

Adler v Air & Liquid Sys. Corp.
2012 NY Slip Op 32097(U)
August 7, 2012
Supreme Court, New York County
Docket Number: 190181/11
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: PAUL G. FEINMAN

PART 12

In Re New York City Asbestos Litigation Justice
Harry Adler

INDEX NO. 190181/11

MOTION DATE _____

MOTION SEQ. NO. 002

-v-
Air & Liquid Systems Corporation, as
successor-by-merger to Buffalo Pumps, et al.

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

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 decided in accordance
with the annexed decision & order.

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

FILED

AUG 08 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/7/2012

PAF J.S.C.

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
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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

DECISION & ORDER

HARRY ADLER	Index No. 190181/2011
SCOTT DEWITT	Index No. 190429/2011
EUGENE LEHNERT	Index No. 190252/2011
JOSEPH MIRABILE	Index No. 190176/2009
ALAN NUDELMAN	Index No. 190320/2011
MARK ROCK	Index No. 190319/2011
ROBERT WEXLER	Index No. 190223/2011
MURRAY BLONDER	Index No. 190370/2011
CHARLES CHIDESTER	Index No. 190293/2011
JOHN DELLARATTA	Index No. 190248/2011
JOSEPH MILAZZO	Index No. 190311/2011
WILLIAM MORITZ	Index No. 190294/2011
IVO PERAICA	Index No. 190339/2011
ANTONIO PEREZ	Index No. 190328/2011
ROBERTO ROMAN	Index No. 190262/2011
FRANK RUGNETTA	Index No. 190389/2011
RAYMOND SABO	Index No. 190318/2011
EDWARD SADOWSKI	Index No. 190215/2011
GEORGE SANTIAGO	Index No. 190445/2011
GEORGE SMITH	Index No. 190299/2011
GLENDIA VEGA	Index No. 190409/2011
THOMAS NEUER	Index No. 190223/2011,

Plaintiffs,

FILED AS SEQ. 002 IN 190181/2011

FILED

AUG 08 2012

-against-

AIR & LIQUID SYSTEMS CORPORATION, as
successor-by-merger to BUFFALO PUMPS, et al.,
Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
PAPERS CONSIDERED ON THIS MOTION FOR A JOINT TRIAL:

Papers	Numbered
All Plaintiffs' Order to Show Cause, Comerford June 21, 2012 Aff. in Support, Exs. A-1	1
Novakidis July 18, 2012 Aff. in Opp., Exs. A - D (Foster Wheeler, CBS Corp and as Lead Counsel for All Other Remaining Defendants)	2
Grady July 19, 2012 Aff. in Opp. (Aurora Pump Company)	3
Hollman July 19, 2012 Aff. in Opp. (The Fairbanks Company)	4

Hollman July 19, 2012 Aff. in Opp. (Atwood & Morrill Company, Inc.)	5
Kasmir July 19, 2012 Aff. in Opp. (Oakfabco, Inc.)	6
Sampar July 19, 2012 Supp. Aff. in Opp. (Taco, Inc.)	7
Tempesta July 19, 2012 Aff. in Opp. (Barnes & Jones, Incorporated)	8
Jones July 18, 2012 Aff. in Opp. (Bakers Pride Oven Company, Inc., n/k/a QCP, Inc.)	9
Kozak July 19, 2012 Aff. in Opp., Exs. A - F (Metro-North and MTA)	10
Smith July 18, 2012 Aff. in Opp. (Consolidated Rail Corporation and American Premier)	11
Lee July 19, 2012 Aff. in Opp. (Georgia-Pacific, LLC)	12
Kromberg July 19, 2012 Aff. in Opp. (Union Carbide and Georgia-Pacific, LLC)	13
DeCicco July 19, 2012 Aff. in Opp. (Dana Companies, LLC)	14
DeCicco July 26, 2012 Letter Withdrawing Dana Companies, LLC's Opposition	15
DeCicco July 19, 2012 Aff. in Opp. (Lennox Industries, Inc.)	16
Pawlowski July 19, 2012 Aff. in Opp., Exs. A- C (Ford Motor Company)	17
Yu July 19, 2012 Aff. in Opp. (G.S. Blodgett Corp., Middleby Marshall, Inc. & Middleby Corp.)	18
DiMarco July 19, 2012 Aff. in Opp. (AMF Incorporated)	19
DiMarco July 19, 2012 Aff. in Opp. (Siemens Industry)	20
Kalfayan July 19, 2012 Aff. in Opp. (Federal Mogul Asbestos Personal Injury Trust)	21
Squitieri July 19, 2012 Aff. in Opp. (American Biltrite, Inc.)	22
Scotto July 19, 2012 Aff. in Opp. (Carrier Corporation)	23

APPEARANCES¹

For All Plaintiffs

Weitz & Luxenberg, P.C.

By: Thomas M. Comerford, Esq.

Frank Ortiz, Esq.

700 Broadway

New York NY 10003

(212) 558-5500

For Defendants Foster Wheeler, LLC, CBS Corp. & as Lead Counsel for All Other Remaining

Defendants

Sedgwick, LLP

By: Stephen Novakidis, Esq.

Three Gateway Center, 12th fl.

Newark NJ 07102

(973) 242-0002

For Defendants Atwood & Morrill Co., Aurora Pump Company, Barnes & Jones, Inc., The Fairbanks Company, Oakfabco, Inc. and Taco, Inc.

McGivney & Kluger, P.C.

By: Michelle D. Grady, Esq.

Laura B. Hollman, Esq.

Justin Kasmir, Esq.

Matthew D. Sampar, Esq.

Carol M. Tempesta, Esq.

80 Broad St., ste. 2300

New York NY 10004

(212) 509-3456

For Defendant Bakers Pride Oven Company, Inc., n/k/a QCP, Inc.

Malaby & Bradley, LLC

By: David H. Jones, Esq.

150 Broadway, ste. 600

New York NY 10038

(212) 791-0285

¹ This motion has been brought by all plaintiffs in the 22 cases in the April 2012 NYCAL In Extremis Cluster transferred to this court by order dated June 8, 2012. However, pursuant to the current controlling protocol for NYCAL In Extremis cases, the defendants designated a lead counsel, here, Sedgwick, LLP, by Stephen Novakidis, Esq. to submit a joint opposition to the plaintiffs' motion for joinder. Individual defendants were permitted to supplement the joint opposition, if necessary, with papers identifying issues particular to the facts of their cases. The appearances noted here relate solely to written papers, and the failure of a defendant's appearance to be noted is not a waiver of that defendant's objection to joinder, as preserved by the joint opposition. Nor does the failure of the court to note a defendant's appearance indicate that the defendant was not present for oral argument of the motion on July 23, 2012.

**For Defendants Consolidated Rail Corporation
and American Premier Underwriters, Inc.**

Eckert, Seamans, Cherin & Mellot, LLC

By: Thomas M. Smith, Esq.

10 Bank St., ste. 700

White Plains NY 10606

(914) 949-2909

**For Defendants G.S. Blodgett Corp., Middleby
Marshall, Inc. & The Middleby Corp.**

Seyfarth Shaw LLP

By: James S. Yu, Esq.

620 Eighth Ave.

New York NY 10018

(212) 218-5500

**For Defendants Metropolitan Transportation
Authority and Metro-North Commuter
Railroad**

Landman Corsi Ballaine & Ford, P.C.

By: Christopher S. Kozak, Esq.

120 Broadway

New York NY 10271

(212) 238-4848

For Defendant Georgia-Pacific, LLC

Lynch Daskal Emery, LLP

By: Lawrence G. Lee, Esq.

264 W. 40th St.

New York NY 10018

(212) 302-2400

**For Defendants Dana Companies, LLC, Lennox
Industries, Inc. and Union Carbide Corporation**

Darger Errante Yavitz & Blau, LLP

By: Daniel E. DeCicco, Esq.

Jonathan B. Kromberg, Esq.

116 E. 27th St., 12th fl.

New York NY 10016

(212) 452-5300

For Defendant Ford Motor Company

Aaronson, Rappaport, Feinstein & Deutsch, LLP

By: Christopher L. Pawlowski, Esq.

600 Third Ave.

New York NY 10016

(212) 593-6700

**For Defendants American Biltrite, Inc. AMF Inc., Carrier Corp., Federal Mogul Asbestos Personal
Injury Trust, as successor to Felt Products MFG, Co., and Siemens Industry, Inc.**

Wilson, Elser, Moskowitz, Edleman & Dicker, LLP

120 E. 42nd St.

New York NY 10017

(212) 490-3000

PAUL G. FEINMAN, J.:

By order of the Administrative Judge dated June 8, 2012, twenty-two April 2012 *in extremis* asbestos-related personal injury and wrongful death cases were referred to this court for trial by jury. Plaintiffs, all represented by the same counsel, now move by order to show cause to join the twenty-two individual actions for a single trial pursuant to CPLR 602(a) on the ground that the actions present common issues of law and fact. The remaining defendant, numbering in excess of eighty at the time of the argument of this motion, either through their joint opposition, or their individually filed opposition, raise numerous arguments as to why these cases should be

tried separately. For the reasons that follow, the court has determined that these twenty-two cases shall be tried in three groups: one will consist of plaintiffs who have been diagnosed with lung cancer; a second will consist of plaintiffs who have been diagnosed with mesothelioma and who also allege exposure during their time working in the U.S. Navy (including one who worked for the U.S. Merchant Marine); and a third will consist of plaintiffs who have been diagnosed with mesothelioma but who never worked in the Navy. Two plaintiffs—Glenda Vega and Thomas Neuer—will be excepted from these sub-groups and will be tried separately and individually.

Plaintiffs' papers focus on numerous factors which they believe justify joinder of all twenty-two of these matters, such as similar worksites and occupations among the plaintiffs; similar times of exposure; similar diseases; common "traditional" method of exposure which led to alleged inhalation of asbestos; and all plaintiffs being represented by the same counsel. The plaintiffs further submit that, although some plaintiffs are living and others dead, the life status of the plaintiffs is not dispositive of the issue of joinder because most people commonly understand that the diseases of lung cancer and mesothelioma may be fatal.

In opposition, the defendants collectively allege, in a somewhat conclusory fashion, that they oppose consolidation because they would suffer prejudice and because jury confusion would arise from joinder of all of the plaintiffs' claims. More specifically, defendants focus on the size of this cluster (twenty-two plaintiffs in all) and the number of defendants (Smith Aff. ¶ 6), the fact that this cluster of plaintiffs includes individuals suffering from one of two different diseases (mesothelioma and lung cancer) (Sampar Aff. ¶ 5), that members were exposed by different means at differing locations (Smith Aff. ¶ 6), that some members of the cluster are deceased and

others currently alive (Kromberg Aff. ¶ 29), and that some plaintiffs allege exposure during their time with the U.S. Navy or Coast Guard (Sampar Aff. ¶ 6).

The Individual Plaintiffs

1. Harry Adler

Harry Adler was allegedly exposed to asbestos in the form of cement, packing materials, and gaskets utilized on and within pumps, valves, and turbines while working on the U.S.S. FDR as a member of the United States Navy between 1958 and 1970. Mr. Adler was further allegedly exposed to asbestos by working with asbestos tiles, asphalt tiles, and joint mix during his tenure as a residential and commercial construction worker from the 1950s through the early 1970s. Mr. Adler was diagnosed with lung cancer on August 19, 2009, and is currently seventy-three years old.

2. Scott Dewitt

Plaintiff Scott Dewitt alleges exposure from numerous occupations over a thirty-year period, including being a hotel employee in the early 1970s, a roofer's assistant in the mid-1970s, a fireman in the U.S. Navy from 1977-1979, electrician's assistant at Lawrence Aviation from 1980-1982, maintenance worker at Riverhead Nursing Home from 1988-2004, and a plumber's assistant from the mid-1980s until the mid-1990s. Mr. Dewitt was diagnosed with lung cancer on January 30, 2010; he is currently fifty-four years of age.

3. Eugene Lehnert

Eugene Lehnert was allegedly exposed to asbestos while working at numerous metropolitan New York work sites as a Local 3 Electrician between 1964 and 2006. He alleges exposure from work activities including drilling Bakelite on electrical equipment, scoring floor

tile, sanding joint compound, and removing and replacing boiler insulation. Mr. Lehnert alleges additional exposure from his presence near spray fireproofing at One New York Plaza and near raw fiber dumping at the Kentile factory, as well as from working on multiple home renovations between the years of 1968 and 1975, during which time he worked with drywall and applied joint compound. Mr. Lehnert was diagnosed with lung cancer on May 2, 2011 and is currently sixty-six years of age.

4. Joseph Mirabile

Joseph Mirabile alleges exposure during his nearly thirty years working as a plumber; specifically, Mr. Mirabile alleges exposure to asbestos-containing pipe covering, insulation, valves, pumps, gaskets, spray fireproofing, floor tile, and wallboard compound at various New York metropolitan worksites. Between 1976 and 1977, Mr. Mirabile also served as a fireman in the U.S. Navy, where he alleges exposure to asbestos from proximity to ship turbines, pumps, and valves. Mr. Mirabile was diagnosed with lung cancer on April 18, 2011; he is currently seventy-six years old.

5. Alan Nudelman

Alan Nudelman alleges exposure to asbestos as a result of his co-ownership of a gas/service station. During the time periods of 1959-1966 and 1974-1984, Mr. Nudelman was responsible for ordering parts and observing and supervising mechanics involved in daily automobile repair work—including the blowout, sanding, and blowing off of auto parts. Mr. Nudelman was diagnosed with lung cancer on April 4, 2011. He is currently seventy years of age.

6. Mark Rock

Mark Rock was allegedly exposed to asbestos while serving as a fireman in the U.S. Coast Guard between 1951 and 1954, and while employed as a plumber and construction manager at various commercial and residential sites in and about New York State from 1956 until the early 1980s. Mr. Rock alleges specific exposure to various asbestos-containing products such as including gaskets, packing, joint compound, pipe covering, floor tiles, and press pads. He alleges exposure to asbestos-containing equipment including boilers, pumps, valves, hot water heaters, air conditioning units, and steam presses. Mr. Rock was diagnosed with lung cancer on November 2, 2010. He is currently eighty years of age.

7. Robert Wexler

Robert Wexler alleges exposure throughout his twenty-plus year career working as a plumber in the New York City metropolitan area (1958-1979). Specifically, he alleges exposure to asbestos-containing boilers, furnaces, pumps, valves, steam traps, baker ovens, gaskets, and other items. Mr. Wexler was diagnosed with lung cancer on May 12, 2011. He is currently sixty-eight years of age.

8. Glenda Vega

Glenda Vega alleges exposure to asbestos as an infant bystander to hole patching work performed in her Bronx apartment between 1975 and 1977. She alleges further exposure during this same time period to asbestos brought home on her father's clothing as a result of his employment, which at the time involved wall-patching work at various buildings throughout New York City. Ms. Vega was diagnosed with peritoneal mesothelioma on July 11, 2011. She is currently thirty-eight years old.

9. Thomas Neuer

Thomas Neuer was allegedly exposed to asbestos during his career as a signalman and foreperson for the MetroNorth, Conrail, and Penn Central railroad companies between 1972 and 1980. He was allegedly exposed to pipe insulation, wires, and Bakelite used in fuse boxes and switch controls during his work in the Park Avenue Tunnel, Grand Central Station and the command towers in each respective railroad area. Mr. Neuer was diagnosed with mesothelioma on April 7, 2011, and is currently sixty-five years old.

10. Murray Blonder

Murray Blonder alleges that he was exposed to asbestos working as a carpenter at various residential and commercial work sites throughout the New York metropolitan area between 1954 and 1979. Specifically, Mr. Blonder was allegedly exposed to asbestos from mixing and sanding asbestos-containing joint compound, cutting and installing asbestos-containing sheetrock, sawing, scoring, and snapping vinyl asbestos floor tile, cutting into wood fire doors, and applying insulation while installing boilers. Mr. Blonder was diagnosed with mesothelioma on September 12, 2011, and is currently seventy-five years old.

11. Charles Chidester

Charles Chidester was allegedly first exposed to asbestos as an electrician in the Navy between 1944 and 1969. During this time, Mr. Chidester was allegedly exposed to asbestos-containing pumps and valves on the U.S.S. Connelly and as a bystander on both the U.S.S. Randolph and the U.S.S. America. Mr. Chidester also alleges exposure from electrical panels, turbines, and evaporators. Mr. Chidester was allegedly exposed for a second period while working at a military training center located in Florida between 1971 and 1974 from contact with joint compound and asbestos insulation on condensers inside of chiller units. Mr. Chidester was

diagnosed with mesothelioma on April 25, 2011; he is currently eighty-five years old.

12. John Dellaratta

John Dellaratta was allegedly exposed to asbestos from 1950 to 1969 while working as a printer for the Imperial Paper Box company in Brooklyn, where he was allegedly exposed to asbestos insulation and cement on printing machinery. He alleges further exposure at Imperial Box from performing maintenance work on pipe coverings, boilers, and roofing materials. Mr. Dellaratta was also employed as a painter for Nassau County, where he allegedly regularly worked with asbestos-containing taping, joint compound and vinyl tile from 1969 until the late 1970s. Mr. Dellaratta was diagnosed with mesothelioma on May 27, 2011, and passed away on December 11, 2011 at the age of seventy-nine.

13. Joseph Milazzo

Joseph Milazzo alleges exposure to asbestos between the years of 1967 and 1971 while working in the supply area of two U.S. Navy ships. Mr. Milazzo alleges that he was at times exposed daily basis while delivering equipment parts to various sections of the ship and observing repair work on ship pumps, valves, and turbines; the latter repair work, he alleges, involved removal and replacement of asbestos-containing cement and the use of asbestos-containing blankets, gaskets, and rope packing. Mr. Milazzo was diagnosed with mesothelioma on August 10, 2011. He is currently sixty-three years old.

14. William Moritz

William Moritz alleges exposure to asbestos during two time periods—while working as an electrician's assistant aboard two ships in the U.S. Navy from 1958 to 1960, and while working as a truck driver for the Daily News from 1970 to 1977. During the former period, Mr.

Moritz alleges indirect exposure to asbestos cement, packing, and gaskets utilized on pumps, valves, turbines, and boilers on the ship. During the latter, Mr. Moritz alleges asbestos exposure from deteriorating pipe covering and cement, as well as from brake dust released from multiple brake jobs performed each week in the truck garage. Mr. Moritz was diagnosed with mesothelioma on May 6, 2011 and is currently seventy-three years of age.

15. Ivo Peraica

Ivo Peraica alleges exposure to asbestos during his time working as an insulator after immigrating to the United States in 1978. Mr. Peraica allegedly removed asbestos from various types of equipment, including boilers, pumps, chillers, and turbines in a variety of New York City metropolitan area work sites. Mr. Peraica was diagnosed with mesothelioma on August 26, 2011. He is currently sixty-three years old.

16. Antonio Perez

Antonio Perez was allegedly exposed to asbestos while working as a laborer for Mario & DiBono from 1970 to 1973. Specifically, he alleges exposure via involvement in asbestos spray application at the World Trade Center site and from performing similar work at Rockefeller Center, One Penn Plaza, and at a school in downtown Manhattan. While participating in spray work, Mr. Perez also allegedly observed others install floor tile and pumps containing asbestos. Mr. Perez was diagnosed with mesothelioma on August 8, 2011, and is currently seventy-one years old.

17. Roberto Roman

Roberto Roman was allegedly exposed to asbestos while serving as a fireman in the U.S. Navy from 1964 to 1968 and again while later employed as a stationary fireman/boiler-tender at

various New York City metropolitan area health and educational institutions between 1972 and the mid-1980s. As a Navy fireman, Mr. Roman was allegedly exposed while performing work on boilers, pumps, valves, insulation, gaskets, and packing. Mr. Roman alleges he was exposed as a stationary fireman/boiler-tender while working on boilers, pumps, valves, refrigeration units, and HVAC units. Mr. Roman was diagnosed with mesothelioma on July 1, 2011; he is currently sixty-nine years old.

18. Frank Rugnetta

Frank Rugnetta alleges asbestos exposure during multiple periods throughout his varied forty-plus year career as a plumber and mechanic. He alleges exposure as a plumber's assistant (1956-1963) from removing and installing residential boilers and furnaces, among other activities. Mr. Rugnetta alleges exposure as an auto mechanic from 1964-1966 and as service station owner from 1972-1979 from performing automobile brake and clutch repair. Mr. Rugnetta also alleges exposure to asbestos-containing electrical equipment including switchgear, breakers, and Bakelite during his time as a mechanic for the Port Authority and New York Transit Authority (1966-1971). Finally, he alleges exposure during his time as a facilities maintenance mechanic at four airports (1972-1980s) to asbestos-containing air starter units, brakes, clutches, baggage carousels, pumps, valves, and other equipment. On August 19, 2011, Mr. Rugnetta was diagnosed with mesothelioma; he is currently sixty-seven years old.

19. Raymond Sabo

Raymond Sabo was allegedly exposed to asbestos throughout a twenty-year career (1959-1979) as a carpenter and painter performing demolition, roofing, painting, wallpaper hanging, and floor tile work in numerous buildings throughout the New York City metropolitan area. He

allegedly worked with and around others working with asbestos-containing boilers, valves, pumps, turbines, hot water heaters, roofing, joint compound, floor tiles, and fire-rated doors. Mr. Sabo was diagnosed with mesothelioma on August 15, 2011. He died on February 11, 2012 at age seventy.

20. Edward Sadowski

Edward Sadowski alleges exposure to asbestos while working as a carpenter's mate in the U.S. Navy from 1951 to 1955, and as a carpenter and construction supervisor working in numerous buildings throughout the New York City region from 1955 to 1983. Specifically, he alleges asbestos exposure by working with boilers, valves, pumps, turbines, chillers, joint compound, floor tile, and fire-rated doors. Mr. Sadowski was diagnosed with mesothelioma on May 3, 2011. He died on September 26, 2011, at age eighty.

21. George Santiago

George Santiago was allegedly exposed during his career with the New York City Transit Authority from 1969 through 1980 during his work with asbestos-containing electrical equipment (panel boards, control panels, control circuits, switching gear, etc.), pumps, transformers, air compressors, brakes, gaskets, pipe covering, cement, and blankets. On August 8, 2011, Mr. Santiago was diagnosed with mesothelioma. He is currently sixty-two years old.

22. George Smith

George Smith alleges asbestos exposure from his time as an oiler and fireman in the Merchant Marine and U.S. Navy from 1945 to 1947. He was allegedly exposed through firsthand work on pumps, boilers, valves, and turbines with asbestos-containing cement, firebrick, packing, and gaskets. Further, he alleges indirect exposure through proximity to

shipmates and yardworkers using the same materials. Mr. Smith was diagnosed with mesothelioma on November 17, 2010. He died on October 8, 2011 at age eighty-four.

Analysis

CPLR 602 (a) permits a court to join actions involving common questions of law or fact; joinder of common matters is appropriate “where it will avoid unnecessary duplication of trials, save unnecessary costs and expense and prevent the injustice which would result from divergent decisions based on the same facts” (*Chinatown Apartments, Inc. v New York City Transit Authority*, 100 AD2d 824, 826 [1st Dept 1984]). The courts are given “great deference” in the decision to join matters (*Matter of Progressive Ins. Co. [Vasquez-Countrywide Ins. Co.]*, AD3d 518, 519 [1st Dept 2004]). The chief policy considerations behind consolidation or joinder are efficiency and the conservation of judicial resources (*see Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 73-74 [1st Dept 2002]; *Matter of New York City Asbestos Litigation*, 188 AD2d 214, 225 [1st Dept 1993], *affd* 82 NY2d 821 [1993]). Yet, “considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial” (*Johnson v Celotex Corp.*, 899 F2d 1281, 1284 [2d Cir 1990]). Joint trials are ill advised when “individual issues predominate, concerning particular circumstances applicable to each plaintiff” (*Bender v Underwood*, 93 AD2d 747, 748 [1st Dept 1983]). Thus, although a joint trial has the potential to “reduce the cost of litigation, make more economical use of the trial Court’s time, and speed the disposition of cases as well as [] encourage settlements” (*Malcolm v National Gypsum Co.*, 995 F2d 346, 354 [2d Cir 1993]), it is “possible to go too far in the interests of expediency and to sacrifice basic fairness in the process” of joinder, and joint trial should be denied where (1) individual issues predominate over common issues in the cases sought to be

joined, or (2) the party opposing the joint trial demonstrates substantial prejudice” (*Ballard v Armstrong World Industries*, 191 Misc. 2d 625, 627-28 [Sup Ct Monroe Cty 2002]).

To decide whether a joint trial is proper in the context of asbestos-related personal injury and wrongful death actions, this court continues to consider the factors articulated in *Malcolm v National Gypsum Co.*, 995 F2d 346, 351-352 (2d Cir 1993). Specifically, the court looks at “(1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs [a]re living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented by the same counsel; and (8) type of cancer alleged” (*id.* at 351 [quotations and citations omitted]). The party moving for joinder bears the initial burden of demonstrating the commonality of the issues, at which point the burden shifts to the opponent to establish prejudice and potential jury confusion (*Bender v Underwood*, 93 AD2d 747, 748 [1st Dept 1983]).

Considering the number of plaintiffs in the present action and the substantial practical and logistical challenges that would result from a proceeding with twenty-two plaintiffs and a substantially larger number of defendants (currently in excess of eighty), the interest of justice does indeed dictate that the plaintiffs be split into smaller groups for trial. Accordingly, all seven plaintiffs who have been diagnosed with lung cancer—Harry Adler, Scott Dewitt, Eugene Lehnert, Joseph Mirabile, Alan Nudelman, Mark Rock, and Robert Wexler—will be joined in a consolidated proceeding. The pathology of lung cancer is substantively different than that of mesothelioma, and the differences in medical testimony that will be required for this disease makes grouping plaintiffs who are diagnosed with this condition a reasonable basis on which to segregate them from the remainder of the plaintiffs, all of whom are diagnosed with some form

of mesothelioma. While causation will likely be disputed at trial, the issue of the etiology of lung cancer is common to all members of this first group and it is likely that the same experts will be testifying for most, if not all, of the plaintiffs therein (*see Matter of New York City Asbestos Litig.*, 9 Misc3d 1109[A], *2 [NY Sup Ct 2005]).

Once the plaintiffs with lung cancer have been separated, fifteen plaintiffs—fourteen of whom have been diagnosed with pleural mesothelioma—remain. From these remaining fifteen plaintiffs, plaintiff Vega (the sole party in this action diagnosed with peritoneal, and not pleural, mesothelioma) and plaintiff Neuer will be severed for reasons discussed in greater detail below. Still, the remaining thirteen individuals who have been diagnosed with pleural mesothelioma are simply too numerous for one consolidated proceeding. The practical and logistical obstacles to conducting such a proceeding are too abundant and obvious, and the risk of juror confusion and substantial prejudice is too great with a group containing all of the plaintiffs with mesothelioma in this cluster, regardless of how many similarities such plaintiffs share.

Accordingly, the remaining thirteen pleural mesothelioma plaintiffs will be further divided into two groups. In opposing any joinder whatsoever, defendants point out that there are several plaintiffs claiming exposure during their service in the U.S. Navy, and such defendants may be entitled to certain federal government contractor defenses that would not be applicable to the defendants in the other cases in the instant action (*see, e.g., Sampar Aff.* ¶ 6; *see also Boyle v United Technologies Corp.*, 487 US 500, 512 [1988]). Though this issue itself would not necessarily predominate over numerous common factors within a numerically smaller group of plaintiffs (as evidenced by the fact that the lung cancer group in this cluster will remain undivided notwithstanding the fact that some individuals therein served in the Navy and others

did not), further dividing the pleural mesothelioma group along the lines of Navy vs. non-Navy exposure nevertheless serves as a rational and convenient mechanism for dividing the “mesothelioma group,” which is simply too large despite the commonality among its members. Thus, those plaintiffs diagnosed with mesothelioma will be sub-divided into two sub-groups: one smaller sub-group of plaintiffs with mesothelioma who also allege exposure during their time working in the U.S. Navy (Charles Chidester, Joseph Milazzo, William Moritz, Edward Sadowski, and George Smith²), and another consisting of plaintiffs with mesothelioma who have never worked in the Navy (Murray Blonder, John Dellaratta, Ivo Peraica, Antonio Perez, Roberto Roman, Frank Rugnetta, Raymond Sabo, and George Santiago).

Defendants also raise the argument that plaintiffs have varying tobacco smoking histories, which, they allege, will confuse the jury in a consolidated proceeding. Thus, defendants contend the cluster should consequently be further subdivided into smoking and non-smoking sub-groups (*see, e.g.*, Yu Aff. ¶ 7). Plaintiffs’ different smoking histories, however, will not prevent the jury from executing its function. The pattern jury instructions assume that jurors are capable of distinguishing between concurrent causes of an illness and/or the aggravation of a pre-existing condition, and the court will not presume that jurors would be unable to distinguish between multiple smoking histories in fulfilling their function. Thus, further taxing of scarce judicial and juror resources by subdividing the aforementioned groups into smoking and non-smoking sub-groups is not merited.

Further, with regard to the different life statuses of the plaintiffs, this court has repeatedly held that the life status factor is not determinative of the issue of joinder in asbestos cases (*see*

² Plaintiff Smith in fact alleges exposure during his time working in the U.S. Merchant Marine Corps, but will nevertheless be joined within the “Navy-mesothelioma group.”

Matter of New York City Asbestos Litig., 2005 NY Slip Op 51465[U], *1). The *Malcolm* factors must be considered in their totality; no single factor is dispositive. It is commonly understood that the alleged diseases ultimately lead to death and, coupled with the long-term nature of the alleged exposures, whether the plaintiffs are alive or deceased is of little import (see *Matter of New York City Asbestos Litig.*, 9 Misc3d 1109[A], *1 [NY Sup 2005]). Accordingly, different life status will not serve as a factor that will prohibit consolidation of plaintiffs into groups which, under the *Malcolm* factors, will both ensure each plaintiff's ability to his or her day in court but which will also utilize judicial resources, and increasingly scarce jurors, in an economical manner.

Defendants also argue that the differences among plaintiffs' occupations, work sites, and types of exposure render these matters too factually dissimilar for joinder. They contend that *common* rather than "similar" jobsites is the litmus test for the relevant prong of the *Malcolm* analysis, and that the myriad sites at which plaintiffs allege exposure—including naval yards, commercial sites, and residential buildings—are not sufficiently similar so as to qualify as common work sites (see, e.g., Smith Aff. ¶ 13). Defendants also cite plaintiffs' varying occupations, including electrician (Chidester), painter (Sabo), and roofer's assistant (Dewitt), and argue that the way in which each may have been exposed to asbestos-containing products is vastly different (*id.* at ¶ 14). With the exception of plaintiffs Vega and Neuer (whose cases are discussed in greater detail below), these arguments fail to persuade the court that consolidation of plaintiffs into groups according to the disease with which they have been diagnosed are unwarranted or unduly prejudicial. Each plaintiff alleges exposure from the same or similar products—mainly, asbestos-containing insulation, pipe covering, and floor tile, and

valves/gaskets. Testimony and evidence regarding most of these products and the type of asbestos exposure that could result from them will be identical or nearly so in each matter (*see Matter of Dankenbrink*, Sup Ct, NY County, Feb. 19, 2010, Shulman, J., index No. 190009/09).

Defendants raise two issues in this vein worth addressing, however. First, they argue that two of the plaintiffs—Nudelman (within the lung cancer group) and Rugnetta (within the mesothelioma group)—allege exposure due to proximity to “friction products,” which would allegedly require unique “witnesses, studies, and other evidence” (Novakidis Aff. ¶ 39). This argument, however, does not alone tip the *Malcolm* calculus in favor of providing separate trials for these two plaintiffs in light of the substantial commonality with the other members of their disease-specific groupss; indeed, a plaintiff’s need for unique evidence and witnesses to support some idiosyncratic elements of his or her case within a consolidated proceeding does not render a separate proceeding necessary (or even useful) per se. Second, defendants allege that three plaintiffs—Vega, Milazzo, and Moritz—were exposed to asbestos as “bystanders,” arguing they were present when work with asbestos-containing products was being performed by someone else (Novakidis Aff. ¶ 40). Of these three, however, Vega is the only plaintiff who was a “bystander” in the sense that she was not exposed to asbestos during the course of her employment. For reasons enumerated below (the most important of which is that she is the only plaintiff in this cluster suffering from the disease of peritoneal, and not pleural mesothelioma), Vega will be severed from the mesothelioma group. Despite alleging that they are “bystanders,” Milazzo and Moritz also allege exposure to asbestos-containing products during the course of their employment. Further segregating the groups along this relatively minor distinction would only further tax judicial resources without providing any real benefit to the individual plaintiffs

or defendants; indeed, it is highly unlikely that even plaintiffs who allege exposure primarily as a result of work they themselves were performing were not also exposed to asbestos in this second-hand fashion as well, and that they thus would not present evidence from which a jury could draw this conclusion.

Defendants further argue that the varying time frames of exposure will lead to jury confusion and prejudice against them. The plaintiffs do indeed allege exposure during some mutually exclusive time periods ranging from the 1950s to the 1980s and beyond. Although the dates of exposure vary, this alone is not sufficient to warrant denial of a consolidated trial (*see Matter of Batista*, Sup Ct, NY County, Feinman, J., index No. 190009/09). Defendants fear that that the jury will apply the more restrictive state-of-the-art standard of later years to matters from years pre-dating this standard. However, as noted in previous decisions issued by this court, the Occupational Safety and Health Administration (OSHA) regulations were enacted in 1971, so any defendant to a claim which involves a time period which crosses this threshold year would have to hear state-of-the-art testimony related to pre-OSHA and post-OSHA standards even if cases were severed in this manner. Therefore, no additional confusion or prejudice will be created by the sub-groups created in this decision.

Defendants argue convincingly, however, that the actions of two plaintiffs—Glenda Vega and Thomas Neuer—ought to be tried separately and individually. Vega is the sole plaintiff among the twenty-two diagnosed with peritoneal mesothelioma,³ which is a distinct disease from

³ The remaining fourteen plaintiffs diagnosed with mesothelioma in this cluster were diagnosed with pleural mesothelioma.

not only lung cancer, but also from pleural mesothelioma⁴ (Crapo Aff. ¶ 15). She is the only plaintiff who does not allege firsthand occupational exposure to asbestos, and the only plaintiff who alleges take-home exposure (Kromberg Aff. ¶ 7). Further, the defendant Union Carbide Corporation is a defendant only in the *Vega* case and no others in the cluster. None of the *Malcolm* factors (with perhaps the exception of ‘same plaintiff’s counsel’) weigh in favor of a joint trial involving Vega and other any plaintiff’s case within this cluster. Plaintiff Vega’s disease and the underlying etiology of her illness are truly unique among the twenty-two plaintiffs and consolidation of her case would present a specific risk of prejudice and possible confusion. Accordingly, the Vega case will be tried separately from the other twenty-one cases.

Plaintiff Neuer’s action is the only action within this cluster involving a claim of liability under the Federal Employers’ Liability Act (FELA); as such, plaintiff Neuer’s case is the only one that will involve the negligence standard of care as provided by FELA and not that of strict product liability. Confusion among jurors is very likely to occur between the elements of a FELA claim (in particular, the unique statutory duty and breach elements that Neuer must prove under FELA) and the similar but distinct elements of the strict products liability claims levied against all other defendants. The unique claims, defenses, and potential damages relating to FELA in the Neuer case accordingly require that plaintiffs’ motion to consolidate be denied with respect to plaintiff Neuer, whose trial proceed in due course as a separate action.

Finally, since all plaintiffs in this cluster share counsel, the risk of jury confusion during the proceedings of the aforementioned sub-groupings can be avoided by the use of “intelligent

⁴ Peritoneal mesothelioma has a different classification code than pleural mesothelioma under the International Statistical Classification of Diseases and Related Health Problems (ICD) published by the World Health Association (see <http://www.who.int/classifications/icd/en/>), and has different risk factors as demonstrated by epidemiological studies than pleural mesothelioma exposure (Kromberg Aff. at ¶ 13).

management devices” (*Zalduondo v City of N.Y.*, 141 AD2d 816, 818 [2d Dept 1988]; *see also Matter of Dankenbrink*, Sup Ct, NY County, Feb. 19, 2010, Shulman, J., Index No. 104216/04, quoting *Matter of New York City Asbestos Litig.*, 2006 NY Slip Op 50375[U], *4; *see, e.g., New York Cent. Mut. Ins. v McGee*, 25 Misc 3d 1232[A], 2009 Slip Op 52385[U], *5 [Sup Ct, Kings County 2009]; *Matter of New York City Asbestos Litig.*, 22 Misc 3d 1109[A], 2009 Slip Op 52385[U], *6 [Sup Ct, Kings Co. 2009]). Counsel should specifically familiarize themselves with the procedures described for implementing the innovations in the publication *Jury Trial Innovations in New York State: A Practical Guide for Trial Judges*, available at www.nyjuryinnovations.org.

In sum, consideration of the *Malcolm* factors in the instant case in concert with the reality that “consolidation [and joinder] is favored by the courts” where equitable and in the interest of judicial economy (*Humiston v Grose*, 144 AD2d 907, 908 [1st Dept 1988]), this court finds that the most prudent grouping of plaintiffs in this case entails consolidating all seven plaintiffs who have been diagnosed with lung cancer (Harry Adler, Scott Dewitt, Eugene Lehnert, Joseph Mirabile, Alan Nudelman, Mark Rock, and Robert Wexler) in one group for trial, consolidating the eight plaintiffs who have been diagnosed with pleural mesothelioma who do not allege exposure while working in the U.S. Navy (Murray Blonder, John Dellaratta, Ivo Peraica, Antonio Perez, Roberto Roman, Frank Rugnetta, Raymond Sabo, and George Santiago) in a second group, and consolidating the five plaintiffs diagnosed with mesothelioma who allege exposure while working for the Navy (Charles Chidester, Joseph Milazzo, William Moritz, Edward Sadowski, and George Smith) in a third group. The remaining actions of the two plaintiffs, Glenda Vega and Thomas Neuer, will continue as actions to be individually tried.

The group of plaintiffs diagnosed with lung cancer (all of whom are currently alive) shall be tried first, followed by the group with mesothelioma who were not in the Navy, then the group with mesothelioma who served in the Navy, then the cases of the individual plaintiffs Vega and Neuer.

It is therefore

ORDERED that plaintiffs' motion for a joint trial is granted to the following extent:

Group I (Lung Cancer)

HARRY ADLER	Index No. 190181-11
SCOTT DEWITT	Index No. 190429-11
EUGENE LEHNERT	Index No. 190252-11
JOSEPH MIRABILE	Index No. 190176-09
ALAN NUDELMAN	Index No. 190320-11
MARK ROCK	Index No. 190319-11
ROBERT WEXLER	Index No. 190223-11; and it is further

Group II (Mesothelioma, non-Navy)

MURRAY BLONDER	Index No. 190370-11
JOHN DELLARATTA	Index No. 190248-11
IVO PERAICA	Index No. 190339-11
ANTONIO PEREZ	Index No. 190328-11
ROBERTO ROMAN	Index No. 190262-11
FRANK RUGNETTA	Index No. 190389-11
RAYMOND SABO	Index No. 190318-11
GEORGE SANTIAGO	Index No. 190445-11

Group III (Mesothelioma, Navy)

CHARLES CHIDESTER	Index No. 190293-11
JOSEPH MILAZZO	Index No. 190311-11
WILLIAM MORITZ	Index No. 190294-11
EDWARD SADOWSKI	Index No. 190215-11
GEORGE SMITH	Index No. 190299-11; and it is further

ORDERED that the remaining two cases in this cluster (Vega and Neuer) will proceed separately and individually; and it is further

ORDERED that the Group I plaintiffs and defendants shall appear in Part 12 for jury selection on September 10, 2012; and it is further

ORDERED that any motions in limine which must be resolved prior to jury selection should be the subject of a letter application made no later than August 24, 2012 with the original letter sent to chambers (60 Centre Street, rm 529, New York, NY10007). Any opposition to the motions in limine should be addressed to the court in letter format delivered to the court by September 7, 2011. The court will hear argument on the motions in limine just prior to the start of jury selection on September 10, 2012; and it is further

ORDERED that any slides or Power Point presentations which the parties will use in opening statements shall be exchanged by September 7, 2012. Opening statements shall commence September 13, 2012. The trial will not be in session on September 17, 18, 21, 26 and on all Wednesdays.

This constitutes the decision and order of the court.

Dated: August 7, 2012
New York, New York


J.S.C.

FILED

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