

SUPREME COURT OF THE STATE OF NEW YORK  
ALL COUNTIES WITHIN THE 3<sup>RD</sup>, 4<sup>TH</sup>, 5<sup>TH</sup>, 6<sup>TH</sup> AND 7<sup>TH</sup> JUDICIAL DISTRICTS

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IN RE: 3<sup>RD</sup> JUDICIAL DISTRICT ASBESTOS LITIGATION  
4<sup>TH</sup> JUDICIAL DISTRICT ASBESTOS LITIGATION  
5<sup>TH</sup> JUDICIAL DISTRICT ASBESTOS LITIGATION  
6<sup>TH</sup> JUDICIAL DISTRICT ASBESTOS LITIGATION  
7<sup>TH</sup> JUDICIAL DISTRICT ASBESTOS LITIGATION

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THIS DOCUMENT RELATES TO:

Index Nos.

ALL CASES

3<sup>rd</sup> JDAL Master File: TJDAL #2471-01  
4<sup>th</sup> JDAL Master File: #191740  
5<sup>th</sup> JDAL Master File: #2001-1062  
6<sup>th</sup> JDAL Master File: #CA 2009-000513  
7<sup>th</sup> JDAL Master File: #2001-012718

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THIRD, FOURTH, FIFTH, SIXTH, AND SEVENTH JUDICIAL DISTRICT ASBESTOS  
LITIGATION

CASE MANAGEMENT ORDER

January 27, 2021

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**I. Applicability of This Order**

This Order applies to all pretrial procedures involving all asbestos personal injury and wrongful death cases now or hereafter commenced in the Supreme Court, State of New York, Third Judicial District, Fourth Judicial District, Fifth Judicial District, Sixth Judicial District, and Seventh Judicial District, except as otherwise directed by the Court upon motion and for cause shown by the party seeking to have this Order declared inapplicable, and supersedes all previous case management orders and amendments thereto entered in the asbestos litigation previously pending in all counties throughout the above-named districts.

## **II. Purpose**

It is in the interest of justice to encourage and bring about the fair, expeditious and inexpensive resolution of these cases. In an effort to achieve this goal, this case management order ("CMO"), is established to allow the parties to obtain reasonably necessary documents and information without imposing undue burdens in order to permit the parties to evaluate the cases, reach early settlements, and prepare unsettled cases for trial.

The essential components of the CMO include, to the extent feasible:

1. 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;
2. conducting early pretrial conferences to explore settlement opportunities, to resolve pretrial management problems, and to establish discovery cut-off dates;
3. grouping, ordering, and firm scheduling of cases for pretrial procedures and trial; and
4. coordination of discovery, the use and compensation of Liaison Counsel, and other orders as necessary to avoid duplication, contain costs, and expedite disposition through settlement or trial

## **III. Filing Procedures**

### **A. Files**

1. A Master File has been established in the Office of the County Clerk for each of the Judicial District Asbestos Litigations referenced herein, for all asbestos cases commenced in

those jurisdictions and assigned to the undersigned for coordinated pretrial proceedings. Entries on the Master Files shall be applicable to each asbestos case assigned to the undersigned for coordinated pretrial proceedings.

2. The original of this Order shall be filed by the Supreme Court Clerk in the Master Files previously established, and a copy shall be deemed to be part of the record of each coordinated action.

3. A separate file shall also be maintained under a separate Index Number for each individual action in the office of the County Clerk of the county in which such individual action was commenced, and entries shall be made therein in accordance with this Order.

**B. Captions of Cases**

Every document filed in these coordinated actions, that has general application to all cases, shall bear a caption similar to the caption of this Order.

**C. Filing of Papers**

1. When a paper has general application to all cases in a particular jurisdiction, the caption shall bear the index number of that jurisdiction's master file and the designated Supreme Court Clerk of that jurisdiction shall file such a paper in the Master File, as follows:

3rd Judicial District Master File: TJDAL #2471-01 (filed in the Supreme Court of New York, Albany County).

4th Judicial District Master File: # 191740 (filed in the Supreme Court of New York, St. Lawrence County).

5th Judicial District Master File: #2001-1062 (filed in the Supreme Court of New York, Onondaga County).

6th Judicial District Master File: #CA 2009-000513 (filed in the Supreme Court of New York, Broome County).

7th Judicial District Master File: #2001-012718 (filed in the Supreme Court of New York, Monroe County).

2. No further copies of the papers need to be filed. Any document so filed shall be deemed to have been filed in each case to which this Order applies and shall constitute part of the record of each such case.

3. When a paper, like a Plaintiff's Initial Fact Sheet ("PIFS") or a motion, is applicable only to an individual case, the attorney submitting such paper for filing shall supply a cover sheet containing the caption, name and index number to which the paper is applicable.

Such paper shall not be filed in the jurisdiction's Master File but, rather, in the individual case file under the appropriate index number.

4. When a paper is filed that is applicable to two or more but less than all of these coordinated actions, the captions shall state the case names and separate index numbers of the actions to which that paper is applicable. The Clerk shall file a copy in the separate file bearing the index number so identified to which the paper is intended to be applicable.

5. It shall be the responsibility of the attorney submitting such paper for filing to supply a cover sheet containing the captions, names and index numbers of all cases to which the paper is applicable and supply the Clerk with sufficient copies of any such paper to facilitate compliance with the directives of this paragraph.

#### **IV. Rules of Procedure**

The Civil Practice Law and Rules and the Court Rules of each respective jurisdiction together with the express provisions of this Order shall govern all proceedings herein.

## **V. Pleadings**

A. Plaintiff's Initial Fact Sheet ("PIFS"), annexed hereto as Exhibit "A," shall be included with the complaint or served upon the defendants within sixty (60) days after filing of the complaint or sixty (60) days from the date of this Order, whichever date is later. The PIFS shall be filed in the file of the individual action. The PIFS shall include plaintiff's specific work site(s). If more than one work site or injurious exposure is claimed, the PIFS shall list each of them. To the extent possible, plaintiffs' counsel is to attempt to provide this information to defense counsel. PIFS are not intended to limit proof and are not admissible for any purpose.

B. To the extent not previously done, plaintiffs' counsel may file in the Master File of each applicable jurisdiction and serve on defendants a complaint or set of complaints containing standard allegations generally applicable to all claims of a similar nature. Thereafter, plaintiffs may serve and file a short form complaint which incorporates by reference all of the allegations contained in the appropriate standard complaint. In the case of previously filed complaints, leave is hereby granted to file such short form complaints as amended complaints filed by that firm.

C Defendants may file in the Master File of each applicable jurisdiction and serve on plaintiffs' Liaison Counsel a standard answer with affirmative defenses. When such standard set of defenses has been filed, a defendant may serve an acknowledgment of service, annexed hereto as Exhibit "B," on the plaintiff, by which service defendant will be deemed to have denied all material allegations contained in the plaintiff's complaint, except as stated in such acknowledgment, and to have raised each of the affirmative defenses contained in defendants' standard answer, except as stated in such acknowledgment. If a defendant adopts the model

cross-claim of defendants by its acknowledgment of service, all co-defendants to which the cross-claim may apply will be deemed to have denied all material allegations contained in the cross-claim. Nothing herein shall preclude a defendant from filing an individual answer, if it so chooses.

D. Any plaintiff may, without further leave of the Court, amend his or her complaint (1) to add claims based on survivorship, death of the original plaintiff, change of the disease alleged, or loss of consortium or society; (2) to sever any joined claims; or (3) to add additional defendants. Service of such amendments on counsel who have appeared in the action for a defendant shall be considered service on that defendant. Such amendments may incorporate by reference the allegations of the complaint on file where appropriate. Defendants who have previously answered shall be deemed to have answered the amended complaint as set forth in the preceding paragraph. Other amendments to the pleadings shall be made in compliance with C.P.L.R. §3025. However, the parties are encouraged to consent to such amendments where appropriate in light of New York State's recognition that leave to amend is to be freely granted.

## **VI. Liaison Counsel**

A. Appointment of Liaison Counsel to act on behalf of plaintiffs' counsel and on behalf of defendants' counsel after appropriate consultation where necessary will facilitate communications among the Court and counsel, minimize duplication of effort, coordinate joint positions, and provide for the efficient progress and control of this litigation.

B. Subject to the right of any party to present individual positions or divergent positions or to take individual actions, Liaison Counsel are vested by the Court with the following responsibilities and duties:

1. to coordinate the briefing of motions;

2. to coordinate the argument of motions;

3. to coordinate the conduct of discovery procedures, including but not limited to coordination of the preparation of joint written interrogatories, joint requests to admit, and joint requests for the production of documents, where applicable;

4. to coordinate the examination of witnesses in depositions;

5. to coordinate the selection of counsel to act as spokespersons at pretrial conferences; and

6. to call meetings of counsel for plaintiffs and defendants respectively for the purpose of proposing joint actions, including but not limited to responses to questions and suggestions of the Court or of adversaries with regard to orders, schedules, briefs, and stipulations of the facts.

C. Liaison counsel for the Plaintiffs shall be Joseph W. Belluck, Esq. of the law firm of Belluck & Fox, LLP.

D. Liaison Counsel for the Defendants shall be Meagan E. Dean, Esq. of the law firm of McGivney Kluger Clark & Intoccia, P.C.

E. Liaison Counsel are authorized to receive orders, notices, correspondence and telephone calls from the Court, and the Clerk of the Court on behalf of all defendants and plaintiffs and shall be responsible for notifying all counsel of all communications received from the Court. Except as otherwise set forth in this Order, Liaison Counsel may not be used by any Party for service of papers, orders, notices or correspondence to other counsel.

F. Notwithstanding the appointment of Liaison Counsel, each counsel shall have the right to participate in all proceedings before the Court as fully as such counsel deems necessary.

G. Liaison Counsel shall not have the right to bind any party except Liaison Counsel's own respective client(s) as to any matter without the consent of counsel for any other party.

H. Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel shall be reimbursed for their necessary and reasonable out-of-pocket expenses actually incurred in performing their tasks pursuant to this Order and shall keep records of such expenses in reasonable detail for examination by counsel. The reimbursement for such expenses shall be periodic, but not less than every six months by counsel for plaintiffs and defendants, respectively. Liaison Counsel shall be paid by each plaintiff's and defendant's counsel on an equitable basis to be agreed upon by the parties or fixed by the Court with each plaintiff and defendant having to pay a proportionate share of the out-of-pocket costs incurred by its respective Liaison Counsel, as indicated below.

I. Reimbursable expenses shall not include billable hourly rates or in any way account for the time spent by attorneys, paralegals, or any other person performing tasks pursuant to this Order unless agreed upon by the parties, and are limited to only the actual out-of-pocket expenses incurred by Liaison Counsel and/or their respective firms. Such costs include, but are not limited to, copying fees, filing fees, costs associated with establishing telephonic or general conferences, and similar expenses that apply to general matters.

J. Liaison Counsels' invoices for expenses incurred as Liaison Counsel pursuant to this Order, to the extent they exist, shall be due and payable when submitted.



## **VII. Standard Consolidated Discovery**

### **A. Interrogatories**

Standard Interrogatories (C.P.L.R. §3120) and Requests for Production of Documents (C.P.L.R. §3120) shall be used as set forth herein. The Court on its own motion hereby permits the use of interrogatories in addition to depositions pursuant to C.P.L.R §3130.

#### **1. Defendants' Interrogatories**

a. Defendants have developed a single, standard joint set of interrogatories to plaintiffs which, to the extent not previously done, shall be filed in the Master File in each applicable jurisdiction and provided to plaintiffs' Liaison Counsel. These standard interrogatories are captioned Defendants' Standard Set of Interrogatories and Requests for Production of Documents. A copy is annexed hereto as Exhibit C.

b. Plaintiffs shall serve upon all defendants in the action responses to defendants' standard set of interrogatories in accordance with the time line set forth herein. The interrogatories shall be answered in full and verified by each individual plaintiff according to the C.P.L.R.

c. After the standard set of interrogatories are answered, any defendant may, with the consent of the plaintiff or by order of the court, serve supplemental, non-repetitive interrogatories in accordance with the time lines set forth herein. Defense Counsel are admonished to exercise the utmost good faith in determining the necessity for such further interrogatories.

d. Copies of any records obtained by any defendant pursuant to authorization of a plaintiff, other than those records which are obtained through a mutually agreed upon

records retrieval service, shall be made available to plaintiff's counsel by notice of receipt mailed to plaintiff's counsel within twenty (20) days of receipt. If medical records are received by a party less than twenty (20) days before jury selection is scheduled to begin, then the records shall be made available within five (5) business days, or the next business day if the jury selection has commenced.

## **2. Plaintiffs' Interrogatories**

a. Plaintiffs have developed a single, standard joint set of interrogatories designed to obtain general liability information. A copy is annexed hereto as Exhibit "D."

b. To the extent not previously done, each defendant shall file in the Master File of each jurisdiction a single set of responses which shall be applicable to all coordinated actions. Any defendant who has served Answers to Interrogatories in any other jurisdiction in New York State, if that response remains accurate, may, with the consent of the plaintiff, adopt those Answers to Interrogatories as and for their responses to plaintiffs' interrogatories in the applicable judicial district. However, defendants are obligated to provide responses to any non-duplicative interrogatories served in this venue. Responses by defendants to this set of interrogatories shall be served on plaintiffs' counsel. Response by such defendant shall be due within sixty(60) days of service.

c. Plaintiffs may submit to individual defendants standard product and contractor identification interrogatories with respect to particular work sites. A copy of these standard product and contractor identification interrogatories is annexed hereto as Exhibit "E." Each defendant shall have sixty (60) days from receipt of the product and contractor identification interrogatories to serve its response. If any defendant produces

and authenticates to plaintiffs' counsel the universe of documents and items responsive to the standard product and contractor identification interrogatories for a particular location for all years and for all products and/or contractors at issue, and updates that production as necessary, then that defendant will be relieved from re-producing these documents and items in individual cases. Defendants can thereupon adopt the prior universal response regarding a particular facility in response to an interrogatory in an individual case. Such adoption may be made by letter from defendant's counsel and shall not require any additional client verification.

d. After the standard set of general liability and product/contractor identification interrogatories are answered, any plaintiff may, with the consent of the defendant or by order of the court, serve supplemental, non-repetitive interrogatories in accordance with the time line set forth herein. Plaintiff's counsel are admonished to exercise the upmost good faith in determining the necessity for such further interrogatories.

## **B. Document Requests**

### **1. General Guidelines**

a. Subject to Paragraph B.2 below, the provisions of C.P.L.R. §3120 shall govern all requests for documents. The requesting party shall specify a reasonable time, place, and manner for making the inspection. The request will describe each item with reasonable particularity.

b. Counsel are directed to exercise the utmost good faith in making requests for production and in responding to requests. Counsel are directed to exercise their best efforts to

resolve on an informal basis disputes arising out of the document requests and responses and objections thereto.

## **2. Defendants' Requests for Documents**

a. Counsel for the defendants have developed a standard document request to the plaintiffs which is captioned Defendants' Standard Set of Interrogatories and Requests for Production of Documents, annexed hereto as Exhibit "C." To the extent not previously done, this discovery request shall be filed in each jurisdiction's Master File and is deemed to apply to all cases without the necessity of further filing and service of the request in individual cases, except that defendants' Liaison Counsel shall serve a set of standard document requests upon a plaintiff's counsel who has not previously appeared on behalf of some other plaintiff in this litigation who requests such service.

b. Plaintiffs shall serve upon defendants' Liaison Counsel the requested documents in accordance with the time line set forth herein. If any of the requested documents are not in plaintiff's or their counsel's possession, custody, or control, the plaintiff shall provide a mutually agreed-upon 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. In the event counsel for any defendant does not wish to utilize the records retrieval service, he or she shall so notify plaintiff's counsel, in writing. Under such circumstances, plaintiff shall provide counsel for that defendant with a photocopy of an authorization to obtain records from other persons, which authorization shall recite that it shall be honored to the same extent as an original. Such a photocopied authorization shall be deemed sufficient to authorize release of records from third persons of any requested documents pertaining to this litigation.

c. After plaintiffs have responded to the standard set of document requests, defendants may, with the consent of the plaintiff or by order of the court, serve supplemental, non-repetitive requests for documents in accordance with the time lines set forth herein. Counsel are admonished to exercise the utmost good faith in determining the need for such further document requests. Plaintiff shall produce or arrange for production of documents pursuant to defendant's supplemental document request within sixty (60) days of receipt. If plaintiffs have previously provided such documents to a defendant or defendant's counsel, plaintiffs may respond to defendants' demand by letter adopting such prior production.

### **3. Plaintiffs' Requests for Documents**

a. Plaintiffs have developed a single, standard document request to the defendants. A copy is annexed hereto as Exhibit "D."

b. To the extent not previously done, each defendant shall produce or arrange for production of documents pursuant to plaintiffs' standard document requests within sixty (60) days of service, subject to agreement between plaintiffs' Counsel and the particular defendant's counsel about the specific time and place and on a reasonable schedule for production. Each defendant shall produce documents by serving one set of the requested documents on plaintiffs' Counsel.

c. After the defendants have responded to the standard set of document requests, plaintiffs may, with the consent of the defendant or by order of the court, serve supplemental, non-repetitive document requests in accordance with the time line set forth herein. Counsel are admonished to exercise the utmost good faith in determining the need for such further document requests. Defendants shall produce or arrange for production of documents pursuant to plaintiffs' supplemental document requests within sixty (60) days of receipt. If

defendants have previously provided such documents to a plaintiff or plaintiff's counsel, defendants may respond to plaintiffs' demand by letter adopting such prior production.

**C. General Discovery Provisions**

1. Disputes with regard to discovery shall be called immediately to the attention of the Court for resolution and shall not be relied upon by any party as a justification for not adhering to the time line unless otherwise directed by the Court.

2. Document production shall be in such form as will make clear the request to which the document is responsive.

3. Objections based on privilege shall clearly identify the privilege claimed and sufficient information concerning (i) the basis for the claim of privilege to establish prima facie the validity of the claim, and (ii) the privileged information to permit identification of the information or document as to which privilege is claimed. If not so identified, the privilege shall be deemed waived. The parties shall negotiate in an effort to preserve the confidentiality of trade secrets.

4. Responses to requests calling for business or medical records shall state whether the record is or is not a record made in the course of a regularly conducted activity so as to be admissible under C.P.L.R. §4518.

5. Any objection to discovery based on burdensomeness shall describe the burden with reasonable particularity. Any objection to the time, place, or manner of production or burdensomeness shall state a reasonably available alternative as a counterproposal.

6. Any response that a document cannot be located or information not determined shall state with reasonable particularity the efforts made to obtain the requested document or information.

7. Any party wishing to propound any discovery on a party in a given case other than that provided herein may do so only upon application to the Court or by stipulation with opposing counsel.

8. In accordance with the C.P.L.R., formal discovery demands served upon a non-party shall be served contemporaneously upon all parties to the action.

**D. Previously Produced Documents**

1. Upon notice of the time and place of its previous production, any document produced by a party, its predecessor or successor in any other asbestos personal injury/wrongful death case shall be deemed produced in these cases, and any representations made by any defendant with respect to such document shall be deemed made in these cases. This paragraph is not intended to address the ultimate issue of admissibility at trial of any previously produced documents, and expressly leaves this issue for resolution by the trial court.

2. Pursuant to C.P.L.R. §3123, plaintiffs may submit to each defendant one or more lists of exhibits of previously produced documents they intend in good faith to use at trial. Such defendant shall respond as to the genuineness of said document(s) no later than sixty (60) days before trial.

**VIII. Medical Examinations of Plaintiffs**

Defendants shall, if they desire, jointly obtain a medical examination of the plaintiff in accordance with C.P.L.R. §3121 and in accordance with the time line set forth herein. A report of the medical examination together with copies of all tests shall be provided to plaintiff in accordance with the time line.

## **IX. Depositions**

### **A. General Guidelines**

1. All depositions shall be taken in accordance with the New York Civil Practice Law and Rules except as provided herein. All depositions of parties shall be held in a county within the Third, Fourth, Fifth, Sixth, or Seventh Judicial Districts unless otherwise ordered by the Court or agreed to by Liaison Counsel.

2. All counsel shall avoid unnecessary and repetitive questioning of witnesses and shall work towards completing a deposition as soon as is reasonably possible. Any party found to be frustrating this process may be sanctioned by the Court. Unless all parties otherwise agree, all objections, except as to the form of the question, shall be reserved until the time of trial. Any objection as to form shall be clearly stated, and upon request, the reasons shall be given in order to enable the questioner to amend or change the question or correct any possible error as to form. All questions shall be answered except where a claim of privilege is made, which claim, if not resolved, shall be forthwith brought before the Court for resolution.

3. All counsel may attend any deposition. All depositions shall be taken before a notary public, who will swear the witness.

4. 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 cases. Nothing in this provision shall be deemed to prohibit a party from moving the Court to limit the use of deposition testimony taken in another case based upon good cause shown.

5. To the extent practicable, Plaintiffs' and defendants' Liaison Counsel should continue to work toward scheduling depositions convenient to counsel and to the witnesses, given their work and medical needs.



6. All depositions shall be conducted with due regard for the physical and emotional condition, health, and disability of the deponent. If an *in extremis* deposition is noticed to be taken outside of the Third, Fourth, Fifth, Sixth, or Seventh Judicial Districts, the noticing party must provide, together with the notice, medical certification that the deponent is unable to travel due to his present condition. Upon application to the Court, plaintiff's counsel may be required to pay the travel expenses of at least one, but no more than two, defense counsel incurred in attending any deposition noticed to be taken outside of the aforementioned judicial districts.

**B. Depositions of Plaintiffs**

1. Depositions shall be limited to depositions of plaintiff, plaintiff's spouse, plaintiff's personal representative, family members included on plaintiff's fact witness list or who may provide testimony concerning product identification, pain and suffering, or any other alleged damages, and up to four co-workers, unless plaintiff intends to call more than those four co-workers as witnesses at trial. No other depositions of plaintiff, members of plaintiff's family, or co-workers shall be conducted except by order of the Court.

2. In all actions, the right of Defendants and Third Party Defendants to depose Plaintiff's spouse or personal representative of a decedent at any time prior to jury selection are reserved. Such a deposition may be requested, noticed for, and/or scheduled by any defense counsel.

3. Questioning of the injured Plaintiff shall begin with interrogation by a lead defense counsel, followed by interrogation by other defense counsel in an order agreed to by defense counsel or as decided by the Court when such an agreement cannot be reached.

4. Questioning of the plaintiff's spouse or personal representative shall begin with interrogation by the defense counsel who requested, noticed, and/or scheduled the deposition,

followed by interrogation by other defense counsel in an order agreed to by defense counsel or as decided by the Court when such an agreement cannot be reached.

**C. Depositions of Defendants**

1. Plaintiff may serve notice of intent to take nonrepetitive depositions of defendants' representatives pertaining to issues which were not covered or not adequately covered by prior depositions of that defendant. Objections to said depositions shall be brought by the affected defendant before the Court who shall issue a ruling. All corporate depositions shall be noticed at a time and place convenient to the witness, taking into account the expense to the defendants' witness.

2. The parties shall make every effort to use depositions as well as other discovery obtained from defendants in the preparation of other cases both in this State and throughout the country for all purposes as if taken in each action in these cases in accordance with the provisions of this Order. Except as otherwise provided herein, no other depositions of defendants shall be taken in these cases except as provided above.

3. Questioning of the Defendant shall begin with interrogation by the Plaintiff's counsel, who noticed the deposition, followed by other Plaintiff's counsel in the order of service of cross-notice. If the above deponent is a present or former officer or employee of a Defendant, questioning by a defense counsel shall begin with counsel for such Defendant, followed by other defense counsel in an order agreed to by defense counsel or as decided by the Court when such an agreement cannot be reached.

**D. Depositions of Non-Party Witnesses**

1. Non-party fact witness depositions shall be taken in accordance with the deadlines set forth in each case-specific Scheduling Order.

2. Questioning of a non-party fact witness who will provide product identification testimony, if the witness is offered by the plaintiff's counsel, shall begin with interrogation by a lead defense counsel, followed by interrogation by other defense counsel in an order agreed to by defense counsel or as decided by the Court when such an agreement cannot be reached, absent consent of parties otherwise. If a non-party fact witness who will provide product identification is offered by a defendant, questioning of the witness shall begin with interrogation by Plaintiff's counsel, absent consent of parties otherwise.

## **X. Videotape Depositions**

### **A. Videotape Depositions of Seriously Ill Plaintiffs**

1. Where a deponent is in extremis, a detailed Doctor's Affidavit shall be served with the notice of the deposition. The affidavit shall specify the deponent's present diagnosis and prognosis.

2. Upon plaintiff's service of a Doctor's Affidavit, plaintiff's responses to interrogatories, a copy of the complaint, and receipt by defendants of all requested documents in plaintiff's or his counsel's possession including all medical, tax and social security records, plaintiff's counsel may notice and take the videotape deposition of any plaintiff in extremis without further order of the Court.

3. Plaintiff's counsel shall confer with defendants' Liaison Counsel before scheduling of the deposition in order to reach a mutually agreeable date and time. All parties are encouraged to act reasonably concerning the scheduling. If no agreeable time can be reached, Liaison Counsel are to advise the Court by letter. The Court will then issue an order, sua sponte, setting forth the date and time of the deposition. Said videotape deposition will be scheduled not less than three (3) weeks from service of the Doctor's Affidavit. Plaintiff shall permit

defendants to take a discovery deposition at a mutually agreeable time not less than seven (7) days prior to the videotape deposition, unless otherwise agreed-upon by the parties in a particular case. If the parties do not agree, and it appears that plaintiff will not survive to give meaningful testimony in accordance with the time mandates above, plaintiff may request a telephone conference with the Court and Liaison Counsel to seek relief from these provisions.

#### **B. Procedures as to Videotaped Depositions**

1. Videotaped depositions may be taken by any party upon service of proper notice of deposition for any use permitted by the C.P.L.R. subject to the above provisions.

2. Videotaped depositions of deponents who have not been previously deposed and who are not terminally ill may not be taken sooner than fifteen (15) days after the date of the taking of the witness' deposition by off-camera stenographic method ("discovery deposition") unless otherwise agreed to by counsel.

3. When a party taking a deposition, in addition to having the testimony taken stenographically and transcribed, also desires to have the testimony videotaped, the party shall include notice of the videotaping of the deposition in the written notice required.

4. The videotaped deposition shall be taken before a notary public, who will swear the witness.

5. At the beginning of the deposition and prior to the witness being sworn, the videotape operator shall record an identification sign. As the sign is being recorded, the operator shall, in addition, vocally record the information on the sign. The identification sign shall indicate the caption of the action, the date, the time, and the name of the notary public before whom the videotaped deposition is being taken. After the identification sign has been

recorded, each participant shall identify himself or herself on camera, stating clearly the name, the address, and the role of the participant.

6. After the identification required by Paragraph X.B.5. has been completed, the witness shall be sworn. The swearing shall be on camera.

7. After the witness has been sworn, testimony shall be taken in accordance with the provisions herein. The taking of such testimony shall be videotaped in its entirety.

8. During the taking of a videotape deposition, the operator before whom the deposition is taken shall assure that the videotape records the witness in a standard fashion at all times during the deposition, unless all counsel agree otherwise or unless, on motion before the Court, the Court directs otherwise. The operator shall limit the use of videotape camera techniques such as close- up views of the witness or other similar techniques to vary the head and shoulders view which is being recorded for presentation in the courtroom to an initial viewing of the witness and the background and up to two (2) close-up views to demonstrate physical injuries unless otherwise agreed upon or ordered by the Court. As an exception to the foregoing, the operator shall, at the request of the attorney questioning the witness, cause a close-up view of a deposition exhibit to be taken while the witness is being questioned concerning the exhibit.

9. When a videotape deposition has been taken, the videotape shall be shown immediately to the witness for examination, unless such showing and examination are waived by the witness and the parties.

10. The notary public before whom a videotape deposition is taken shall cause to be attached to the original videotape recording a certification that the witness was sworn by him or her and that the videotape recording is a true record of the testimony given by the witness. If the

witness has not waived his or her right to a showing and examination of the videotape deposition, the witness also shall sign the certification. If the witness has exercised his or her right pursuant to Paragraph XB.9 to examine the videotape and, having done so, refuses to certify that the videotape recording is a true record of his testimony, the notary public before whom the videotape deposition was taken shall so note on the certification form and shall further state the reasons given by the witness for refusing to certify that the videotape recording is a true record of his or her testimony. The operator who videotaped a deposition pursuant to the provisions of this Order shall execute the following written certification prior to the beginning of the videotape deposition:

I, \_\_\_\_\_, hereby affirm that I am familiar with the provisions of the Third, Fourth, Fifth, Sixth, and Seventh Judicial District Asbestos Litigations' Case Management Order pertaining to videotape depositions and will ensure that the videotaping of this deposition is done in compliance with these provisions and in an impartial manner.

11. Upon payment of reasonable charges therefor, the operator before whom the deposition was taken shall furnish a copy of the videotape deposition in the form of a videotape or an audio recording to any party or the deponent.

12. The party taking the deposition shall be responsible for ensuring that the necessary equipment for videotaping the deposition is present at the time the deposition is taken. The party desiring to use the videotape deposition for any purpose subsequent to the taking of the deposition shall be responsible for ensuring that the necessary equipment for playing the videotape deposition back is available when the videotape depositions is to be used. When a videotape deposition is used during a hearing, a trial, or any other court proceeding, the party first using the videotape deposition in whole or in part shall ensure the availability of the same or

comparable videotape playback equipment to any other party for such other party's use in further showing the videotape deposition during the hearing, the trial, or other proceeding in question.

13. The cost of the videotape as a material shall be borne by the party taking the videotape deposition. The cost of recording the deposition testimony on videotape shall be borne by the party taking the videotape deposition. The ownership of the videotape used in recording testimony shall remain with the party taking the videotape deposition.

14. A party wishing to take a further videotape deposition, not covered herein, must make application to the Court.

#### **XI. Use of Discovery and Depositions from Other Cases**

A. Various employees of parties, former employees of parties, and witnesses with knowledge have been deposed in other cases involving alleged asbestos-related personal injuries, and there has been extensive document discovery conducted in other cases involving alleged asbestos-related personal injuries. To avoid undue expense, duplication and unnecessary imposition on counsel, the parties, and the witnesses, parties may use depositions taken in other state and federal jurisdictions and in cases where a party or a predecessor or successor in interest had notice and opportunity to attend and participate as provided in C.P.L.R. §3117. The issue of the admissibility of this deposition at trial against a particular defendant is expressly left for resolution by the trial court.

B. Any party seeking to use any portion of such prior deposition as substantive evidence at trial may, at any time, advise counsel for any party against whom a deposition may be used of the deposition he intends to offer as substantive evidence. Any party objecting to the use of the deposition shall file a statement setting forth the specific objections and grounds within thirty (30) days. Such depositions can be used as if noticed and taken in these cases against those parties or their successors in interest. If objection is made, the objecting party shall

make an appropriate *in limine* motion setting forth the grounds it asserts for excluding the use of the deposition.

## **XII. Motion Practice**

### **A. Discovery Motions**

1. Parties are strongly encouraged to resolve all discovery disputes without the need for Court intervention. However, when a dispute cannot be resolved amongst the parties, a motion may be brought pursuant to the applicable provisions of the C.P.L.R. All motions are upon submission only, unless oral argument is requested by the moving party or unless otherwise directed by the Court.

2. Discovery or other motions must comply with the notice provisions of the CPLR and are to be made returnable on an asbestos general conference date for the jurisdiction in which the case is pending. On the return date of the motion, if the Court has not received a copy of the responsive papers it will assume there is no opposition to the requested relief. Counsel for the moving party may then submit a proposed Order for the Court's consideration, on notice to all remaining parties in the action.

### **B. Summary Judgment Motions**

#### **1. General Provisions**

a. Summary judgment motions must comply with the notice provisions of the CPLR and are to be made returnable on an asbestos general conference date for the jurisdiction in which the case is pending. On the return date of the motion, if the Court has not received a copy of the responsive papers it will assume there is no opposition to the requested relief. Counsel for the moving party may then submit a proposed Order for the Court's consideration, on notice to all remaining parties in the action.



b. It is presumed that all motions will be on submission unless oral argument is requested by the moving party or unless otherwise directed by the Court.

## **2. Short-Form Motion Practice with Lack of Product or Contractor Identification**

Each party has a right to seek or oppose an accelerated judgment pursuant to C.P.L.R. §§3211 and/or 3212. However, in an effort to avoid unnecessary formal motion practice and to streamline the conclusion of these cases, the Court hereby adopts the following procedures:

a. At any time, plaintiff may notify a defendant that, upon the review of a file in a particular case, it appears unlikely that plaintiff will be able to produce any evidence of identification of products containing asbestos manufactured or supplied by that particular defendant, or of a contractor's involvement in a particular work site at a particular time. Upon receipt of such notification, such defendant may prepare and submit to the Court a proposed order, upon Notice of Motion, with proof of service on all parties, dismissing plaintiff's complaint and all cross-claims against such defendant, that gives notice to all parties of defendant's intention to enter an order dismissing plaintiff's claims and the cross-claims against such defendant. If, within twenty (20) days of submission, no co-defendant objects to the dismissal, the Order shall be signed by the Court. A dismissal under this procedure will preclude the dismissed party from being included on a verdict sheet as a potential fault-sharer. If a defendant objects to the dismissal, it shall notify the Court and parties in writing and, at the same time, provide evidence supporting its objection. Any party seeking to respond to the objecting defendant's submission must do so no later than twenty (20) days after submission of the defendant's objection and evidence. The Court will then rule on the papers, whether the defendant seeking dismissal should be dismissed. A copy of a Short-

Form Summary Judgment Motion, which much be filed with a Notice of Motion, is annexed hereto as Exhibit “F.”

b. A defendant may in good faith serve upon the plaintiff, on notice to all counsel, a statement in writing that there is no evidence of product or contractor identification. Such product or contractor identification letters are to be served in accordance with each case-specific Scheduling Order. Where such statement is served upon plaintiff, plaintiff shall respond to such letter no later than the deadline set forth in the case-specific scheduling order by:

i. advising the defendant of the identities of the co-worker(s) or other witness(es) who will testify concerning product or contractor identification, or specifying documents that will evidence product or contractor identification. In doing so plaintiff will not be precluded from presenting additional witnesses or documents at the time of trial so long as such witnesses or documents have been identified as required by the C.P.L.R. and/or this CMO; or

ii. by advising the defendant that no evidence of product or contractor identification will be forthcoming, in which case defendant may proceed to enter an order in accordance with paragraph l(a) above.

c. In the event that a plaintiff responds by advising defendant of identities of co-workers and/or other witnesses, the plaintiff must refer the defendant to prior testimony substantiating product or contractor identification or provide sworn affidavit(s) of the designated witnesses stating: (1) the job sites and the time periods affiant was at the job sites; and (2) a summary of the anticipated testimony regarding (i) the identification of products and the circumstances of injured plaintiff's/decedent's exposure to the product and/or (ii) the

identification of contractors and the circumstances of plaintiff's/decedent's exposure to asbestos by reason of an act or omission to act by the contractor.

d. In the event defendant desires to depose a co-worker and/or other witness based upon plaintiff's response, defendant shall advise plaintiff's counsel in writing. Such deposition is to proceed in accordance with the scheduling provisions set forth herein.

### **XIII. Trial Assignment**

#### **A. Composition**

1. Cases will be assigned to trial dates chronologically by filing date, except as otherwise modified herein (concerning the procedure for scheduling *in extremis* cases) or as agreed-to by counsel. The cases shall also, as much as practicable, proceed in a chronological order from the date of filing.

2. At any time, plaintiffs' counsel may move this Court, by Order to Show Cause, in an appropriate case, pursuant to Rule 3407 of the C.P.L.R., for a trial preference. That motion will be heard on the date of the asbestos general conference calendar for the jurisdiction in which the case is pending. Should there be no objection or should the parties agree that the case so qualifies under Rule 3407, the Court shall assign the case a trial date in accordance with Rule 3407 and Liaison Counsel may submit to the Court a stipulated order setting forth a proposed trial date and governing Scheduling Order.

#### **B. Discovery Schedules**

1. A Scheduling Order for each individual case pending within the Third, Fourth, Fifth, Sixth, and Seventh Judicial Districts will be executed and filed following the trial assignment of the case pursuant to provision VIII(A)(2).

a. In accordance with each case-specific Scheduling Order, Plaintiffs shall serve responses to defendants' standard interrogatories and document production requests; upon receipt thereof, defendants may upon consent or court order, serve supplemental interrogatories and document production requests.

b. In accordance with each case-specific Scheduling Order, defendants having not previously served answers will respond to plaintiffs' standard interrogatories and document production requests; upon receipt thereof, plaintiffs may upon consent or court order, serve supplemental interrogatories and document production requests.

c. Plaintiff's deposition will be conducted in accordance with the deadlines set forth in the each case-specific Scheduling Order.

d. Following the plaintiff's deposition, depositions of non-parties, defendants and third parties may commence. Depositions of all such witness shall be taken within the deadlines set forth in each case-specific Scheduling Order, absent consent of parties. However, depositions of defendants and non-product identification witnesses may be taken up to one (1) month prior to trial, or at such other time upon consent of parties.

e. Parties shall commence third-party actions within the deadlines set forth in each case-specific Scheduling Order.

f. Defendants may serve notice of lack of product or contractor identification upon plaintiff's counsel within the deadlines set forth in each case-specific Scheduling Order.

g. Plaintiffs must respond to defendant's product or contractor identification letters in accordance with the deadlines set forth in each case-specific Scheduling Order.

h. Plaintiff shall file his note of issue and statement of readiness in accordance with the deadline set forth in each case-specific Scheduling Order. Discovery may

continue by all parties past the Note of Issue filing date; however, Plaintiff's product identification discovery may not be disclosed after the Note of Issue unless on stipulation by all parties or motion for good cause shown.

i. Plaintiff shall provide all medical expert reports, pathology, and radiology to defendants' Liaison Counsel in accordance with the deadline set forth in each case-specific Scheduling Order.

j. Defendants shall provide all medical expert reports to plaintiff's Liaison Counsel in accordance with the deadline set forth in each case-specific Scheduling Order.

k. The Court will convene and conduct pretrial settlement conferences in advance of every trial. The date of the pretrial settlement conferences will be set forth in the Scheduling Order which is issued by the Court for every action. The Court may also schedule additional pretrial settlement conferences by notifying Liaison Counsel of the dates. Considering the issues of judicial economy, and the expense of impaneling juries for the Court system and respective Counties, all parties are obligated to engage in good faith settlement practices.

l. Pursuant to Uniform Trial Court Rule §202.26 plaintiffs' and defendants' attorneys will be required to appear at the pretrial settlement conferences prepared and fully authorized to resolve all remaining issues including the settlement of the action.

m. Plaintiffs and Defendants shall provide the court with an *ex parte*, confidential settlement memorandum prior to the final settlement conference in each matter and in accordance with the deadline and requirements set forth in each case-specific Scheduling Order.

n. Plaintiff must serve all pretrial submissions in accordance with the deadline set forth in each case-specific Scheduling Order.

o. Defendants must serve all pretrial submissions in accordance with the deadline set forth in each case-specific Scheduling Order.

p. Plaintiffs and Defendants must serve all motions *in limine* in accordance with the deadline and briefing schedule set forth in each case-specific Scheduling Order.

Motions *in limine* are to be returnable on the date of jury selection.

#### **XIV. Pretrial Submissions**

A. Pretrial submissions shall be served in accordance with the deadline and briefing schedule set forth in each case-specific Scheduling Order. Pretrial submissions include a list of all expert witnesses, fact witnesses and all exhibits that the parties intend to use at trial. Counsel shall have an opportunity to designate additional witnesses and exhibits in response to their adversaries' designations, within two (2) weeks of receipt thereof.

B. The parties shall submit proposed *voir dire*, requests for jury charges, or other submissions in accordance with each case-specific Scheduling Order. Additionally, the trial court shall direct a schedule for objections to exhibits or proposed deposition testimony, as necessary and as the Court so chooses.

#### **XV. Reverse Bifurcation**

Reverse bifurcation is left to the discretion of the trial judge.

#### **XVI. Miscellaneous**

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 plaintiffs' 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.

Consistent with the objectives of this CMO and in order to expedite the processing of these claims and in the interest of justice to encourage and bring about the fair, expeditious and inexpensive resolution of these cases all parties are presumed to consent to the use of *ex parte* communications by the Court with respect to settlement negotiations and issue resolution unless otherwise indicated by a party. Failure, at the Preliminary Conference, on the part of any party to object to the use of *ex parte* communications by the Court will be deemed a consent to such communications in the furtherance of settlement and issue resolution.

Liaison Counsel for Plaintiffs and Defendants are hereby directed to mail or provide electronically a copy of this Order to all known counsel who have appeared in an action presently pending within the Third, Fourth, Fifth, Sixth, and Seventh Judicial District Asbestos Litigations and shall make available to counsel in future actions filed within these Litigations.

**SO ORDERED.**

Dated: January 27, 2021  
Utica, New York

  
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Erin P. Gall, J.S.C.