

**Matter of New York City Asbestos Litig.**

2010 NY Slip Op 32462(U)

September 8, 2010

Supreme Court, New York County

Docket Number: 190281/09

Judge: Martin Shulman

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: M. SHULMAN  
Justice

PART 1

HORN, ROBERT, ETAL

INDEX NO. 190281/09

- v -

A. W. CHESTER TON CO.,  
ETAL

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 11

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ <del>Order to Show Cause</del> — Affidavits — Exhibits <u>A-S</u>	<u>1</u>
Answering Affidavits — Exhibits <u>various</u>	<u>2-30</u>
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

**FILED**  
NEW YORK COUNTY CLERK'S OFFICE

**FILED**  
SEP  
NEW YORK COUNTY CLERK'S OFFICE

**FILED**  
SEP 09 2010  
NEW YORK COUNTY CLERK'S OFFICE

Dated: SEP 8 2010

MARTIN SHULMAN  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

-----X  
In Re: NEW YORK CITY ASBESTOS LITIGATION,  
-----

Index Nos.: 190281/09, *et al.*

- ROBERT HORN (Index No. 190281/09)
- DARLENE LARSON (Index No. 190006/08)
- GERALD MOORS (Index No. 190363/09)
- KAREN RICHMAN (Index No. 190335/09)
- SALVATORE SACCHERI (Index No. 190364/09)
- FRANCISCO SALVADOR (Index No. 190228/09)
- MATHEW P. SWALLING (Index No. 190229/09)
- RODNEY THAUT (Index No. 190333/09)
- ANNA M. TRIVILINO (Index No. 190288/09)
- WOLFGANG ZEISING (Index No. 190136/09)

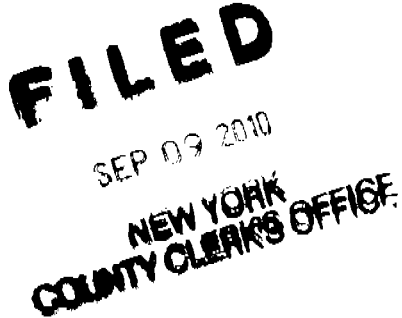
**DECISION and ORDER**

Plaintiffs,

-against-

A.W. CHESTERSON CO., *et al.*,

Defendants.  
-----X



**Hon. Martin Shulman, J.:**

The ten captioned asbestos cases involving the following plaintiffs: Robert Horn (“Horn”), Darlene Larson (“Larson”), Gerald Moors (“Moors”), Karen Richman (“Richman”), Salvatore Saccheri (“Saccheri”), Francisco Salvador (“Salvador”), Mathew P. Swalling (“Swalling”), Rodney Thaut (“Thaut”), Anna M. Trivilino (“Trivilino”) and Wolfgang Zeising (“Zeising”)(collectively, “Plaintiffs”) have been transferred as part of an *in extremis* cluster to this court pursuant to the NYCAL Amended Case Management Order for trial.

Pursuant to CPLR §602(a) and claiming the existence of common questions of law and fact, Plaintiffs’ counsel moves by order to show cause to consolidate the

following eight personal injury/wrongful death actions ("Consolidation OSC")<sup>1</sup> into three groups for successive joint trials: the first group is to be comprised of Horn, Moors and Thaut ("Group 1 Pltfs"); the second group is to be comprised of Saccheri, Swalling and Trivilino ("Group 2 Pltfs"); and the third group is to be comprised of Saldivar and Zeising ("Group 3 Pltfs"). Alternatively, Plaintiffs' counsel requests the joint trial of the Horn, Moors, Saccheri, Swalling, Thaut and Trivilino actions.

In no particular order, co-defendants, Georgia Pacific ("Georgia"), Burnham, LLC ("Burnham"), Crane Co. ("Crane"), Ford Motor Co. ("Ford"), Kentile Floors, Inc. ("Kentile"), Courter & Company ("Courter"), Treadwell Corporation ("Treadwell"), Tishman Realty and Construction Co., Inc. ("TRCC"), United Gilsonite Laboratories ("UGL"), A.O. Smith Water Products, Inc. ("A.O. Smith"), Flowserve US, Inc. ("Flowserve")<sup>2</sup>, Rockwell Automation, Inc., successor by merger to Allan-Bradley ("Rockwell"), NIBCO, Inc. ("NIBCO"), Trane US, Inc., f/k/a American Standard, Inc. ("American Standard"), Carrier Corporation, successor in interest to Bryant Heating and Cooling Systems ("Carrier"), Kaiser Gypsum Company, Inc. ("Kaiser"), Union Carbide Corporation ("Union Carbide"), Alcatel-Lucent USA, Inc., f/k/a Lucent Technologies, Inc., successor to Western Electric Co. Inc. ("Lucent"), Warren Pumps, LLC ("Warren"),

---

<sup>1</sup> For discrete reasons set forth in footnotes 1 and 2 of the Dymond Affirmation in support of the Consolidation OSC, Plaintiffs' counsel does not seek to consolidate the Larson and Richman actions with these eight actions.

<sup>2</sup> Flowserve is a successor in interest to Rockwell Manufacturing Company, Edward Valves, Inc., Nordstrom Valves, Inc. and Edward Vogt Valve Company.

CBS Corporation ("CBS")<sup>3</sup>, Reichhold, Inc. ("Reichhold"), Lorillard Tobacco Company ("Lorillard"), Hollingsworth and Vose Company ("H&V"), Foster Wheeler, LLC ("Foster Wheeler") and General Electric Company ("GE"), (collectively, "Defendants"), oppose<sup>4</sup> the Consolidation OSC<sup>5</sup>, each contending these cases' dissimilarities outweigh their commonalities.

In support of Plaintiffs' Consolidation OSC, counsel's supporting affirmation advances obvious commonalities among Plaintiffs: i.e., Belluck & Fox, LLP jointly represent Plaintiffs who were/are allegedly afflicted with mesothelioma; Plaintiffs were engaged in similar occupations in the construction trades and/or in home/residential renovations; Plaintiffs were exposed to asbestos containing materials and/or products ("ACM") as end-users/bystanders and their respective exposure histories do temporally overlap which, in turn, will result in the same state-of-the-art, medical and expert evidentiary overlap at a joint trial; at trial, Defendants will seek to prove liability of one or more of their co-defendants, any settling tortfeasor and one or more absentee bankrupt

---

<sup>3</sup> CBS is a Delaware Corporation, f/k/a Viacom, Inc., a successor by merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation.

<sup>4</sup> In opposition to Plaintiffs' Consolidation OSC (and to promote brevity), Warren and CBS have adopted the respective facts and legal arguments of co-defendants Foster Wheeler and GE; Courter and Treadwell have adopted the respective facts and legal arguments of co-defendant Kentile; and Carrier, A.O. Smith, Flowserve and Rockwell have adopted the respective facts and legal arguments of all co-defendants.

<sup>5</sup> In this cluster, Richman is the only case in which Lorillard is a named defendant. In this action, Richman *inter alia* alleges she was exposed to asbestos while smoking Kent filtered cigarettes. As indicated in footnote 1, *supra*, although Plaintiffs' counsel clearly did not request that Richman be consolidated with any of these actions for joint trial and it will be tried separately, still, Lorillard out of caution filed its opposition to the Consolidation OSC to make sure this litigation posture remains the case. Parenthetically, H&V has adopted the respective facts and legal arguments of co-defendant Lorillard.

tortfeasors to mitigate their own liability under CPLR Article 16 and this proof via documentary and testimonial evidence will provide for considerable overlap; five of the eight plaintiffs are deceased<sup>6</sup> and consolidating any of decedents' cases with the remaining living Plaintiffs' cases among the requested trial groupings will not be prejudicial since Plaintiffs were/are all diagnosed with mesothelioma, an indisputably fatal disease; the state of the art testimony and other expert testimony in a general way will be substantially common to Plaintiffs and Defendants; and "Defendants in all cases have been served with interrogatories and medical records and depositions have been<sup>7</sup> conducted for all Plaintiffs . . ." (Dymond Aff. In Support of Consolidation OSC at ¶ 26), thus, these cases are ready for trial.

Against the backdrop of the foregoing commonality factors Plaintiffs uniformly share, their counsel's affirmation further discusses particular commonalities among the requested joint trial groupings, *viz.*:

**Group 1 Pltfs**

- Group 1 Pltfs share a common work site on navy ships and *inter alia* engaged in "work performed on boilers, pumps, valves, turbines/engines, gaskets, packing, and insulation . . ." (*Id.* at ¶ 22);

---

<sup>6</sup> At the commencement/during the pendency of these actions and subsequent to the initial return date of the Consolidation OSC in July 2010, Horn, Saccheri, Swalling, Zeising and Thaut succumbed to this asbestos-induced disease.

<sup>7</sup> To the extent any discovery remains outstanding, Plaintiffs' counsel highlights this court's willingness to "be responsive to any reasonable request and will either briefly delay the trial or tailor the trial sessions to avoid any prejudice or due process concerns. . ." (*see Barnes v. A.O. Smith Water Products Co.*, 2008 NY Slip Op 31026U; 2008 N.Y. Misc. LEXIS 8397 [\*7](Sup. Ct. N.Y. Co., Shulman, J.).

- ❑ Horn and Moors were exposed to ACM from the 1950s to the 1970s and Thaut was exposed to ACM in the 1960s and 1970s, all of which allow for their respective exposure histories to temporally overlap and, in turn, will result in the same state-of-the-art, medical and expert evidentiary overlap at a joint trial; and
- ❑ Group 1 Pltfs have named common Defendants who “are represented by the same law firm, and one law firm actually represents 21 defendants in these cases . . . [a] factor [ ] [which] weigh[s] in favor of a joint trial.” (bracketed matter added) (*Id.* at ¶ 28).

### Group 2 Pltfs

- ❑ A particular commonality factor among the Group 2 Pltfs is their alleged ACM exposure to joint compounds as end users/bystanders in both residential and commercial work sites; and
- ❑ Trivilino was exposed to ACM in the 1960s and 1970s and Saccheri and Swalling were exposed to ACM in the 1970s and will similarly result in the same state-of-the-art, medical and expert evidentiary overlap at a joint trial.

### Group 3 Pltfs

- ❑ The Group 3 Pltfs were exposed to ACM in “insulation utilized in steam systems . . . [and] have a substantial overlap in time periods of exposure . . . [i.e., Zeising was exposed to ACM in the 1960s and 1970s and Saldivar was exposed to ACM in the 1970s] . . .” (*Id.* at ¶ 34).

Alternatively, counsel urges the consolidation of the Horn, Moors, Saccheri, Swalling, Thaut and Trivilino actions because these co-plaintiffs were uniformly exposed to asbestos containing joint compound either as end users or bystanders during residential renovations (*Id.* at ¶ 35; see also, Exhibits G and H to Consolidation OSC).

In their voluminous opposition to consolidating these eight cases among the three joint trial groupings, Defendants jointly and severally make well-worn arguments that the bundling of asbestos cases generally violates their due process rights, is fundamentally unfair and will manifestly create logistical concerns that will severely

prejudice their ability to defend. Ironically, Defendants further highlight certain “common” differences among all Plaintiffs which predominate over the common factors: (1) Plaintiffs did not uniformly share common work sites which ranged from commercial and residential sites to Coast Guard vessels/navy ships and powerhouses; (2) Plaintiffs did not uniformly share common occupations but were in fact rather diverse (e.g., Swalling claims ACM exposure as a telephone operator [see Foster Wheeler/GE’s Opp. Aff. at ¶ 41]; see also, UGL’s Opp. Aff.); (3) Plaintiffs did not uniformly experience common exposures, namely, some of Plaintiffs were exposed as end-users of ACM whereas others were exposed as bystanders (i.e., Trivilino alleges non-occupational, bystander exposure to asbestos-containing joint compound during residential renovations [see, e.g., Georgia’s Opp Aff. at footnote 13; see also, Kentile’s Opp. Aff. at ¶ 11]; see also, TRCC’s Opp. Aff. at ¶ 5); (4) regardless of any temporal overlap among Plaintiffs in the three trial groups, the alleged dissimilar 40 year time span (regardless of some overlap) requiring discrete state-of-the-art testimony will foster jury confusion if Plaintiffs’ actions were jointly tried in any group; (5) Defendants in cases involving the living co-plaintiffs’ personal injury claims will be prejudiced by having them jointly tried with the wrongful death claims and even claim prejudice in participating in a joint trial exclusively of wrongful death claims due to the disparity of decedents’ ages when they succumbed to mesothelioma (e.g., Horn died at the age of 76, whereas Swalling died at the age of 63); (7) in a joint trial regardless of Plaintiffs’ counsel’s suggested trial groupings, the friability and dose-relationship (low dose release versus high dose release of ACM fibers, etc.) of the many diverse asbestos containing products and materials to which respective Plaintiffs were cumulatively exposed will cause further jury



confusion and prejudice Defendants; (8) contrary to Plaintiffs' counsel's assertions that all discovery has been completed, Defendants severally continue to complain about not receiving respective employment records<sup>8</sup>, medical records, tax records, list of expert witnesses, list of product-identification witnesses, etc., and therefore cannot be ready for trial; (9) there is a total lack of common defendants in these actions, viz., "there are 175 defendants left in these cases and more than 100 of them are in only ONE CASE . . ." (emphasis in the original)(Georgia's Opp. Aff. at ¶ 53)<sup>9</sup>; (10) a number of these Defendants are named in only one action and should not have to suffer through a "more burdensome and lengthy trial . . ." (Carrier's Opp. Aff. at ¶ 9); and (11) weaving a singular thread of Plaintiffs' joint compound exposure (regardless of Plaintiffs' diverse workplaces, occupations and exposure time periods) to alternatively consolidate six of the eight cases does not vitiate the predominant differences (e.g., those of Plaintiffs exposed to ACM while on ships at sea perforce must be tried separately to avoid jury confusion because federal law is implicated).

Kaiser *inter alia* informs that in addition to the foregoing arguments, in three of the eight actions, it received "No Opposition Summary Judgment Motions, dismissing all claims as against Kaiser-Gypsum, with prejudice . . ." (Imbasciani Opp. Aff. at ¶30).

---

<sup>8</sup> For example, Ford claims it has not received all the necessary documentation to adequately defend against Thaut's loss of earnings claim valued somewhere between \$1,016,047.00 - \$1,682,277.00 (Ford's Opp. Aff. at ¶ 7).

<sup>9</sup> Expanding on this point, Crane's counsel also notes that "there are one-hundred and twenty seven (127) unique defendants, including: thirty-seven (37) remaining defendants in Horn, forty-six (46) remaining defendants in Moors, nine (9) remaining defendants in Richman, three (3) remaining defendants in Saccheri, twenty-one (21) remaining defendants in Saldivar, twenty-six (26) remaining defendants in Swalling, forty-nine (49) remaining defendants in Thaut, eleven (11) remaining defendants in Trivilino, and two (2) remaining defendants in Zeising . . ." (Crane's Opp. Aff. at ¶ 14).

Reichhold has a separately filed summary judgment motion seeking dismissal of Swalling's claims against this co-defendant alleging a failure of product identification. In opposing the Consolidation OSC, Reichhold further states that the Swalling action must be separately tried because of this decedent's alleged exposure to chrysotile asbestos encapsulated in phenolic molding compounds ("PMCs") used for electrical wiring insulation and other similar uses. This decedent, Reichhold further argues, is the only individual in this cluster of cases to have experienced this unique exposure to PMCs as well as to "Western Electric asbestos containing relays, spring switches, fuse panels, terminal blocks and 608 switching equipment . . ." (Reichhold's Opp. Aff. at ¶ 9), a distinguish factor that predominates over any perceived commonalities.

As noted earlier, Flowserve, Allen-Bradley and A.O. Smith uniformly adopt Defendants' arguments in opposition to the Consolidation OSC. However, these co-defendants further oppose consolidation with any plaintiff with whom he/she has "no involvement" noting this nuanced factor: "[These co-defendants] will be prejudiced by the potentially improper association of [Flowserve, Allen-Bradley and/or A.O. Smith] with various plaintiffs who never identified . . . [Rockwell Manufacturing Company, Edward Valves, Inc., Nordstrom Valves, Inc., Edward Vogt Valve Company, Allen-Bradley and/or A.O. Smith] products." (bracketed matter added)(see, e.g., A.O. Smith's Opp. Aff. at ¶ 5).

### **Discussion**

CPLR §602(a) permits a court to consolidate two or more actions for joint trials if they involve common questions of law and fact. "Consolidation 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 A.D.2d 824 (1<sup>st</sup> Dept. 1984). Joint trials will also foster judicial economy, quicken the disposition of cases (*City of Rochester v. Levin*, 57 A.D.2d 700 [4<sup>th</sup> Dept. 1977]) and potentially encourage settlements (*In re New York City Asbestos Litigation [Brooklyn Naval Shipyard Cases]*), 188 A.D.2d 214, 225 [1<sup>st</sup> Dept.], *aff'd* 82 N.Y.2d 821 [1993]). Fairness compels the court to consider joint trials ill-advised "where individual issues predominate, concerning particular circumstances applicable to each plaintiff. . . ." (*Bender v. Underwood*, 93 A.D.2d 747, 748 [1<sup>st</sup> Dept. 1983]) and one or more of the defendants.

In exercising discretion to consolidate these eight actions, the court should consider certain suggested factors in determining whether joint trials here are appropriate, to wit: "(1) common work site; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs are living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs are represented by the same counsel; and (8) type of cancer alleged." *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 351-352 (2<sup>nd</sup> Cir. 1993).

Notwithstanding Defendants' contrary view and consistent with this court's earlier decisions (i.e., *Barnes v. A.O. Smith Water Products Co.*, at footnote 7, *supra*)(Exhibit E to Dymond Aff. in Support of Consolidation OSC), this court finds that certain commonalities do exist and certain issues Defendants collectively claim predominate over the commonalities will not defeat Plaintiffs' application for joint trials generally.

First, Plaintiffs are represented by the same law firm. Second, Plaintiffs share a common, albeit fatal illness, mesothelioma. Third, this court has previously held that except under unique circumstances, the *Malcolm* factors generally do not compel plaintiffs to share a common (i.e., identical) work site, occupation or time period of exposure either as bystanders or end-users (as a practical matter, a worker exposed to ACM as a bystander regularly passing through one job site to get to another job site is factually no different from a non-worker exposed to ACM during the course of residential renovations). Thus, this court finds there are similarities in the manner in which almost all of Plaintiffs performed their respective tasks in the construction trades, in the powerhouses and on ships and in the manner of their exposures to ACM during overlapping periods of time from the 1950's to the 1970's. Finally, against this backdrop, the state of the art testimony and other expert testimony in a general way will be substantially common to Plaintiffs.

In *Bombace v. A.O. Smith Water Products, Co.*, n.o.r., Index No 190053/09, April 19, 2010 (Sup. Ct., N.Y. Co., Shulman, J.), this court had the occasion to reconsider some of Defendants' arguments opposing consolidation because of potential jury confusion where a respective plaintiff claimed ACM exposure at powerhouses or during stints in the U.S. Navy and/or on ships at sea. This court took judicial notice of, and analyzed the following decisions and their histories:

*Ballard v. Anchor Packing Company*, n.o.r., Index No. 109102/08 issued September 9, 2009 (Sup. Ct., N.Y. Co., Feinman, J.). . . , a decision and order which determined a strikingly similar motion to consolidate twelve personal injury/wrongful death actions for a joint trial. In *Ballard, supra*, when Justice Feinman *inter alia* consolidated nine mesothelioma cases for a joint trial, the court apparently did not find these factors so dissimilar

as to warrant severing the actions of plaintiffs exposed to ACM in powerhouses, the U.S. Navy and/or at sea from the actions of plaintiffs exposed to ACM at other work sites and granting the former separate trials. However, what is significant is the fact that defendants, after filing a notice of appeal of the *Ballard* consolidation decision, immediately moved before the Appellate Division, First Department to stay the trial of those nine actions raising the very same arguments being raised here. Notably, the stay application was denied (*see Matter of New York City Asbestos Litigation*, Motion No. M-4237, 2009 N.Y. Slip Op. 85378[U] [1<sup>st</sup> Dept.]) (Exhibit D to Motion). *See also, Ames v. A.O. Smith Water Products, Co.*, n.o.r., Index No. 107574/08 issued March 19, 2009 (Sup. Ct., N.Y. Co., Friedman, J.) (in its bench decision spread on the record, the court advanced an identical *ratio decidendi*) . . . , *stay den.*, (*see Matter of New York City Asbestos Litig. - A.O. Smith Water Products, Co., Inc., Robert A. Keasbey, Co.*, Motion No. M-1491A, 2009 N.Y. Slip Op. 70086[U] [1<sup>st</sup> Dept.]) (Exhibit F to Motion). Notwithstanding this court's views to the contrary, the foregoing decisions now make it clear that the Appellate Division found defendants' perceived prejudices and concerns about jury confusion wanting.

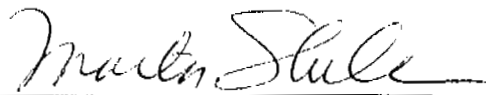
Notwithstanding the foregoing, this court finds the Plaintiffs' suggested three trial groupings strike a fair balance between fostering judicial economy while at the same time foreclosing the prejudice concerns Defendants would have otherwise experienced if Plaintiffs' alternative consolidation request had been granted.

While denying Plaintiffs' alternative consolidation request, this court otherwise grants the primary request contained in Plaintiffs' Consolidation OSC in its entirety. The Horn, Moors and Thaut actions shall be consolidated for a joint trial. Then, the Trivilino, Saccheri and Swalling actions will be jointly tried thereafter and will then be followed by a joint trial of the Saldivar and Zeising actions, albeit all in due course. After the disposition of the Group 1 Pltfs', Group 2 Pltfs' and Group 3 Pltfs' actions, this court will then schedule a trial date for the Richman action.

The remaining parties in the Group 1 Pltfs' actions are directed to appear at a pre-trial conference in Part 1, Room 325, 60 Centre Street, New York, New York 10007 on October 5, 2010 at 11:00 a.m. to determine the jury selection date and resolve any other outstanding issues of concern. Any Defendants in the other trial groupings may wish to appear and seek this court's assistance in resolving any of their concerns.

This constitutes this court's Decision and Order.

Dated: New York, New York  
September 8, 2010

  
HON. MARTIN SHULMAN, J.S.C.

**FILED**  
SEP 17 2010  
NEW YORK  
COUNTY CLERK'S OFFICE