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

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IN RE: NEW YORK CITY ASBESTOS LITIGATION

This Document Refers To:

JOHN LOGAN

Index No. 190203/12

RECOMMENDATION OF THE SPECIAL MASTER CONCERNING DEFENDANTS' FORUM AND TRIAL READINESS OBJECTIONS

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This constitutes my written recommendation on defendants' forum objection to inclusion of plaintiff John Logan's case in the October 2012 In Extremis Group and defendants' objection to plaintiff's request to assign Mr. Logan's case to a trial judge.[1] For the reasons discussed below, I recommend that both the forum and trial readiness objections be overruled and that Mr. Logan's case continue to be included in the October 2012 In Extremis Group and be assigned to a trial judge with the proviso that the trial not begin until after Judge Heitler has ruled on defendants' appeal from this recommendation.

## Background

Plaintiff commenced this asbestos personal injury action in 2012 by filing a complaint in NYCAL and timely applied for inclusion in the October 2012 In Extremis Group after he was diagnosed with mesothelioma. Thereafter, Mr. Logan's deposition was conducted over the course of three days in May 2012. He testified concerning his work as a fireman/water tender, oiler and electrician aboard ships while serving in the Merchant Marine from 1945 to 1957, including his exposure to asbestos as an electrician on board ships at sites in New York City. He also testified to exposure to asbestos in joint compound over the course of several days during some renovations to his home in New Paltz, New York in 1977 and 1978, in some asbestos-containing pipe insulation that he removed from his cellar during that same period, and in floor tile that he removed over several days in the 1990s.

Thereafter, defendants objected to inclusion of plaintiff's case in the October 2012 In Extremis Group, asserting (in an initial letter from defense liaison counsel) that the "action is better suited

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[1] The initial letter from defense liaison counsel stated that "Defendants object to this case on forum grounds." Although defendants' subsequent submissions labeled their objection a "Venue Challenge," they did not assert that venue in New York City was improper under the CPLR and their counsel at oral argument characterized it as a forum objection. Therefore, I am treating it as a forum objection.

to be brought in Ulster County, the location in which Plaintiff presently resides, and where the overwhelming majority of Plaintiff's alleged exposure occurred."[2]

I reviewed defendants' initial letter, defendants' "Venue Challenge" submission, plaintiff's opposition and defendants' reply, as well as portions of the transcript of Mr. Logan's deposition and copies of Mr. Logan's records relating to his service in the Merchant Marine, including numerous Certificates of Discharge of Mr. Logan from various ships, and heard oral argument by counsel for plaintiff and defendants. Thereafter, I overruled defendants' forum objection, finding that "Mr. Logan's exposure through his work on board ships for many years in the Merchant Marine, particularly on the [Ala Wai] when it was docked in New York City for several weeks and on at least one ship docked [in] at least one shipyard in New York City, constitutes sufficiently significant exposure in New York City to entitle him to have his case included in the in extremis docket in NYCAL. The fact that he also may have been exposed to asbestos during home renovations to his home in New Paltz does not disqualify his case from inclusion in the NYCAL in extremis docket." Defendants thereafter requested a formal written recommendation.

Plaintiff's counsel subsequently requested that Mr. Logan's case be assigned to a trial judge, to which defendants objected on the ground that I had not yet provided a formal written recommendation on their forum objection and, therefore, that Judge Heitler had not yet ruled on defendants' planned appeal from that recommendation. During argument on that trial readiness objection, counsel for defendant Georgia Pacific stated that Georgia Pacific also planned to move for summary judgment dismissing the complaint against it on the ground that a sample of the joint compound used in the renovation of plaintiff's home did not contain asbestos. I overruled the trial readiness objection, finding that plaintiff, who is still alive and hopes to have his day in court before he succumbs to mesothelioma, would be substantially prejudiced if his case were not assigned to a trial judge, whereas defendants would not be prejudiced by assigning the case to a trial judge with the proviso that the trial not take place until after I had filed this written recommendation and Judge Heitler had ruled on defendants' appeal therefrom. Defendants requested a written recommendation on the trial readiness objection as well.

## The Forum Objection

The prior Special Master discussed the standard to be applied in considering a forum objection to inclusion of a case in a NYCAL in extremis group:

> The test for whether a case may remain in NYCAL is not a bright line test. Significantly, it is not and has never been a traditional *forum non conveniens* analysis. The propriety of the forum is examined is a matter for the Court's discretion as a means to control its

[2] The contradictory statement in defendants' subsequent submissions that the "case should be sent to Orange County" appears to be in error, because New Paltz is located in Ulster County, New York. Accordingly, I am treating this as a request to send the case to Ulster County.

> docket and prevent forum shopping. Access to the in extremis docket is limited to those plaintiffs who demonstrate *significant* exposure to asbestos in any one of the five boroughs. Significant exposure is measured by length of time and quality of exposure.
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> There is no "magic number" of days or weeks of exposure that is sufficient. It is a case-by-case analysis. . . . The quality of exposure reflects how the plaintiff was exposed – was he a mere bystander or was he working directly with an identifiable asbestos-containing product? In addition, the Court looks at whether there is another forum where there is significant exposure that is more appropriate than New York.

Harold O'Connor (Index No. 190156/10), Recommendation of the Special Master, June 3, 2010 (available on www.nycal.net) (emphasis in original).

I recommend that the Court exercise its discretion to allow this case to remain on the NYCAL in extremis docket because Mr. Logan has demonstrated significant exposure to asbestos in New York City and his exposure to asbestos in the alternative forum proposed by defendants was limited.

Shipboard Exposure in New York City

Mr. Logan served in the Merchant Marines for 12 years, during which he was exposed extensively to asbestos. Much of that service was at sea. However, Mr. Logan testified that he spent "about a month" as an electrician aboard the S/S Ala Wai in New York City, that he remembers the Ala Wai well because it never left port while he was on board, that he stayed on the ship overnight and that he was exposed to asbestos on that ship in his "routine duties as an electrician."[3] (Tr. 75:13-17; 76:17-24; 108:3-109:4; 169:22-23; 171: 8-9; 171:19-21). His Certificate of Discharge confirms that he boarded and disembarked the Ala Wai in New York City and served on the Ala Wai for 33 days. When asked what his duties as an electrician were on this ship, Mr. Logan replied: "The same as any other ship I was on." (108:16-23). He testified that as an electrician, his duties involved the maintenance and repair of all the electrical equipment on the ship. (Tr. 108:17-109:4; 440:7-16) Mr. Logan discussed at length how he was exposed to asbestos aboard all ships on which he served as an electrician, which involved hands-on work that included the disturbing of asbestos-containing insulation, work with asbestos-containing control panels and braking devices on winches, valve work and pump work. (Tr. 87:7-13; 89:2-90:21; 91:14-93:13; 94:18-95:4; 97:23-99:13; 101:7-13; 102:22-103:6; 103:25-104:12; 105:2-12; 106:16-23; 107:14-109:4; 110:25-111:13; 112:6-14; 113:6-17; 115:12-20;

[3] Defendants' attempt to discount Mr. Logan's exposure to asbestos on the Ala Wai in New York City based on his statement that "I have no memory at all of that ship" is at best misplaced, because he said that when asked "Do you have a specific memory of what your sleeping quarters were on the Ala Wai?" and he previously testified that although he did not recall the physical description of that ship, he recalled that it was a cargo ship, that it did not have a full crew and that he remembered it well because it never left port. (Tr. 169:12-171:20; 173:23-174:2)

116:12-117:2; 118:2-7; 118:21-119:9; 200:25-201:19; 220:25-221:12; 420:12-421:11; 422:10-424:6; 444:3-445:21).

Mr. Logan also testified that he was exposed to asbestos while at least one of his ships was docked at the Todd Shipyard in Staten Island, New York. His exposure there resulted from working right next to shipyard workers who performed work on boilers, pumps, valves and associated piping that required the removal and re-application of various types of asbestos insulation. (Tr. 440:21-443:11; 462:15-22; 463:2-6). Although Mr. Logan was not asked at his deposition how long the Todd Shipyard repair work lasted, his counsel has represented that Mr. Logan has estimated the duration at five to seven days. Of course, counsel's representation is not admissible, but Mr. Logan may testify on the subject if he is still alive when his case comes to trial. That Mr. Logan, after serving on a large number of ships more than 50 years ago, did not recall the name of the ship repair company or the name of the ship is hardly surprising and does not, as defendants have suggested, preclude consideration of his exposure to asbestos at the Todd Shipyard in determining the significance of his asbestos exposure in New York City.[4]

Based on the foregoing, I conclude that Mr. Logan had significant exposure to asbestos in New York City.

Home Renovations in Ulster County

Defendants' citation of testimony concerning Mr. Logan's possible exposure to asbestos during renovation work on his home in New Paltz does not lead me to conclude that Ulster County would be a more appropriate forum. From the testimony, it appears that Mr. Logan worked on the dining room expansion and bathroom construction sporadically over the course of less than a year during 1977 and 1978 while he was working full time as the Superintendent of Public Works for the Village of New Paltz. (Tr. 28:16-17; 34:16-19; 130:14-25) Although the overall project was quite extensive, he spent a total of only several days working with joint compound, the only allegedly asbestos-containing product used, in each of the dining room expansion and the bathroom construction.[5] (Tr. 29:3-34:19; 292:14-23) He also removed some of the asbestos-containing insulation on heating pipes in the cellar so that he could connect those pipes to new plumbing to heat the new bathroom and expanded dining room. (Tr. 353:19-354:8; 354:24-356:17) The bedroom renovation that defendants cite occurred in the 1980s and is

[4] Although not necessary to my conclusion that Mr. Logan's exposure to asbestos in New York City was sufficiently significant to warrant inclusion on the NYCAL in extremis docket, I note that, according to Mr. Logan's Certificates of Discharge provided by defendants, he also boarded and disembarked ships in New York City on a total of 55 days, during which time he may also have performed work as an electrician or otherwise that exposed him to asbestos.

[5] It seems anomalous for Georgia Pacific to argue that Mr. Logan's exposure to asbestos during his home renovation work was so much more significant than his exposure on board ships in New York City, when it claims (and plans to base a summary judgment motion on the fact) that the joint compound sampled in his home does not contain any asbestos.

unlikely to have exposed Mr. Logan to asbestos because he went out and bought products for his projects and asbestos-containing joint compound was removed from the marketplace in 1977. (Tr. 38:9-23; 39:9-16) The floor tile removal work occurred in the 1990s and took "several days." (Tr. 35:3-36:13)

Thus, it appears that the total amount of time Mr. Logan may have been exposed to asbestos during renovations of his home is considerably less than the amount of time he was exposed to asbestos on ships in New York City. In view of Mr. Logan's significant exposure to asbestos in New York City, his choice of forum should not be disturbed.

## The Trial Readiness Objection

Defendants will not be prejudiced by the granting of plaintiff's request to assign this case to a trial judge, as long as that assignment is made with the proviso that the case shall not actually go to trial until after the Court has ruled on defendants' planned appeal from this recommendation. By contrast, if the trial readiness objection were sustained, plaintiff would be substantially prejudiced, due to my delay and through no fault of his own, because he most likely would lose the chance to have his day in court before he succumbs to mesothelioma. Therefore, I recommend that the Court also overrule defendants' trial readiness objection.

## Conclusion

For the reasons stated above, I recommend that Defendants' forum and trial readiness objections be overruled and that plaintiff's case be assigned to a trial judge with the proviso that the trial not take place until after Judge Heitler has ruled on defendants' appeal from this recommendation.

Dated: October 31, 2012

Respectfully submitted,

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