

DRAFT – February 28, 2017. Published on NYCAL Website for Comment.

SUPREME COURT OF THE STATE OF NEW  
YORK ALL COUNTIES WITHIN THE CITY OF  
NEW YORK

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

New York City  
Asbestos Litigation  
(NYCAL)

-----X

Index No.

This Document Relates To:

All Cases

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### **I. Applicability of This Order**

This Case Management Order (“CMO”) applies to all pretrial proceedings in asbestos personal-injury and wrongful death cases now or hereafter assigned to the New York Asbestos Litigation (“NYCAL”), except as otherwise directed by the Coordinating Judge of NYCAL upon motion and for cause shown by the party seeking to have this Order declared inapplicable. This CMO supersedes all previous case management orders and amendments thereto entered in NYCAL.

### **II. Objectives**

It is the objective of the Court to encourage and bring about the fair, expeditious, and inexpensive resolution of these cases. To that end, this CMO directs the following:

- A. The standardization of pleadings and discovery so that the parties can obtain the necessary information to evaluate cases for settlement or to prepare them for trial at minimum cost;
- B. The coordination of discovery, the appointment of Liaison Counsel, the appointment and compensation of a Special Master, in order to avoid duplication, contain costs, and expedite disposition via settlement or trial.
- C. The scheduling of early pretrial conferences to explore settlement opportunities, to resolve pretrial management problems, and to establish discovery cut-off dates;
- D. The grouping, ordering and firm scheduling of cases for pretrial proceedings and trial.

### **III. Special Master**

- A. **Special Master Term.** The Coordinating Judge appoints, on consent of counsel, Shelley Rossoff Olsen, Esq. to serve as Special Master. Her term will last for one year, until \_\_\_\_\_, 2018. Thereafter the Special Master shall serve one year terms, which will automatically be renewed unless 1) any Liaison Counsel (described in section \_\_ below) objects by \_\_\_\_\_ of the year preceding the end of the Special Master's term, or 2) the Special Master is relieved of his or her duties on consent of all Liaison Counsel, or 3) the Special Master is relieved of his or her duties for good cause shown upon motion by any Liaison Counsel or upon the court's own motion, or 4) the Special Master leaves of her own volition after giving not less than 60 days' notice via email to the Coordinating Judge and

Liaison Counsel. If the expiration date of the Special Master's term falls on a weekend or holiday in a given year, the term will extend to the next business day.

- B. **Special Master Duties.** The Special Master shall supervise compliance with discovery, including, but not limited to, adequacy of the plaintiffs' and defendants' responses to standard interrogatories, production of documents, expert disclosure, the conduct of depositions, and other discovery disputes that may arise. The Special Master shall convene and conduct mandatory settlement conferences as necessary, and shall have such other duties as specified by this CMO.
- C. **Resolution of Discovery Disputes.** In the event of a discovery dispute the requesting party shall notify the Special Master without delay and request intervention. No motion to compel discovery shall be made without first seeking the assistance of the Special Master. Any party objecting to a ruling by the Special Master shall notify by email the Special Master and all other interested parties within three business days of receiving the Special Master's ruling of its intention to raise an objection. Upon receipt of this email, the Special Master shall promptly reduce the recommended ruling to writing. The objecting party shall present its objections by order to show cause to the Coordinating Judge within seven days of receipt of the Special Master's written ruling, unless this time is extended by the Coordinating Judge or the Special Master. In the absence of a motion by order to show cause to the Coordinating Judge, the Special Referee's ruling will be law of the case.

D. **Compensation.** The parties agree that the Special Master shall be compensated at the flat annual rate of \$368,000. This fee is to be borne 50% by the plaintiffs and 50% by the defendants. The assessment and collection of the fee amounts from the plaintiffs' and defendants' bars shall be the responsibility of Rossi, LLP, a financial management company agreed to by the parties, and any successor financial management company agreed to by the parties. The Special Master's fee shall be paid by Rossi, LLP on March 20, June 20, September 20, and December 20 or upon the first business day after the relevant day. Plaintiffs and defendants shall each pay 50% of Rossi, LLP's fee.

E. **Parties.** On or before May 26 of each year, plaintiffs will submit the following information to Rossi, LLP: 1) allocations among plaintiffs for their share of the Special Master's compensation and Rossi LLP's fee, including names, addresses, and emails of all plaintiffs' counsel; 2) lists of all participating defendants in NYCAL, including names and addresses and emails of all such defendants' counsel. For purposes of this Section III of the CMO "participating" defendants shall be defined as all those defendants who are included in the Accelerated Docket, as defined in section \_\_ below, or in the Active Docket, as defined in section \_\_ below. Lists of plaintiffs and defendants given to Rossi LLP shall be updated regularly by Liaison Counsel to account for new litigants. Based on this information provided pursuant to this paragraph, Rossi LLP will promptly notify plaintiffs' counsel and defendants' counsel of the parties' respective payments of their proportionate share of the Special Master's compensation and Rossi, LLP's

fee. Plaintiffs' counsel shall be responsible for full payment of their clients' shares to Rossi LLP on or before June 15 of each year. Defendants' counsel shall be responsible for full payment of their clients' shares to Rossi LLP on or before August 15 of each year. These amounts may be recouped by plaintiffs' and defendants' counsel in the form of client disbursements.

F. **Share Allocations of Fee.** As the number of plaintiffs involved in the Accelerated and Active Dockets is amenable to accurate calculation, each plaintiff's share of the Special Master's compensation and Rossi LLP's fee shall be calculated by percentage allocation of the total plaintiffs' share. As the number of defendants involved in the Accelerated and Active Dockets is difficult to anticipate, each defendant's allocation shall be calculated by Rossi, LLP, which allocation shall include each defendant's share of the Special Master's compensation and Rossi, LLP's fee. Any excess amounts paid annually by either plaintiffs or defendants for the Special Master's compensation and Rossi LLP's fee shall be kept in separate escrow accounts set up by Rossi, LLP for plaintiffs and defendants, respectively. These amounts in escrow, if any, shall be applied to the following year's compensation for the Special Master and fee for Rossi, LLP. The defendants' annual set amount shall be reevaluated and adjusted each year, as necessary.

#### IV. Venue

All asbestos personal injury and wrongful death cases arising in New York, Queens, Kings, Bronx or Richmond Counties shall be filed in New York County.

Cases shall be tried in New York County, except upon the entry of the appropriate Administrative Order, NYCAL cases ready for trial may also be assigned to one or more trial parts in another county.

**V. Filing Procedures**

A. **Files.** A master e-file, known as the NYCAL Master File, has been established in the Office of the Clerk of New York County for all asbestos cases assigned to the Coordinating Judge of NYCAL. Entries on the NYCAL Master File shall be applicable to each asbestos case assigned to the Coordinating Judge. The original of this Case Management Order shall be e-filed in the NYCAL Master File and shall be deemed part of the record of each action in NYCAL. A separate file shall also be maintained under a separate index number for each individual action by the office of the Clerk of New York County.

B. **Captions of Cases.** Any document e-filed in these coordinated actions that has general application to all cases shall bear a caption as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
ALL COUNTIES WITHIN THE CITY OF NEW YORK

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**IN RE: NEW YORK CITY** : New York City  
**ABESTOS LITIGATION** : Asbestos Litigation  
: Index No. \_\_\_\_\_  
:

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C. **Filing of Papers.**

1. When a paper has general application to all cases, the caption shall bear index number \_\_\_\_\_ and the Clerk of New York County shall e-file such paper in the NYCAL Master File. No further copies of the papers need to be e-filed. Any document so e-filed shall be deemed to have been e-filed in each case to which this Case Management Order applies and shall constitute part of the record of such case.

2. When a paper is applicable only to an individual case, the attorney submitting such paper for e-filing shall supply a cover sheet containing the caption and index number to which the paper is applicable. The Clerk of New York County shall e-file such paper in the file applicable to the individual case, and not in the NYCAL Master File.

3. When a paper is applicable to two or more cases, the captions shall state the case names and index numbers of the actions to which the paper is applicable, and it shall be e-filed in each applicable case file.

## **VI. Rules of Procedure**

The Civil Practice Law and Rules and the Local Rules of the Supreme Court of the State of New York, New York County, together with the express provisions of this CMO, shall govern all proceedings herein. Where this CMO's provisions differ from the CPLR's, the CMO shall control.

## **VII. Pleadings**

A. **Complaints.** Plaintiffs' counsel shall e-file in the NYCAL Master File a set of complaints containing standard allegations generally applicable to all claims of a similar nature. Thereafter, plaintiffs shall, to the maximum extent feasible, serve and e-file a short form complaint which incorporates by reference all allegations contained in the appropriate standard complaint. Complaints shall comport with the CPLR, with the following modifications. To the extent that the plaintiff wishes to be placed on the Accelerated Docket, as defined in section \_\_, below, she must allege facts and include documentation of minimum criteria for placement on the Accelerated Docket, as set forth in section \_\_ below. For placement on the Active Docket, as defined in section \_\_, below, the complaint must allege and include the requisite documentation of minimum criteria for placement in the Active Docket as set forth in section \_\_ below. [The following language has been moved within this section:] Complaints shall be served as provided in the CPLR. No complaint shall be filed before plaintiff's counsel has applied for plaintiff's social security records from the Social Security Administration or can represent in good faith that there is an impediment to making such application. [Language Omitted.] The complaint shall contain a paragraph setting forth the date of the application for social security records, or the impediment that prevents such application. It is presumed by the parties and the court that in most cases a plaintiff will seek social security records before filing the complaint. Failure to comply with the requirements of seeking social security records before filing the complaint, and for making the requisite recitations



regarding such records in the complaint, shall not provide grounds to dismiss the complaint, but may expose counsel to sanctions.

- B. **Amended Complaints.** Any plaintiff may, without further leave of the court, amend her complaint, subject to the limitations stated herein. Where an amended complaint has been e-filed and served, a motion to substitute parties, pursuant to CPLR \_\_\_\_, will be deemed to have been made and granted. If a plaintiff in an Accelerated Trial Cluster, as described in section \_\_ below, amends her complaint to add an additional defendant(s) during the sixty day period before April 1 for the April Cluster and October 1 for the October Cluster, at the request of any late-added defendant, the plaintiff's action will be automatically be removed from the cluster and shall be put into the next succeeding Accelerated Trial Cluster, except for extraordinary cause shown by plaintiff and as approved by the Special Master. Automatic removal shall not preclude application by defendants for any other relief to which they may be entitled for other reasons. [Language added from old CMO:] If a plaintiff in an Accelerated Trial Cluster amends his or her complaint to add an additional defendant(s) on or after April 1 for the April Cluster or on or after October 1 for the October Cluster, at the request of the late-added defendant, that plaintiff's action shall be automatically removed from the cluster and added to the chronological list of cases from which cases are assigned to the Active Docket, except for extraordinary cause shown by plaintiff. However, if the plaintiff is still living at the time the window for next Accelerated Trial Cluster opens, plaintiff

may reapply for inclusion in that cluster if the plaintiff is alive at the time of application.

C. **Pleading Punitive Damages.** Pursuant to the court's order dated \_\_\_\_, punitive damages are no longer deferred in NYCAL and may be sought, where there is a good faith basis for doing so, against named defendant(s). In cases where the complaint already contains a prayer for punitive damages plaintiff shall consider whether it intends to seek punitive damages against a named defendant or defendants. Plaintiff and defendants shall confer and where plaintiff agrees that it has no good faith basis for proceeding with a punitive damages claim plaintiff shall sign a No Opposition Summary Judgment dismissing the prayer for punitive damages pursuant to Section XXII of this CMO. Where an existing complaint does not contain a prayer for punitive damages, the plaintiff may amend the complaint to include punitive damages, if he or she has a good faith reason for doing so, without leave up to ten days prior to the date of plaintiff's application to be included in an Accelerated or Active Cluster, as defined in sections \_\_ and \_\_ below. After that time, but prior to the trial court setting a trial date, if a plaintiff contends that subsequent discovery supports a punitive damages claim against one or more additional defendants, plaintiff may move before the Special Master to amend the complaint to include punitive damages. The Special Master's decision shall be appealable pursuant to Section III.C of the CMO.

D. **Answers.** Defendants shall serve and e-file in the NYCAL Master File a standard Answer with affirmative defenses. Once a defendant has e-filed a standard

Answer, a defendant may respond to any complaint served upon it with an acknowledgement of service, by which service defendant will have been deemed to have denied all material allegations contained in the complaint, except as stated in such acknowledgement, and to have raised each of the affirmative defenses contained in defendant's standard answer, except as stated in such acknowledgement. If plaintiff files an amended complaint, all defendants who have previously filed a standard answer in the NYCAL Master File shall be deemed to have denied all material allegations in the amended complaint. All co-defendants to which any cross-claims may apply will be deemed to have denied all material allegations in such cross-claims. Nothing herein shall preclude a defendant from filing an individual answer if it so chooses.

### **VIII. Liaison Counsel**

- A. **Role.** Liaison Counsel act on behalf of the plaintiffs' and defendants' bars in NYCAL. They facilitate communication among the Court and counsel, minimize duplication of effort, coordinate joint positions, and assist in the efficient progress of this litigation.
- B. **Responsibilities.** Subject to the right of any party to present individual or divergent positions or take individual actions, Liaison Counsel are charged by the Court to work with the Court and the Special Master: 1) to ensure that NYCAL fairly, expeditiously and inexpensively resolves cases; 2) to suggest improvements to NYCAL; 3) to coordinate discovery, including the preparation and modification

of form disclosure devices; 4) to call meetings of counsel in NYCAL for the purpose of coordinating responses to issues that have arisen in NYCAL; 5) to assist the Court in convening Town Hall meetings where all counsel are invited to meet with the Coordinating Judge. Liaison Counsel are authorized to receive orders, notices, correspondence, email, and telephone calls from the Coordinating Judge and shall be responsible for disseminating communications received from the Coordinating Judge. Liaison counsel do not have the right to bind any party, except an individual Liaison Counsel's own clients, as to any matter without the consent of counsel for the party in question.

C. **Number and Terms of Liaison Counsel.** There shall be four plaintiffs' Liaison Counsel and four defendants' Liaison Counsel, chosen by plaintiffs' and defendants' bars by election, respectively. Liaison Counsel shall serve in staggered two year terms, so that two plaintiffs' Liaison Counsel and two defendants' Liaison Counsel shall be elected each year. There shall be no term limits on service of Liaison Counsel. To ensure continuity after the effective date of this CMO, and because of their lengthy and valuable service to the Court and extensive knowledge of the history of asbestos litigation, the existing Liaison Counsel, Charles Ferguson and Jordan Fox for the plaintiffs, and Robert Malaby and Judy Yavitz for the defendants, will serve for an additional year, beginning \_\_\_\_\_. The defendants' and plaintiffs' bars shall each elect two additional Liaison Counsel to begin serving a two-year term on \_\_\_\_\_.

## **IX. Standard Consolidated Discovery**

**A. Authorizations.** At the time of the service of the complaint, or as soon as practicable thereafter, plaintiff shall provide authorizations for medical, employment, social security, disability, workers compensation, union, military, and tax records to defendants.

**B. Defendants' Standard Interrogatories.** Defendants have developed a single, standard joint set of interrogatories, which has been e-filed with the court in the Master File, and are attached to this CMO. These interrogatories shall be deemed to apply to all cases, and need not be served on a plaintiff's counsel. Plaintiffs shall provide detailed verified answers, to defendants' standard set of interrogatories and request for documents pursuant to the CPLR. After a plaintiff has answered the defendants' standard joint set of interrogatories, any defendant may serve supplemental, non-repetitive interrogatories, upon good cause shown and the approval of the Special Master. Plaintiff shall [omitted language] respond to any supplemental interrogatories in a given case within 60 days of service.

**C. Plaintiffs' Standard Interrogatories.** Plaintiffs have developed standard sets of interrogatories designed to obtain general liability information tailored to various types of defendants, which have been e-filed with the court in the Master File and are attached to this CMO. These interrogatories shall be deemed to apply to all cases, and need not be served on defendants' counsel where a defendant named in the complaint has already appeared in NYCAL. Each defendant shall e-file in the Master File a single set of responses to the relevant standard set(s) of interrogatories,

which responses shall be applicable to all actions in NYCAL. Any defendant answering the interrogatories for the first time shall provide detailed verified answers to plaintiffs' applicable set of interrogatories within sixty days of the service of the complaint. If plaintiffs' Liaison Counsel agree, defendants may designate and serve interrogatories and their answers to such interrogatories which have been filed in other jurisdictions in lieu of responding to the relevant plaintiffs' set of interrogatories in NYCAL. After a defendant has answered the plaintiffs' applicable standard set of interrogatories, a plaintiff may serve supplemental, non-repetitive interrogatories upon good cause shown and approval of the Special Master. A defendant shall respond to any supplemental interrogatories per the CPLR. The Special Master may extend the time to answer for good cause shown.

**D. Product Identification Interrogatories.** Plaintiffs may serve on individual defendants standard product identification interrogatories with respect to particular worksites. Defendants shall respond to plaintiff's product identification interrogatories per the CPLR. The Special Master may extend the time to answer for good cause shown. Defendant's objections to any such interrogatories shall be brought before the Special Master pursuant to section III.C.

**E. Interrogatory Answers.** All interrogatories should be fully and substantially answered, though well-taken objections may be raised with the Special Master pursuant to section III.C. All answers shall be verified by a party. If a party fails to provide substantially complete answers to standard interrogatories, the opposing party shall forthwith notify the Special Master pursuant to section III.C. [Omitted Language]

Absent good cause, a party's failure to timely and substantially respond to standard interrogatories, and to product identification interrogatories if applicable, within the time frames provided herein shall result in postponement of the deposition of that party upon application to the Special Master.

**F. Document Requests, General Guidelines.** Document discovery may proceed by inspection upon consent of the parties. Where document discovery proceeds by inspection, the requesting party shall specify a reasonable time, place and manner for making the inspection. [Language Omitted.]

**G. Defendants' Requests for Documents.** Counsel for defendants have developed a standard document request that is e-filed in the NYCAL Master File and deemed to apply to all cases without the necessity of service on individual plaintiffs. Plaintiffs shall serve responses to defendants' document request per the CPLR, unless otherwise provided in the CMO or order of the Special Master or the Court. If any of the requested documents are not within a plaintiff's possession, custody or control, plaintiff shall provide a mutually agreeable records retrieval service with the necessary authorizations to obtain such records from other persons, the costs of which shall be borne by each party receiving a copy of such records. After plaintiff responds to the standard set of document requests, defendant may serve supplemental, non-repetitive, document requests, upon good cause shown and approval of the Special Master. Plaintiff shall [omitted language] respond to any supplemental document request in a given case within 60 days of service of the

request. All document production shall be in such form as will make clear which documents are responsive to which request.

**H. Plaintiffs' Requests for Documents.** Plaintiffs have developed a standard document request with sections tailored to classes of defendants in NYCAL. The standard document requests are e-filed in the NYCAL Master File. To the extent not previously done, each defendant shall respond to plaintiff's document request per the CPLR, unless otherwise provided by this CMO or order of the Special Master or the Court. If the production is to go forward after inspection, the plaintiff shall specify a reasonable time, place and manner for the inspection. After a defendant responds to the standard set of document requests, plaintiff may serve supplemental, non-repetitive document requests, upon good cause shown and approval of the Special Master. Defendant shall [omitted language] respond to any supplemental document request in a given case within 60 days of service of the request. All document production shall be in such form as will make clear which documents are responsive to which request.

**I. Business Records.** There shall be a presumption of admissibility at trial for all documents provided in response to requests for business records, unless the response specifically states that the document is not admissible under CPLR 4518. Any such response shall specify why the document is not admissible.

**J. Burdensomeness.** Objections to discovery based on burdensomeness shall describe the burden with reasonable particularity. Any objection to the time, place or manner of



production, or as to burdensomeness, shall state a reasonably available alternative as a counterproposal.

**K.Unavailable Documents or Information.** Any response that a requested document cannot be located, or an interrogatory answer cannot be answered in full, shall state with reasonable particularity the efforts made to obtain the unavailable document or information.

**L. Additional Discovery.** Any party seeking to propound discovery on a party in a given case other than that provided herein may do so only upon application to the Special Master or by stipulation with opposing counsel.

**M. Discovery Concerning Punitive Damages.** Where plaintiff asserts a punitive damages claim against a defendant, plaintiff shall answer defendants' standard interrogatories and document requests seeking information related to punitive damages per the CPLR, and defendant shall answer plaintiffs' standard interrogatories and document requests seeking information related to punitive damages per the CPLR. The parties shall confer about the possibility of a No Opposition Summary Judgment Motion as set forth in section VII.C before responding to standard interrogatories and document requests seeking information concerning punitive damages.

**N.Pathology/Radiology Materials/Medical Defense Liaison.** Defendants shall appoint a Medical Defense Liaison Law Firm or Firms, which shall be named on the NYCAL website. Plaintiffs shall produce to Defense Medical Liaison pursuant to the discovery order set by the Special Master all pathology and radiology materials

received, prepared, procured, and/or relied upon by plaintiff that are in plaintiff's possession. These materials shall include, but are not limited to: x-rays, PET scans, CAT scans, MRIs, radiological and/or sonographic studies, pathology blocks, tissues and slides of any kind. In addition, plaintiffs' counsel shall provide authorizations to defendants to obtain the material specified in this paragraph. Disputes concerning authorizations shall be submitted to the Special Master. If a facility or physician requires a subpoena for such materials, counsel for the party seeking such material shall prepare a Judicial Subpoena for the Coordinating Judge upon notice to all parties.

**O. Post-Note Discovery.** Where necessary, discovery shall continue after the filing of a note of issue pursuant to the Uniform Rules for the New York State Trial Courts section 202.21(d) upon directive of the Court or the Special Master. Except as set forth in § XI(D) below, or upon consent of the parties, absent extraordinary circumstances no further discovery shall be allowed ten days before a firm date to select a jury in a trial-ready case.

**P. Previously Produced Documents.** Upon notice of the time and place of the previous production any document previously produced to plaintiff's firm by a party or its predecessor or successor in interest in any other asbestos personal injury or wrongful death action shall be deemed produced in all cases in NYCAL. Any representation made by any defendant with respect to such previously produced document(s) shall be deemed made in all cases in NYCAL. This paragraph does not address the ultimate issue of the admissibility of any such previously produced document at trial.

**Q.Discovery Disputes.** Discovery disputes shall be brought to the immediate attention of the Special Master for resolution, and shall not be the basis for any non-adherence to the discovery time lines set forth herein or by the Special Master, unless allowed by the Special Master. Objections based on privilege shall clearly identify the privilege claimed and provide sufficient information concerning 1) the basis for the claim of privilege to establish prima facie the validity of the claim, and 2) the general content of the information to permit identification of the information or document as to which privilege is claimed. If not so identified, the privilege is deemed waived. Where necessary, the parties shall negotiate a confidentiality order to preserve the confidentiality of trade secrets. Any appeal of the Special Master’s resolution of the dispute shall be made pursuant to § III(C) of this CMO.

**X. Medical Examinations of Plaintiffs**

Defendants shall have the opportunity to a single independent medical examination (“IME”) of the plaintiff in accordance with CPLR 3121 and in accordance with the discovery order set forth by the Special Master, as described in section \_\_\_ below. A report of the medical examination, and copies of all tests, shall be provided to all parties in accordance with the discovery order set forth by the Special Master. Any plaintiff not made available on reasonable notice for independent medical examination at least two weeks prior to the discovery order deadline set by the Special Master for defendants’ production of expert witness reports will be removed from a Trial Cluster, as that term is used in sections \_\_\_ and \_\_\_ below. Any dispute concerning an IME shall be

referred to the Special Master. Any appeal of the Special Master's resolution of the dispute shall be made pursuant to § III(C) of this CMO.

## **XI. Depositions**

- A. **General Guidelines.** All depositions shall be taken in accordance with CPLR 3107, except as provided herein. All depositions shall be conducted with due regard for the physical and emotional condition of the deponent. All counsel shall avoid unnecessary questioning of witnesses, including repetitive questioning. Conduct of Counsel shall be professional and comply with 22 NYCRR § 221. Any objections shall be made pursuant to CPLR 3115(b). Unless all parties agree, all objections at discovery depositions, except those made pursuant to CPLR 3115(b), shall be preserved until the time of trial, with the exception of de bene esse depositions, at which all objections shall be stated on the record. Any objections as to form shall be stated with sufficient clarity to allow the questioner to adjust his questioning to meet the objection. The resolution of such objections may be sought forthwith from the Special Master. Counsel may notice any deposition to apply to more than one case and shall use best efforts to ensure that appropriate depositions are noticed to apply to all appropriate clusters or cases.
- B. **Location of Depositions.** All depositions of parties shall be held in New York City unless otherwise ordered by the Special Master. Where a party demonstrates with a medical certification that a party is unable to travel, the presumption shall be that the deposition shall go forward at or near to a witness's home. A diagnosis

of mesothelioma supported by a doctor's letter or other medical documentation is prima facie evidence of a plaintiff's inability to travel and that the deposition should go forward at or near to plaintiff's home. Upon application to the Special Master, plaintiff's counsel may be required to pay travel expenses incurred by no more than two defense counsel [Omitted Language] in attending any deposition outside of New York City. Upon application to the Special Master defendant's counsel may be required to pay travel expenses incurred by no more than two plaintiff's counsel in attending any deposition outside of New York City.

C. **Deposition Scheduling.** Defendants shall appoint a deposition scheduler and publish that person's or Firm's name and contact information on the NYCAL website. Except for good cause shown to the Special Master, no more than six depositions shall be scheduled for a single day.

D. **Depositions of Plaintiffs and Plaintiffs' Family and Co-Workers.** Depositions of fact witnesses by defendants shall be limited to plaintiff, plaintiff's spouse, and up to four co-workers, unless plaintiff intends to call more than those four co-workers at trial. If plaintiff does not have a spouse or the spouse is deceased, defendants may depose another family member. Notwithstanding the above any family member who is able to provide product identification information may be deposed by a defendant. Depositions of family members, other than family members who provide product identification, shall be postponed until just before or during trial. Absent good cause, failure to timely and substantially respond to defendants' standard interrogatories shall result in postponement of the deposition

of plaintiff, plaintiff's family member, or plaintiff's co-worker upon application to the Special Master. [Omitted Language.]

- E. **Depositions of Defendants.** The parties shall make every effort to use depositions, as well as other discovery, obtained from defendants in other cases as if taken in NYCAL. No other depositions shall be taken of defendants except upon stipulation of the parties or application to the Special Master. Such applications shall specify the areas sought to be covered by an additional deposition, and demonstrate that the proposed lines of questioning will not be repetitive or cover ground already adequately addressed in prior depositions of the defendant in question.
- F. **Notice of Non-Party Witnesses: Content.** A notice of deposition of a non-party witness shall designate the areas of expected interrogation by the noticing counsel. If any other counsel desires to interrogate a non-party witness on different topics, such counsel shall serve a cross-notice of deposition and designate the areas of reasonably expected interrogation. Such areas shall be considered direct examination by that cross-noticing party, and as to such areas the cost of deposition shall be borne by the cross-noticing party.
- G. **Multi-District Depositions.** Any party may, with leave of the Court or the Special Master, conduct multi-jurisdictional depositions, either within or without the State, in connection with other asbestos litigation, with respect to the following categories of witnesses: 1) any witness having charge of records of associations, trade organizations, Workers Compensation commissions, insurance companies,

or any other group or entity whose records contain documents, or whose personnel have knowledge of facts, common to all pending asbestos cases, 2) state of the art experts, or 3) corporate officials of defendants.

## **XII. Video Recordings of Depositions**

- A. Video recordings of depositions may be taken by any party upon service of proper notice of deposition for any use permitted by the CPLR.
- B. A video recorded de bene esse deposition of a seriously or terminally ill plaintiff whose availability at trial may reasonably be doubted may be promptly taken on notice and without further order of the Court if plaintiff's counsel certifies as to plaintiff's medical condition in accordance with section \_\_ of this CMO. Plaintiff's counsel should confer with defendants' deposition scheduler appointed for the trial cluster in which plaintiff's case is pending to schedule the deposition with reasonable notice, giving due consideration to the plaintiff's medical condition. Plaintiff shall forthwith provide to all defendants medical verification of the disease alleged and such medical and employment records as may be in plaintiff's or his/her attorney's possession. Notice of the deposition shall be provided by email no less than ten days prior to the scheduled date. Except pursuant to order of the Court, in no event shall the taking of the video recorded deposition pursuant to this section take place more than 14 days from the date of defendants' receipt of plaintiff's counsel's certification and notice to take the video recorded deposition. Where a prior discovery deposition has not been held,

plaintiff shall permit defendants to take an off-camera discovery deposition at defendants' expense immediately prior to the video recorded deposition.

- C. **Additional Video Deposition.** A party having a good faith basis to take an additional video deposition of a witness must make an application to the Special Master pursuant to Section III.C. There shall be a presumption that there shall be a single videotaped deposition of any witness.

### **XIII. Use at Trial of Nonparty Interrogatories and Depositions**

- A. Answers by nonparties of NYCAL standard sets of interrogatories may be used at trial to prove 1) that a product or products of the nonparty contained asbestos, or that asbestos was used in conjunction with the nonparties' product or products, and/or 2) any failure to warn by the nonparty concerning an asbestos-containing product and/or the use of asbestos in association with a product. In all other respects, nonparties' answers to standard form interrogatories shall not be admissible at trial unless subject to an applicable hearsay exception under the Rules of Evidence of the State of New York. For purposes of this section, a nonparty shall include a settled party.
- B. To avoid undue expense, duplication and imposition on counsel, the parties, and witnesses, parties may use depositions taken in other state and federal jurisdictions where such depositions would be admissible under CPLR 3117 or Federal Rule of Evidence 804(a)(b)(1). Parties may also use depositions taken in other state and federal jurisdictions where such depositions would be admissible under Federal



Rule of Evidence 807. The issue of admissibility of such deposition testimony is left for resolution by the trial court. NYCAL trial courts may use federal case law as persuasive authority in interpreting FRE 804(a)(b)(1) and 807. Any party seeking to use any portion of such prior deposition as substantive evidence at trial shall, no later than 45 days prior to a trial date, advise counsel for any party against whom a deposition may be used of the deposition it intends to offer as substantive evidence. If a trial date has been set with less than 45 days' notice, the parties shall cooperate concerning prompt designation of deposition testimony pursuant to this section. Any party objecting to the use of the deposition shall make an appropriate in limine motion.

#### **XIV. Dockets and Trial Clusters**

- A. **Dockets.** There are three dockets in NYCAL: 1) Accelerated, 2) Active, and 3) Deferred. Each is defined below.
- B. **Accelerated Docket Defined.** The Accelerated Docket is comprised of actions brought by plaintiffs who are terminally ill from an asbestos-related disease with a life expectancy of less than one year [or who have a diagnosis of mesothelioma]. Cases on the Accelerated Docket will be set for trial as provided in Section XV below.
- C. **Active Docket Defined.** The Active Docket will be comprised of all actions brought by or on behalf of plaintiffs who have a functional impairment that meets

the following minimum criteria. For purposes of these criteria the following definitions apply.

1. A “Board Certified Pulmonary Specialist” or “Board Certified Internist” means a physician currently actively licensed to practice medicine in one or more of the states of the United States who is currently actively certified by the American Board of Internal Medicine in the subspecialty of pulmonary medicine (pulmonary specialist) or the American Board of Internal Medicine (internist).
2. A “currently certified B-Reader” shall refer to an individual who successfully completed the National Institute for Occupational Safety and Health (“NIOSH”)-sponsored X-Ray interpretation course and whose NIOSH certification is up to date.
3. “ILO grade” shall refer to the radiological ratings of the International Labor Office set forth in “Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses” (1980)
4. “Pulmonary Function Testing” shall refer to spirometry, lung volume testing and diffusing capacity testing which conform to quality criteria established by the American Thoracic Society (“ATS”) and is performed on equipment which meets ATS standards for technical quality, all as set forth in 20 CFR 718.103 and Appendix B thereto or in the ATS guidelines 144 American Review of Respiratory Disease 1202-18 (1991). Each subject must be tested with and without inhaled bronchodilators, with best values

taken. Predicted values for spirometry and lung volumes shall be those published by Morris, Clinical Pulmonary Function Testing, 2d Ed., Intermountain Thoracic Society (1984).

5. “Minimal Criteria for the Active Docket” shall be defined as follows:
  - a. Non-Malignant Changes Shown by Testing. Chest X-rays which, in the opinion of a currently certified B-Reader, show small irregular opacities of ILO Grade 1/0; and pulmonary function testing that, in the opinion of a Board Certified Pulmonary Specialist or Internist, shows either:
    - i.  $FVC < 80\%$  of predicted value with  $FEV-1/FVC > 68\%$  (actual value), or  
 $TLC < 80\%$  of predicted value;
  - OR
  - ii. Chest X-rays which, in the opinion of a currently certified B-Reader, show small irregular opacities of ILO grade 1/1 or greater; and Pulmonary Function Testing that in the opinion of a Board Certified Pulmonary Specialist or Internist, that shows either:  
 $FVC < 80\%$  of predicted value with  $FEV-1/FVC > 65\%$  (actual value), or  
 $TLC < 80\%$  of predicted value;
- OR

iii. Chest X-rays which, in the opinion of a currently certified B-Reader, to a reasonable degree of medical certainty, demonstrate bilateral asbestos-related pleural thickening which has an ILO grade B2 or greater and with pulmonary function testing that, in the opinion of a Board Certified Pulmonary Specialist or Internist, to a reasonable degree of medical certainty, shows either:

FVC < 80% of predicted value with FEV-1/FVC > 68% actual value, or TLC < 80% of predicted value, and with a statement by a Board Certified Pulmonary Specialist or Internist that, based upon a complete review of the claimant's entire medical record, to a reasonable degree of medical certainty, the asbestos-related changes are a substantial contributing factor to the pulmonary function changes;

OR

b. Non-Malignant Changes Shown by Pathology. In the case of a claim brought on behalf of a decedent, if representative lung tissue of the decedent is available, a report by a Board Certified Pathologist, stating that to a reasonable degree of medical certainty, more than one representative section of lung tissue that is unaffected by any other process (e.g. cancer or emphysema) demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies, and that there is no other more likely explanation for the presence of the fibrosis;

OR

- c. **Diagnosis of Cancer.** A diagnosis of cancer, which is demonstrated by a medical report of a Board Certified Internist, Pulmonary Specialist, Oncologist, or pathologist showing the diagnosis as a primary cancer, which states to a reasonable degree of medical certainty that the cancer in question is caused by asbestos exposure.
- D. **Deferred Docket Defined.** The Deferred Docket will be comprised of all actions brought by or on behalf of plaintiffs alleging injury due to exposure to asbestos who do not meet the minimum criteria for the Active Docket set forth in Paragraph XIV(C), above.

#### **XV. Accelerated Trial Clusters**

- A. **Deadlines.** The Court will assign for trial on the first Monday in April and the first Monday in October of each calendar year an Accelerated Trial Cluster of living plaintiffs. The Accelerated Trial Cluster will be designated on the First Thursday of the preceding November (for an April Cluster) and May (for an October Cluster). Letter applications for assignment to the Accelerated Trial Cluster shall be provided to the Court, the Special Master and the defendants by email by no earlier than the third Thursday of the preceding August (for an April Cluster) and the preceding February (for an October Cluster), and no later than ten days before the designation date. Such letter application will be accompanied by a statement that the plaintiff is terminally ill, the nature of the illness, and the plaintiff's life expectancy, if known. To be eligible for inclusion in an

Accelerated Trial Cluster, a plaintiff must be alive and have a pending lawsuit at the time of the application. Except upon application to the Special Master upon good cause shown, plaintiff must provide to defendants the following information at the time the letter application for assignment to the Trial Cluster is made: 1) complete answers to defendants' standard interrogatories, 2) complete responses to defendants' standard requests for production, and 3) where applicable, authorizations for medical, employment, social security, disability, workers compensation, union, military, and tax records. Except upon application to the Special Master for good cause shown, upon application to be included in an Accelerated Trial Cluster, to the extent plaintiff has such records listed in (3) in the previous sentence in its possession it shall produce copies to defendants. All such records in plaintiff's possession shall be produced at the time application for the trial cluster is made. Timely production of any Social Security records in plaintiff's possession shall be a priority.

**B. Late Applications.** Any plaintiff who has failed to file an application and supporting materials for inclusion in a particular Accelerated Trial Cluster with the time periods specified above may make special application to the Special Master for an exception to the provisions of section XV(A) in the interest of justice and for good cause shown. The presumption shall be that no cases shall be approved for a given Accelerated Trial Cluster if timely application has not been made pursuant to section XV(A). Upon a finding of special circumstances, the Special

Master shall recommend to the Court for inclusion of a case into the Accelerated Trial Cluster despite a late application.

- C. **Objections.** By the first Wednesday of each November and May for the April and October Accelerated Trial Clusters, defendants shall file by email to the Special Master any objection to inclusion of a case in an Accelerated Trial Cluster.
- D. **Further Discovery.** Each case in an Accelerated Trial Cluster will be prepared strictly in accordance with the discovery order prepared by the Special Master. The discovery order applicable to each Accelerated Trial Cluster will be based on the time line contained in the model discovery order annexed hereto as Exhibit \_\_\_. The particular discovery order applicable to a specific Accelerated Trial Cluster will be published by the Special Master on the NYCAL website together with the list of the cases to be included in the cluster.
- E. **Failure to Adhere to Discovery Deadlines.** Failure to meet a deadline in accordance with the applicable discovery order, unless excused by the Special Master in writing within ten days of the deadline for good cause shown, may result in sanctions as provided in § XIX below.

## **XVI. Active Trial Clusters**

- A. **Active Trial Clusters.** A case on the Active Docket shall be clustered and scheduled for trial by date the action was commenced, except that for any case that is on the Deferred Docket, and which is later placed on the Active Docket by stipulation or order of the Court granting leave to amend the complaint, the

relevant date shall be the date of the order or the stipulation. The Special Master shall publish Active Trial Clusters of sixty cases each for the following eight months of each year: February, March, May, June, August, September, November, December. The Special Master shall publish each Active Trial Cluster thirteen months prior to the anticipated trial date. On an annual basis the Court may consider increasing or decreasing the size of each Active Trial Cluster or the number of Trial Clusters published each year depending on the number of cases included on the Active Docket or submitted for inclusion on the Active Docket.

B. **Further Discovery.** Additional discovery for each Active Trial Cluster shall comport with the model discovery order provided in Exhibit \_\_\_. Defendants shall appoint a coordinating counsel for discovery in each Active Trial Cluster. Defendants may appoint separate counsel for fact discovery and medical discovery in the same Active Trial Cluster. These attorneys will be identified by letter to the Special Master with a copy to plaintiff's counsel and all defense counsel in a particular Active Trial Cluster within seven days of the publication of the list of remaining defendants for that Active Trial Cluster. Coordinating counsel shall facilitate implementation of this order and work to minimize the number of disputes that go before the Special Master and the Court. Defendants' coordinating counsel shall be responsible for communication with plaintiffs' counsel on discovery issues. Coordinating counsel shall have the authority to extend deadlines for the plaintiffs' compliance with discovery deadlines subject to the approval of the Special Master. Plaintiffs' counsel shall deliver to defense



medical liaison counsel all radiology and pathology materials in their possession for cases in the Active Trial Cluster in accordance with the discovery orders. Active Trial Clusters and discovery orders will be published by the Special Master. The discovery order applicable to a particular Active Trial Cluster will be based on the time line set for the in the model order annexed hereto as Exhibit \_\_\_\_\_. Thirty days after the publication of an Active Trial Cluster, plaintiffs shall provide defendants with a list of all remaining defendants in the cases.

### **XVII. Deferred Docket**

The Deferred Docket consists of all actions brought by or on behalf of claimants who do not meet the minimum criteria for the Active Docket. Until further order of the court, all proceedings with respect to the Deferred Docket are stayed, except for stipulations (as described in this section) to transfer cases to the Active or Accelerated Dockets, as described in sections \_\_\_ and \_\_\_, and motions to amend complaints. Any case commenced after the date of this CMO shall be placed on the Deferred Docket, unless the complaint sets forth with particularity facts and annexes the requisite documentation to qualify the case for the Active or Accelerated Dockets. Any case on the Deferred Docket shall move to the Active or Accelerated Dockets 1) upon stipulation of the plaintiffs' and defendants' Liaison Counsel, or 2) if the court grants a motion to amend the complaint where the proposed complaint sets forth facts and annexes the requisite documentation to qualify the case for the Active or Accelerated Dockets. Leave to amend shall be denied if

the amended complaint does not set forth the requisite facts or attaches the requisite documentation to qualify the case for the Active or Accelerated Dockets.

### **XVIII. Third Party Complaints**

- A. Timing.** To the extent that a defendant has not done so by the time a case is included in an Accelerated or Active Trial Cluster, a defendant must e-file any third-party complaint pursuant to the deadline established by the discovery order issued by the Special Master applicable to a particular case. Within three business days of the filing of any third-party complaint, the third party plaintiff must serve the complaint on the third party defendant or its counsel, along with copies of the plaintiff's complaint, the plaintiff's interrogatory answers, and a copy of plaintiff's deposition transcript. Within three business days of the filing of a third party complaint, the third party plaintiff shall serve plaintiff's counsel with a copy of the third-party complaint. Failure to provide timely notice of the third party action to the third-party defendant or plaintiff's counsel may result in dismissal of the third party action upon application to the Special Master. Nothing contained in this paragraph alters the service obligations set forth in the CPLR.
- B. Untimely Third Party Complaint.** Third party complaints not e-filed on or before the filing deadline set forth in the discovery order may only be e-filed upon motion and with permission of the Special Master or the Court after appeal of a ruling by the Special Master. Any such motion to e-file a third party complaint after the filing deadline shall be made upon notice to all remaining parties and

putative third parties. The motion must include an affidavit stating when the information used to substantiate the filing of the third party complaint became available and that such information was not available upon reasonable effort prior to the filing deadline.

### **XIX. Discovery Sanctions**

Any failure to comply with a deadline in a discovery order issued by the Special Master, unless excused by the Special Master in writing within ten days of the deadline for good cause shown or agreed to in writing by defendants' [language omitted] counsel and plaintiff's counsel, shall be deemed to be a willful failure to disclose within the meaning of CPLR 3126. Sanctions may include, but not be limited to, removal from a cluster, preclusion of witnesses, and the striking of pleadings. Parties shall no longer have the right to amend answers to interrogatories up to thirty days prior to jury selection without leave of the Special Master. However, the parties may move before the Special Master for permission to amend interrogatories and add additional fact witnesses for good cause shown, and upon a showing that this amended discovery will not prejudice the opposing parties. Any party wishing to avail itself of the sanctions provided herein shall make a written application, on notice, to the Special Master. Opposing papers shall be served within five days of the application. The Special Master will issue a ruling within five days thereafter. Said ruling shall be law of the case unless relief therefrom is granted by the court pursuant to section III(C) of this CMO.

**XX. Requests for Judicial Intervention and Notes of Issue**

- A. Request for Judicial Intervention.** Unless a plaintiff has already purchased a Request for Judicial Intervention (“RJI”), a plaintiff must purchase a RJI within one month of being listed in a trial cluster. Failure to timely e-file the RJI will result in removal of the case from the trial cluster, absent good cause shown and the permission of the Special Master.
- B. Note of Issue.** All notes of issue shall be filed according to the discovery order set by the Special Master once a case is assigned to a trial cluster.

**XXI. Summary Judgment Motions**

All motions for summary judgment shall be decided by the Coordinating Judge. No summary judgment motion shall be made unless discovery is complete on the issue(s) that are the subject of the motion. No summary judgment motion shall be made by a defendant prior to requesting that plaintiff accede to a No Opposition Summary Judgment Motion pursuant to Section XXII. Defendants shall move for summary judgment at least thirty days prior to a trial date, except where the trial judge has set a trial date less than thirty days in the future, in which case the parties shall cooperate and consult with the Coordinating Judge’s chambers concerning scheduling the motion. There shall be a weekly calendar call in the Coordinating Judge’s Part. Adjournments will be handled at the motion calendar or by email to the Part Clerk. Working copies of motion papers shall be provided to the Part Clerk at the weekly calendar call.

## **XXII. Discontinuance**

- A. Stipulations.** Stipulations of discontinuance should not be served except in connection with settlements. When a plaintiff discontinues an action against a defendant, such defendant shall serve written notice of the discontinuance upon all parties to the action and shall thereafter be dismissed from the lawsuit, unless, within ten days of service of the notice, a co-defendant serves a written objection directed to the plaintiff, the defendant, and the Special Master, that it has cross claim, or plans to pursue a cross claim, against that defendant.
- B. No Opposition Summary Judgment Motions.** After plaintiff's depositions have been completed, or co-worker testimony is completed if the plaintiff does not testify, or otherwise if plaintiff consents, each defendant may seek a dismissal by serving on plaintiff's counsel a signed No Opposition Summary Judgment Motion ("NOSJM") in the form annexed as Exhibit \_\_\_\_\_. The request shall be accompanied by a certificate of service and rider affirming that each remaining defendant has been served with the request, or that the request has been served by e-file. If no other defendant objects to the dismissal within twenty days of service, and if plaintiff signs the NOSJM, the dismissal shall be delivered to the Court to be So Ordered and e-filed. Plaintiff's counsel shall advise defendant's counsel within ten days of receipt of an NOSJM request if it does not intend to consent to dismissal accompanied by a statement of the reason for the refusal. After ten days, if defendant's counsel has not received a response from plaintiff's counsel, it may notify plaintiff's counsel by email to secure a response. If no response is received

within fourteen days after the email, defendant's counsel may notify the Special Master, copying counsel for plaintiff, regarding the outstanding request, seeking intervention to secure a response. The parties shall cooperate concerning the use of NOSJMs. While either party may seek sanctions from the Special Master for failure to respond to a NOSJM request, it is expected that the parties will cooperate and sanctions will be unnecessary. Within 20 days from the date of service of a NOSJM, any cross-claimant who opposes the NOSJM shall serve on the Special Master and all parties written notice of opposition stating the grounds therefore. The Special Master shall thereafter schedule and hear argument on the opposition and shall issue a written advisory opinion. A party objecting to this advisory opinion may appeal the opinion to the Coordinating Judge pursuant to the procedures set forth in § III.C of this CMO. A signed, ordered and filed NOSJM shall have the effect of a dismissal as a matter of law. Defendants shall deliver fully executed NOSJMS to the Court on Wednesdays to be "so ordered" and filed.

### **XXIII. Settlement**

The Coordinating Judge and the Special Master shall convene and conduct mandatory settlement negotiations at such times and upon such conditions as the Court or the Special Master deems appropriate. Counsel who appear at any such conference must have full authority to negotiate and commit to settlement. All parties are encouraged to conduct good faith settlement negotiations of an entire trial cluster and not solely individual cases or groups of cases within a trial cluster.

#### **XXIV. Punitive Damages**

Pursuant to the court's order dated \_\_\_\_\_, punitive damages are no longer deferred in NYCAL and may be asserted under the following conditions.

A. **Cases On a Trial Calendar.** Punitive damages shall not be allowed in cases where the Trial Judge has put the case on a trial calendar.

B. **Cases in an Accelerated or Active Trial Cluster, But Not on A Trial Calendar.**

For cases already included in an Accelerated or Active Trial Cluster on the date that this CMO is so-ordered, but without a trial date, if the complaint contains a prayer for punitive damages, plaintiff shall consider whether it intends to seek punitive damages against a named defendant or defendants. Plaintiff and defendants shall confer and where plaintiff agrees that it has no good faith basis for proceeding with a punitive damages claim plaintiff shall sign a No Opposition Summary Judgment pursuant to Section XXII of this CMO. Where an existing compliant in a case in an Accelerated or Active Trial Cluster does not contain a prayer for punitive damages, plaintiff may move to amend its complaint to include a claim for punitive damages, where it has a good faith basis for doing pursuant to Section VII.C. [Omitted Language.] If such motion is granted by the Special Master, and by the court if there is an appeal of the Special Master's ruling, the parties shall engage in discovery on the question of punitive damages.

C. **Cases Not Currently in a Trial Cluster.** In cases not in a Trial Cluster where the complaint already contains a prayer for punitive damages, plaintiff shall consider

whether it intends to seek punitive damages against a named defendant or defendants. Plaintiff and defendants shall confer and where plaintiff agrees that it has no good faith basis for proceeding with a punitive damages claim plaintiff shall sign a No Opposition Summary Judgment pursuant to Section XXII of this CMO. Where an existing complaint does not contain a prayer for punitive damages, plaintiff, if he or she has a good faith basis for doing so, may include a request for punitive damages in the complaint. [Language Omitted.]

**D. Discovery On a Defendant's Financial Condition.** As a defendant's ability to pay punitive damages is a factor to be considered by a jury in quantifying an award of punitive damages, in any case where the plaintiff has asserted a claim for punitive damages against a defendant, no later than immediately prior to the commencement of jury selection, defendant shall provide plaintiff with reliable financial disclosure. For publicly traded companies, SEC forms 10K or 10Q shall suffice. Other entities shall provide 1) an audited profit and loss statement, or 2) an affidavit from the company's senior financial officer attesting to the company's net worth and attaching documentation in support. To the maximum extent feasible, the parties shall stipulate to facts, and/or the admission of documents on the question of a defendant's financial condition.

**D. Jury Deliberation.** Where a claim of punitive damages is allowed under this CMO, and where the Trial Judge finds that the question of punitive damages should go before a jury, the question of whether plaintiff is entitled to punitive damages shall be included in the jury instructions and verdict sheet, but any



deliberations regarding the quantification of such damages shall be bifurcated and decided in a separate trial phase (“Phase II”). If the jury finds that the plaintiff is entitled to punitive damages, then the jury shall determine the quantification of damages in Phase II. At Phase II, after presentation of evidence, closing statements by counsel, and appropriate instructions by the court, the jury shall render a special verdict concerning the amount of punitive damages to be awarded to plaintiff. Unless the parties stipulate otherwise, the same jury shall determine whether punitive damages are warranted against a given defendant, and, if so, the amount of punitive damages.

#### **XXV. Limitations on Joinder**

- A. Cases Where a Joinder Order Has Been Entered.** Joinder orders entered prior to the entry of this Case Management Order are unaffected by the limitations on joinder contained herein.
- B. Joinder of Jury Trials Where Plaintiffs Have Not Asserted Punitive Damages.** Except upon stipulation of the parties or as provided in this section, Trial Judges in NYCAL shall join no more than two plaintiffs’ cases for jury trial. Two cases may be joined for trial where plaintiff demonstrates that joinder is warranted under Malcolm v National Gypsum Co., (995 F2d 346), and New York State cases interpreting Malcolm. Upon good cause shown, a Trial Judge in NYCAL may join a maximum of three cases for trial where it determines that 1) joinder is warranted under two or more of the factors described in Malcolm and New York

State cases interpreting Malcolm, and 2) where the three plaintiffs share the same disease. For purposes of this section “same disease” shall mean that all the plaintiffs in the three cases proposed to be joined for trial share one of the following four categories of disease: 1) pleural mesothelioma, or 2) non-pleural mesothelioma, or 3) lung cancer, or 4) other cancers. Defendants’ objections to joinder at the time of opening statements are deemed preserved throughout trial up to the date of verdict even if one or more defendants cease to be parties during the course of the trial. It will not be necessary to formally renew an objection to joinder if defendants drop out during the course of trial.

**C. Jury Trials Where Plaintiff Has Asserted Punitive Damages Against One or More Defendants.** Plaintiff’s assertion of punitive damages against a defendant or defendants in a case shall not be grounds for severance of any other defendant from that case. Where a plaintiff has asserted a punitive damages claim against one or more defendants, that case may not be joined with any other plaintiff’s case for jury trial absent stipulation of the parties. A plaintiff may drop a claim for punitive damages at the time of a motion for joinder in order to enable a case to be joined with another one or two cases, if the case in question otherwise satisfies the conditions set forth herein

**D. Joinder in Bench Trials.** This Case Management Order places no limitations on joinder in bench trials. The Trial Judge in a bench trial in NYCAL shall determine any applications for joinder according to applicable law.

## **XXVI. Bankruptcy Trusts**

For any case on the Accelerated Docket, a plaintiff who intends to file a proof of claim with any bankrupt entity or trust shall do so no later than ninety days before trial, or if a trial date is set with less than ninety days' notice then plaintiff shall file all intended POCs no later than seven days of the Trial Judge's Order setting a trial date. For cases on the Active Docket, any plaintiff who intends to file a proof of claim with any bankrupt entity or trust shall do so no later than ten days after plaintiff's case is designated in Active Trial Cluster.

## **XXVII. Cooperation**

The court recognizes that cooperation among counsel and parties is essential for the orderly and expeditious resolution of this litigation. The communication of information among the plaintiff's counsel, among defense counsel, and among defendants shall not be deemed a waiver of the attorney-client privilege, the protection afforded by the attorney work-product doctrine, or any other privilege to which a party may be entitled. Any cooperative efforts described above shall not, in any way, be used against any of the parties, shall not constitute evidence of conspiracy, concerted action, or any wrongful conduct, and shall not be communicated to the jury. The exchange of information or documents by counsel will not, by itself, render such information or documents privileged.

## **XXVIII. Death of Plaintiff**

- A. Notification.** Counsel for plaintiff shall notify all defendants of the death of the plaintiff within ten days of learning of plaintiff's death. Such notice will be via email, and posting on the NYCAL website. An amended complaint shall promptly be e-filed.
- B. Estate Representative.** Promptly upon receipt of notice of the appointment of an estate representative ("Notice of Appointment"), counsel for plaintiff shall file and serve an amended complaint. Promptly upon receiving a Notice of Appointment, counsel for plaintiff shall cause new medical release authorization forms to be executed by the Estate Representative. A copy of Letters of Administration or their equivalent, the executed medical authorizations and the death certificate shall be sent to the medical record provider, medical liaison counsel and all counsel for remaining defendants. If an autopsy has been performed, Plaintiff shall notify medical liaison counsel, and counsel for all remaining defendants, when an autopsy has been performed on a deceased plaintiff.
- C. No Stay.** The death of the plaintiff shall not automatically stay discovery or other proceedings in the case. Either side may apply to the Special Master for a stay, but there will be a presumption that there will be no stay due to the death of the plaintiff.

**SO ORDERED:**

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## **Coordinating Judge**