compound and removing tiles. His alleged asbestos exposure occurred in the 1960s and the 1980s.

The 20 defendants remaining in his case are Air & Liquid, Alfa Laval, Armstrong International, Inc., Certain-Teed Corp., Eaton Corp., Eckel Industries, Inc., Elliott Turbomachinery Co., Inc., FMC Corp., Formosa Plastics Corp. USA, Foster Wheeler, LLC, Georgia-Pacific, I.T.T., IMO, J-M Manufacturing Co., Inc., Metropolitan Life Insurance Co., Peerless Industries, Inc., Schneider Electric USA, Inc., Warren, and Weil McLain.

In contrast to the other plaintiffs, Destefano is the sole plaintiff in this group to have been diagnosed with peritoneal mesothelioma. (NYSCEF 392).

C. Jerry Lee Hofstetter

Hofstetter died of pleural mesothelioma at the age of 76. From 1961 to 1967, he served as a fireman and machinist in the Navy, working both at sea and in shipyards, including the Brooklyn Navy Yard. During his service, he was exposed to asbestos from insulation, packing, and gaskets used in pumps, valves, turbines, steam traps, engines, and compressors. Hofstetter later worked for the Military Sea Transportation Service and maintained and repaired ships,

which exposed him to asbestos-containing packing, gaskets, and insulation on pumps, valves, and turbines. He also worked as a machinist for Benicia Pump Repair, where he repaired pumps, valves, turbines, blowers, and compressors, which exposed him to asbestos-containing gaskets, packing, and insulation, with additional exposure from performing brake and clutch jobs on automobiles and farm equipment, and from using asbestos-containing joint compound during a home renovation project. His alleged exposure to asbestos spanned from the 1950s to the 1980s.

The 29 defendants remaining in his action are Agco Corp., Air & Liquid, Alfa Laval, Allegheny Teledyne Inc., Armstrong, BW/IP International Co., Cameron International Corp., Case Corp., Caterpillar, Chevron USA, Inc., Chevron USA, Inc. as successor to Gulf Oil Corp., Clark Equipment Co., CNH, Cooper Cameron Corp., Dean Pump Division, Elliott, Exxon Mobil Corp., Exxon Mobile Oil Corp., Exxon Mobile Chemical Corp., Flowserve US, Inc., as successor to Durco, *et al.*, Flowserve US, Inc., as successor to Rockwell Manufacturing Co., *et al.*, FMC, Georgia-Pacific, Goulds Pumps Inc., IMO, NAPA, Riley, Spirax Sarco, Inc., and Texaco, Inc.

According to defendants, Hofstetter was a California resident when he was exposed to asbestos, diagnosed with mesothelioma, and passed away. (NYSCEF 392).

D. Daniel Barber

Barber died at the age of 77 from mesothelioma. From the age of 10 years old until he was a teenager in the 1950s, he helped his stepfather in a boiler and furnace removal and installation business, where he demolished equipment, exposing him to asbestos-containing insulation and rope gaskets, and he also swept up the work areas, exposing him to asbestos-laden dust. In the 1970s, Barber worked for a construction products company where he was exposed to asbestos-containing fire doors.

There are 32 defendants remaining in his action: AII Acquisition Corp., Air & Liquid,

Alfa Laval, Armstrong, Burnham Corp., Cleaver Brooks Co., Columbia Boiler Co., Compudyne Corp., Crane Co., ECR Intl., Inc., FMC Corp., Georgia-Pacific, Goulds Pumps Inc., Grinnell, Honeywell Intl., Inc., I.T.T., IMO, Kohler Co., Lennox Industries, Inc., McDonnell Douglass Corp., Metropolitan life Ins. Co., Owens Illinois, Inc., Peerless Industries, Inc., Rheem Manufacturing Corp., Riley, Sid Harvey Supply, Inc., Todd Shipyards Corp., Utica Cos., Inc., Warren Pumps, LLC, Weil McLain, Westinghouse Electric Corp., and Zurn Industries, Inc.

Defendants assert that Barber lived in Connecticut during the time he worked for his stepfather's business, and later moved to Michigan, where he was diagnosed with mesothelioma. (NYSCEF 392).

E. John Egri

Egri died of mesothelioma at the age of 54. In the 1970s and 1980s, he worked for a handyman business and performed home and commercial renovations, and he was allegedly exposed to asbestos from mixing and sanding joint compound, and installing ceiling tiles, vinyl asbestos floor tiles, and rolled flooring. Egri also swept and transported asbestos-laden debris, and performed brake jobs which also exposed him to asbestos.

The 13 defendants remaining in his action are: American Biltrite, Inc., Burnham, CBS Corp., Conwed Corp., Domco Products Texas, Inc., General Electric Company, Genuine Parts Company, Georgia-Pacific, Grinnell, Kaiser Gypsum Co., Inc., Mannington Mills, Inc., NAPA Auto Parts, and Riley.

Defendants observe that Egri was a Florida resident when his mesothelioma manifested and when he died. (NYSCEF 392).

F. James Moynihan

Moynihan died from mesothelioma at the age of 68. From the 1960s to the 1980s, he worked as a union carpenter at various construction sites, where he was allegedly exposed to asbestos while working with and around fireproofing, joint compound which was mixed and sanded in his presence, and fire doors containing asbestos cores that were drilled and/or cut near him.

There are 20 remaining defendants in his action: Armstrong Intl., Inc., Burnham, CBS, FMC Corp., Foster Wheeler, LLC, GE, Georgia-Pacific, Goulds, Grinnell, IMO, Intl. Paper Co., Kaiser Gypsum, Mario & DiBono Plastering Co. Inc., Morse Diesel, Inc., Owens Illinois, Riley, Tishman Construction Corp., Union Carbide Corp., Warren, and Weyerhauser Corp.

II. CONTENTIONS

A. Plaintiffs

Plaintiffs argue that consolidating their trials will result in judicial economy, prevent injustice, and encourage settlement, and that a denial of consolidation will severely prejudice them and result in unnecessary duplication of evidence, experts, and issues. Plaintiffs deny that consolidation leads to prejudicial results or impacts jury verdicts or the length of trial, and argue that the statistics proffered by defendants are erroneous and misleading. (NYSCEF 328).

Plaintiffs justify their groupings for consolidated trials as follows:

Altman and Destefano are alive and are the only two living plaintiffs out of the six cases at issue. They and Hofstetter were diagnosed with mesothelioma, all three worked aboard naval ships and in shipyards, including the Brooklyn Navy Yard where Altman and Hofstetter worked, and they shared common occupations, with Altman and Hofstetter sharing virtually the identical

occupation of fireman and engine machinist. They also were all exposed to asbestos emanating from pumps, gaskets, packing, valves, insulation, brakes, clutches, and turbines, and their exposures lasted until the 1980s. (NYSCEF 465).

Barber, Egri, and Moynihan were all exposed to asbestos from a similar set of products while working at construction sites, their exposures overlapped into at least the 1970s, and they died of mesothelioma. (*Id.*).

In all of the proposed groups, Dr. David Zhang will testify as the expert pathologist, while plaintiffs intend to call either Dr. Jacqueline Moline or Dr. Steven Markowitz as their causation and/or general medicine expert. (NYSCEF 328).

B. Defendants

Defendants maintain that consolidating these cases for two trials will adversely affect the potential jury pool, increase the length of time for trial, and result in unreasonably high plaintiff verdicts, which will require appellate review and further erode any judicial economy. They offer data from 29 asbestos cases tried in New York City, reflecting that of the 16 cases involving only one plaintiff, nine resulted in defense verdicts, while only one of the 13 cases involving two or more plaintiffs resulted in a defense verdict. Moreover, the length of trials for single-plaintiff cases ranged from one week to eight weeks, with 10 of the 16 trials lasting four weeks or less. In contrast, the consolidated trials lasted from 4 to 18 weeks, with 8 of the 13 lasting at least two months. The average jury award per plaintiff in a consolidated trial was approximately double the amount awarded to plaintiffs in a single trial. Defendants thus argue that jury awards in consolidated cases yield unreasonable results and tend to favor plaintiffs. (NYSCEF 392).

Defendants also assert that they are prejudiced by the consolidation of these cases given

the differences among the cases, and that the differing evidence will confuse the jury. They observe that there is an absence of defendants in common. (*Id.*). According to Ford's expert, Dr. Antonio Rangel, consolidation of these cases will infringe on defendants' due process rights, as research "shows that the types of decisions jurors have to make during asbestos litigation are prone to sizable and systematic biases, and that these biases are easily exacerbated by trial consolidation." (NYSCEF 372, 373).

Defendants assert that there are no common jobsites among the plaintiffs, even between Altman and Hofstetter, that there are different occupations and differences in exposure, and that they lack a sufficiently common period of exposure. They contend that the Altman, Hofstetter, Barber, and Egri matters will likely involve the law of other states, given their residences, the locations of their exposure, where their diseases manifested, and/or where they died. (*Id.*).

Even though Altman and Hofstetter both worked on Navy ships, defendants maintain that their other exposures to asbestos were different in terms of nature and duration. They observe that Barber, Egri, and Moynihan worked at different jobsites and had different occupations, i.e., boiler maintenance, a handyman business, and carpentry, and that Barber's exposure in the 1950s precedes that of Egri and Moynihan. (*Id.*).

Cleaver Brooks and Domco contend that a substantial right will be prejudiced by consolidation as they have not reviewed discovery in the cases in which their clients are not parties and thus will be unable to cross-examine plaintiff's witnesses effectively in all of the cases. They also argue that the dissimilarity of the products allegedly used by the plaintiffs will confuse the jury and improperly bolster each case, and that given the diverse materials or products used by plaintiffs in their varying trades, there will be a large number of dissimilar

defendants in the proposed trial groups, which would result in the lack of judicial economy. They observe that different states' laws may apply, requiring a conflict of laws analysis. (NYSCEF 367, 369).

NAPA and Genuine Parts contend that the differences in the plaintiffs' cases greatly outweigh their similarities, that the consolidation will not avoid unnecessary costs or delay, and that their rights to a fair trial will be prejudiced. (NYSCEF 371).

1. Destefano

Certainteed contends that Destefano's case differs from that of any of the other plaintiffs, as at least nine defendants are in his case only, and he is the only one who worked at the World Trade Center. Moreover, most of his exposure was as a bystander, and he alone was exposed to cement pipe and electrical products, and suffers from peritoneal mesothelioma. In contrast to Altman and Hofstetter, Destefano was not exposed to friction products. (NYSCEF 437).

J-M Manufacturing asserts that Destefano lacks a common occupation or worksite with the other plaintiffs in his proposed trial group, and is the only plaintiff alleging exposure to transite pipe. (NYSCEF 385).

2. Altman

Pneumo Abex identifies Altman as the only plaintiff to have worked in the truck repair business, and it observes that his naval exposure occurred entirely aboard a navy ship and not at a shipyard, and that his exposure to friction products uniquely spanned three decades. (NYSCEF 390). According to Mack Trucks, Altman's unique experience of having serviced commercial trucks for over 30 years warrants denying consolidation of his matter with those of the other proposed plaintiffs. (NYSCEF 368). Ford maintains that Altman's matter is unique as he is the

only career mechanic alleging decades of exposure to friction products, as it involves approximately 12 "friction" defendants which are not defendants in the other cases in his proposed trial group, as only his exposure spanned approximately 40 years, and as he is the only living plaintiff with pleural mesothelioma. (NYSCEF 372).

3. Moynihan

Defendants contend that Moynihan's exposure to fireproofing spray, joint compound, and the **cores of fire doors** distinguish his case from the others. (NYSCEF 392). Union Carbide maintains that the Moynihan case should be tried separately as at least 10 of the remaining defendants are defendants only in his case, and only he worked as a carpenter and was exposed to fireproofing while the other plaintiffs were exposed to products to which he was not exposed. (NYSCEF 409).

4. Barber

Rheem contends that consolidating the Barber cases, in which it is a defendant, with the other proposed cases, in which it is not a defendant, will be inefficient, uneconomic, and unduly costly. (NYSCEF 383).

According to ECR, the Barber case cannot be tried with any other as it has been automatically stayed by Barber's death and a representative has not yet been substituted, nor a wrongful death complaint filed. It also notes that Barber is the only plaintiff in the proposed group who alleges exposure to boilers and furnaces, and the only one who does not allege exposure to joint compound, brakes, clutches, floor tiles, and fireproofing spray. ECR denies that Barber identified a manufacturer of fire doors during his deposition, and argues that he identified only boiler and furnace defendants in his testimony, while no such defendants were

identified by Egri or Moynihan. ECR also observes that Barber's exposure uniquely began in the 1950s. (NYSCEF 386).

5. Egri

Conwed observes that Egri was allegedly exposed between the ages of 10 and 20, that only he alleges exposure to vinyl asbestos tiles, roll flooring, and ceiling tiles, and that as it is a defendant only in the Egri matter, consolidation would be unduly burdensome and prejudicial for it to be forced to participate in a consolidated trial where the majority of the testimony will not relate in any way to the claim against it. (NYSCEF 388).

6. Hofstetter

Carrier contends that Hofstetter did not share a common shipyard or ship worksite with the other plaintiffs, that he was the only enlisted servicemember, and that he held different positions than Destefano, resulting in different work on different types of ships, within different spaces, and involving distinct types of equipment. The proposed plaintiffs also have dissimilar non-maritime exposure. (NYSCEF 389).

III. APPLICABLE LAW

A motion for a joint trial rests in the discretion of the trial court. (CPLR 602[a]; *Matter of New York City Asbestos Litigation [Konstantin]*, 121 AD3d 230 [1st Dept 2014], *affd on other grounds* 27 NY3d 1172 [2016]; *Matter of New York City Asbestos Litig. [Baruch]*, 111 AD3d 574 [1st Dept 2013]; *JP Foodservice Distrib., Inc. v PricewaterhouseCoopers LLP*, 291 AD2d 323 [1st Dept 2002]; *Rodgers v Worrell*, 214 AD2d 553 [2d Dept 1995]). The discretion is informed by several considerations.

Generally, for actions to be consolidated for a joint trial, there must be a "plain identity"

of issues. (*Viggo S.S. Corp. v Marship Corp. of Monrovia*, 26 NY2d 157 [1970]; *Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332 [1st Dept 2005]). If individual issues "predominate over common issues," actions should not be joined. (*Matter of New York City Asbestos Litig. [Bernard]*, 99 AD3d 410 [1st Dept 2012]). The party seeking consolidation bears the burden of demonstrating the commonality of issues. Once shown, the opposing party bears the burden of demonstrating "prejudice to a substantial right." (Vincent C. Alexander, Practice Commentaries, McKinneys Consol Law of New York, CPLR 602, C602-1). Allegations of prejudice must be specific and not conclusory. (*Konstantin*, 121 AD3d at 245).

To minimize any alleged prejudice to defendants in consolidated cases, and to reduce juror confusion, the court may use techniques such as providing "limiting, explanatory and curative instructions," giving notebooks to jurors to "assist them in recording and distinguishing the evidence in each case," and presenting the jurors with plaintiff-specific verdict questions and sheets. (*Id.*). Although it has been noted that "ameliorative measures, such as clear jury instructions and jury note-taking can be utilized to prevent confusion . . . there is a point at which combining too many cases for a single joint trial is antithetical to the purpose of the consolidation statute." (*In re New York City Asbestos Litig. [Auletta]*, 2011 WL 6891581, 2011 NY Slip Op 33409[U], *5 [Sup Ct, New York County]). There, however, the motion court was faced with a request to consolidate the cases of 10 plaintiffs and 21 defendants. (*See also Matter of New York City Asbestos Litig. [Carfagno]*, 2014 WL 10706773, 2014 NY Slip Op 33672[U] [Sup Ct, New York County] [while plaintiffs in proposed trial group met *Malcolm* factors for consolidation, it was not apparent how conducting joint trial of six plaintiffs and 27 defendants would promote judicial economy or advance other policy considerations underlying consolidation; court thus

separated plaintiffs into two trial groups, one consisting of living plaintiffs and other of deceased plaintiffs]).

While judicial economy and efficiency should be considered in determining whether to consolidate, those interests "must yield to a paramount concern for a fair and impartial trial." (*Johnson v Celotex Corp.*, 899 F2d 1281 [2d Cir 1990]). "The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's - and defendant's - cause not be lost in the shadow of a towering mass litigation." (*Matter of Brooklyn Navy Yard Asbestos Litig.*, 971 F2d 831 [2d Cir 1992]; *see also Malcolm v Ntl. Gypsum Co.*, 995 F2d 346, 350-353 [2d Cir 1993] ["benefits of efficiency can never be purchased at the cost of fairness"]). In that vein, it has also been held that asbestos matters ought not be consolidated for trial "simply because doing so has been the routine, nor should the terms 'efficiency' and 'judicial economy' be used to justify consolidation where experience has shown that [it] generally does not advance these lofty goals." (*Matter of New York City Asbestos Litig. [Bova]*, 2014 WL 4446457, 2014 NY Slip Op 32336[U], *4 [Sup Ct, New York County]).

Jury selection had also been adversely impacted when there was a multiplicity of plaintiffs consolidated for trial given the anticipated duration of such a trial. New initiatives of the Administrative Judge in charge of NYCAL may remove them and the historic trend in consolidating cases in this county continues. (*See Matter of New York City Asbestos Litig. [Dummit]*, 36 Misc 3d 1234[A], 2012 NY Slip Op 51597[U] [Sup Ct, New York County 2012] [in New York County, asbestos cases historically consolidated for trial], *affd* 121 AD3d 230 [1st Dept 2014] [in asbestos cases, routine to join cases], *affd on other grounds* 27 NY3d 1172

[2016]; *Matter of New York City Asbestos Litig. [Ancewicz]*, 188 AD2d 214 [1st Dept 1993], *affd* 82 NY2d 821 [joint trials may reduce cost of litigation, promote judicial economy, speed disposition of cases, and encourage settlements]).

The factors set forth in *Malcolm* have, in NYCAL, guided consolidation decisions. They are, in pertinent part: (1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs are alive or deceased; (7) whether all plaintiffs are represented by the same counsel; and (8) the type of cancer alleged. (*Malcolm*, 995 F 2d 346, 350–51; *Matter of New York City Asbestos Litig. [Konstantin]*, 121 AD3d 230 [1st Dept 2014], *affd on other grounds* 27 NY3d 1172 [2016] [citing *Malcolm*]; *Matter of New York City Asbestos Litig. [Baruch]*, 111 AD3d 574 [1st Dept 2013] [same]; *Matter of New York City Asbestos Litig. [Bernard]*, 99 AD3d 410 [1st Dept 2012] [same]). The *Malcolm* Court also found that a consolidated trial of "48 plaintiffs, 25 direct defendants, numerous third-and-fourth party defendants, and evidence regarding culpable non-parties and over 250 worksites throughout the world was likely to lead to jury confusion." (*Id.* at 352).

Recent decisions shed light on issues attending the determination of whether asbestos cases should be consolidated. In *Matter of New York City Asbestos Litig. (Peraica)*, the Appellate Division, First Department, affirmed the trial court's consolidation of eight cases, finding that the defendant was not unfairly prejudiced by it. (143 AD3d 448 [1st Dept 2016], *app dismissed* 28 NY3d 1167, *lv denied* 28 NY3d 1167 [2017]). While the Court does not provide further details of the consolidation, the trial court consolidated Peraica's case with that of the seven other plaintiffs who had been diagnosed with pleural mesothelioma and did not allege exposure while working in the Navy. Where other plaintiffs had either been diagnosed with lung

cancer or worked in the US Navy, their cases were separately tried. Although the group of plaintiffs including Peraica had different occupations and worksites, the court found that they all alleged exposure to the same or similar products, and that their testimony regarding the products and the resulting exposure would thus be similar. (2012 WL 3276720, 2012 NY Slip Op 32097[U] [Sup Ct, New York County]).

In *Konstantin*, the Court affirmed the trial court's decision to consolidate for trial the case of a plaintiff who had worked as a carpenter at two construction sites between 1973 and 1977 and as a gas station worker from the late 1960s to the early 1970s, with the case of a plaintiff who had worked as a boiler technician on naval vessels from 1960 to 1977. Although their workplaces differed, the Court found that they were each in the immediate presence of dust released from the products on which they worked, and their exposure periods overlapped or were sufficiently common. In both cases, moreover, the periods of exposure ended in 1977, "meaning that the state of the art was the same for both cases," and each suffered from mesothelioma. That they suffered from different types of mesothelioma, that they worked at different worksites, that they asserted different theories of liability, and that one was too ill to attend trial were held not to outweigh the common issues and facts. (121 AD3d at 244-245; *In re New York City Asbestos Litig. [Auletta]*, 2011 WL 6891581, 2011 NY Slip Op 33409[U], *5 [Sup Ct, New York County], and cases cited therein [even where work, worksite, and occupation differ among plaintiffs, such factors "really concern the type of asbestos exposure each plaintiff is claiming and whether there will be shared testimony about the airborne fibers to which plaintiffs were exposed"]).

To date, no New York appellate court has considered the statistics cited by defendants. In

any event, they are based on too small a sample to be other than anecdotal. (*See Hudson v Merrill Lynch Co., Inc.*, 138 AD3d 511, 517 [1st Dept 2016], *lv denied* 28 NY3d 902 [plaintiffs' reliance on statistics as evidence of pretext or bias unavailing, as sample sizes "too small to support an inference of discrimination]).

Any unaddressed arguments are deemed unpersuasive.

IV. DISCUSSION

A. Trial group one (Altman, Destefano, Hofstetter)

Destefano's status as the only plaintiff diagnosed with peritoneal mesothelioma will likely require the offer of unique medical evidence. (*See Malcolm*, 995 F2d at 346 [as plaintiffs suffered from three different diseases, no efficiency in hearing disparate medical evidence, and prejudice could arise where certain diseases permitted almost normal life spans while others were terminal]; *see also Matter of New York City Asbestos Litig. [Adler]*, 2012 WL 3276720, 2012 NY Slip Op 32097[U] [Sup Ct, New York County] [peritoneal mesothelioma distinct from pleural mesothelioma]). Moreover, he is the sole plaintiff in this group to have worked as an electrician and in construction, and was exposed to electrical components, boilers, transite pipe, and home tiles. In contrast to Altman and Hofstetter, he was not exposed to asbestos-containing friction products such as brakes and clutches, nor valves, pumps, and gaskets associated with work on ships. These factors predominate over any factors shared with Altman and Hofstetter.

Altman and Hofstetter were both exposed from the 1950s to the 1980s, served in the Navy or worked aboard naval ships, and had similar occupations as mechanics/machinists and firemen, thereby being exposed to asbestos-laden valves, pumps, and gaskets. They also worked with or around friction products, such as brakes and clutches. Given these common factors, the

state of the art and expert evidence will overlap. (*See eg Matter of New York City Asbestos Litig. [Capozio]*, 22 Misc 3d 1109[A], 2009 NY Slip Op 50072[U] [Sup Ct, New York County 2009] [almost all plaintiffs performed similar tasks in construction trades which exposed them to asbestos during overlapping periods between 1940s and 1990s; state of art and other expert testimony also would be substantially common]). That Altman is alive and Hofstetter is deceased is not inherently prejudicial (*see In re Joint Eastern and Southern Dist. Asbestos Litig. [Schultz]*, 1990 WL 4772 [SD NY 1990] [coexistence of personal injury and wrongful death claims warrants use of cautionary instructions but is not so inherently prejudicial as to preclude consolidation]; *In re New York City Asbestos Litigation v AO Smith Water Prods. [Collura]*, 9 Misc3d 1109[A], 2005 NY Slip Op 51465 [Sup Ct, New York County 2005]), nor is the fact that Hofstetter was exposed to nine products to which Altman was not exposed, as they were exposed in similar fashions. (*See Auletta, supra*). Moreover, the applicability of a different state's law to one of these cases does not require separate trials, at least not at this juncture. (*See In re New York City Asbestos Litigation [Bernard]*, 99 AD3d 410 [1st Dept 2012] [as defendant had not yet asked court to determine whether different state's law applied to action, it would be premature to deny consolidation on that ground, and defendant did not demonstrate why alleged differences in states' laws cannot be cured with jury instructions]). The commonalities between these two plaintiffs predominate over their differences.

A. Trial group two (Barber, Egri, Moynihan)

While all three plaintiffs died of mesothelioma, Barber is the only one of this group to have been exposed in the 1950s, although his exposure ended in the 1970s, and Moynihan is the only one to have been exposed in the 1960s, continuing through the 1980s. Egri was exposed in

the 1970s and 1980s. Although their exposures overlap only in the 1970s, and thus, different state of the art evidence may be presented, they all allege direct and similar kinds of exposure to similar products and kinds of products, notwithstanding the differences in their worksites. (*See Auletta, supra*). These differences do not predominate and they are easily comprehended by jurors, assisted by the court's ameliorative measures.

V. CONCLUSION

For all of the foregoing reasons, it is hereby

ORDERED, that plaintiffs' motion to consolidate is granted in part, and the cases will be tried as follows:

(1) Group One:

(a) Robert Duane Altman, Index No. 190012/16, shall be tried with Jerry Lee Hofstetter, Index No. 190115/16 and first;

(b) Philip DeStefano, Jr., Index No. 190023/16, shall be tried separately; and

(2) Group Two:

Daniel Nicholas Barber, Index No. 190112/16, shall be tried with John Frank Egri, Index No. 190154/15, and with James Moynihan, Index No. 190033/16, and;

(3) John Fox, Index No. 190110/16, shall be tried separately;

(4) Joseph Baginski, Index No. 190127/16, shall be tried separately; and

(5) Craig Evans, Index No. 190257/15, shall be tried separately.

It is further

ORDERED, that each trial after the Altman/Hofstetter trial shall commence subject to court availability on at least five days' notice following the completion of the trials ahead of it; it is further

ORDERED, that the parties are directed to schedule a settlement conference with the Special Master to take place within the next 60 days, and to provide the court with an updated defendant list after the conference; and it is further

ORDERED, that the parties' control date of July 3, 2017 for jury selection/trial is adjourned to September 25, 2017.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE

DATED: June 20, 2017
New York, New York