SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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IN RE: NEW YORK CITY ASBESTOS LITIGATION

Index No. 40000/1988
Motion Seq. No. 010

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This Document Relates to:

CHARLES L. CHIDESTER
JOSEPH MILAZZO
WILLIAM L. MORITZ
ROBERTO ROMAN
EDWARD SADOWSKI
GEORGE W. SMITH

Index No. 190293/2011
Index No. 190311/2011
Index No. 190294/2011
Index No. 190262/2011
Index No. 190215/2011
Index No. 190299/2011
Motion Seq. No. 013

DECISION AND ORDER

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SHERRY KLEIN HEITLER, J.:

The law firm of Weitz & Luxenberg, P.C., on behalf of the above-captioned plaintiffs ("Plaintiffs"), moves by order to show cause for an order lifting the deferral recited in Section XVII of the New York City Asbestos Litigation ("NYCAL") Case Management Order, as amended May 26, 2011 ("CMO"), which provides that "[c]ounts for punitive damages are deferred until such time as the Court deems otherwise, upon notice and hearing", in order to permit Plaintiffs to try their causes of action for punitive damages against the defendants remaining in these cases.[1] Plaintiffs' application is jointly opposed by the NYCAL defendants' liaison counsel and various members of the NYCAL defendants' bar ("Defendants"), and individually opposed by defendants Crane, Cleaver-Brooks, and Domco. The law firm of Eckert, Seamans, Cherin & Mellott, LLC also separately opposes on behalf of the NYCAL defendants it

[1] According to Plaintiffs the remaining defendants in these cases are Crane Co. ("Crane"), Cleaver Brooks Company, Inc. ("Cleaver Brooks), and Domco Products Texas, LP ("Domco").

represents[2].

Plaintiffs' motion is also opposed by *Amici* the Coalition for Litigation Justice, Inc., *et al.*,[3] whose request for leave to file their *Amici Curiae* brief in opposition to Plaintiffs' motion was granted by this court. The opposing parties and the *Amici* request that the court continue to defer counts for punitive damages indefinitely as CMO § XVII purportedly intends.

The Defendants further cross-move under the NYCAL global index number (040000/1988) to vacate and declare inapplicable the entire CMO. Cleaver Brooks and Domco join in the Defendants' cross-motion.

All sides have presented well-reasoned, thoughtful arguments which demonstrate a considerable amount of work and attention to their positions. While Plaintiffs' motion is brought on behalf of certain named individuals, their argument is broad-based and concerns the viability of the application of CMO § XVII to all NYCAL plaintiffs. Defendants recognize this fact and have tailored their arguments to encompass this larger picture.

I heard oral argument on the motions at which all sides were invited to express their positions on the record.

BACKGROUND

The modern industrial use of asbestos[4] began around 1880 and peaked in the 1960s and

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2 Consolidated Rail Corporation, American Premier Underwriters, Inc., Norfolk Southern Railway Company, and CSX Transportation, Inc., (collectively, "Railroad Defendants").

3 The *Amici* define themselves as "organizations that represent companies doing business in New York, their insurers, and civil justice reform groups." *Amici* Brief, p. 1.

4 Asbestos is the generic name for a group of six naturally occurring fibrous silicate minerals.

1970s when asbestos was used in more than 3,000 industrial applications.[5] Studies suggest that all commercial forms of asbestos cause cancer. *Id.* Asbestos litigation, which has been likened to an "elephantine mass"[6] by Supreme Court Justice David Souter, is quite possibly the largest and longest-running mass tort litigation in the United States.[7] The history of asbestos litigation has been described as "a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s."[8]

Tens of thousands of complex, time-consuming asbestos personal injury actions have been filed in the New York County Supreme Court alone. In order to streamline discovery and manage the court's asbestos docket, in March of 1988 Justice Helen E. Freedman of this court oversaw the origination of the CMO which governs all NYCAL cases and which was "crafted with great care by representatives chosen by both the plaintiffs' and the defendants' asbestos personal injury bar and . . . bears the imprimatur of the court." *In re NYC Asbestos Litigation (Ames v Kentile Floors)*, Index No. 107574/08, at *2 (Sup. Ct. NY. Co. June 17, 2009, Heitler, J.), *aff'd* 66 AD3d 600 (1st Dept 2009). The original CMO was silent on the issue of punitive damages.

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5 National Toxicology Program, Department of Health and Human Services, *Report on Carcinogens, Twelfth Edition* (2011), Asbestos, pp. 53-54, available at http://ntp.niehs.nih.gov/ntp/roc/twelfth/profiles/ Asbestos.pdf#search=asbestos

6 *Ortiz v Fibreboard Corp.*, 527 US 815, 821 (1999).

7 Stephen J. Carroll, et al, *Asbestos Litigation*, RAND Inst. for Civil Justice, 2005, at 21, available at http://www.rand.org/pubs/monographs/MG162.html ("2005 Rand Report").

8 *Georgine v Amchem Prods.*, 83 F3d 610, 618 (3d Cir. 1996) (quoting Judicial Conference of the U.S. Ad Hoc Comm. on Asbestos Litig., Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 [1991]).

Thereafter, in 1996, Justice Freedman independently added section XVII to the CMO which requires that all punitive damage claims be deferred until such time as the court deems otherwise, upon notice and hearing. Justice Freedman explained her 1996 determination to defer punitive damages in her 2012 Southwestern University Law Review article (Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 527-28):

> Many courts, including mine, long ago decided that punitive damages had little or no place in the asbestos litigation. . . . Because New York allows imposition of punitive damages in tort cases, rather than merely dismissing the claims, I deferred all punitive claims indefinitely. . . . It seemed like the fair thing to do for a number of reasons. First, to charge companies with punitive damages for wrongs committed twenty or thirty years before, served no corrective purpose. In many cases, the wrong was committed by a predecessor company, not even the company now charged. Second, punitive damages, infrequently paid as they are, only deplete resources that are better used to compensate injured parties. Third, since some states did not permit punitive damages, and the federal [multidistrict litigation] court precluded them, disparate treatment among plaintiffs would result. Finally, no company should be punished repeatedly for the same wrong. However, deferral of all punitive damages claims by judicial fiat despite the fact that other jurisdictions allowed them, and, indeed, New York juries had previously awarded them, clearly raises ethical and possibly equal protection issues.[9]

On this motion Plaintiffs assert that the NYCAL landscape has so dramatically changed since 1996 that the policies and considerations underlying CMO § XVII's deferral of punitive damages no longer apply. Plaintiffs' central arguments in this regard are as follows:

- Prior to 1996 NYCAL asbestos plaintiffs were not denied the right to seek punitive damages at trial[10];
- Unlike NYCAL plaintiffs, asbestos plaintiffs in other states and in other counties within New York State are permitted to assert claims for punitive damages

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9 Although no appellate review was sought concerning Justice Freedman's 1996 determination, there have been some attempts *in limine* to overcome the CMO § XVII ban on punitive damages which were unsuccessful. See *Gadaleta v A.C.&S., Inc.*, Index No. 110739/02 (Sup. Ct. NY. Co. September 22, 2004, Lebedeff, J.); *Bernard v Brookfield Properties Corp.*, Index No. 107211/08 (Sup. Ct. NY. Co. Oct. 24, 2011, Shulman, J.)

10 *See Home Ins. Co. v American Home Products Corp.*, 75 NY2d 196, 204 (1990) ("The concept of punitive damages has been sanctioned under New York law in actions based on negligence . . . and strict products liability . . . .")

without undue adverse effect[11];

- The NYCAL punitive damages deferral emboldens certain defendants to resist engaging in reasonable settlement discussions. This clogs the court's dockets, wastes judicial resources, and prejudices *in-extremis* plaintiffs who have limited expectations;
- The continued wholesale prohibition of punitive damage claims in NYCAL is ethically and constitutionally infirm;
- As a matter of public policy the imposition of punitive damages serves the important goal of deterring tortious conduct not just by manufacturers of asbestos-containing products but dangerous products of all kinds;
- Defendants' concerns that punitive damages will repeatedly be assessed against NYCAL defendants is without foundation in fact;
- The particular circumstances of the cases at issue herein support an award of punitive damages.

Defendants assert that Justice Freedman's reasons for deferring punitive damages are even stronger today than they were almost twenty years ago, and collectively argue:

- The spectre of large punitive verdicts will inflate settlement values, resulting in fewer resources with which to compensate future asbestos claimaints;
- Punitive damages would serve no corrective or deterrent purpose in NYCAL since nearly all asbestos-containing products have been eliminated in this country either by law or by practice;
- Several states bar punitive damages in asbestos cases as a matter of law[12], and courts with large asbestos dockets have precluded punitive damages as a matter of

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11 *See, e.g., Bankhead v ArvinMeritor, Inc.*, 205 Cal. App. 4th 68, 88 (Apr. 19, 2012); *Drabczyk v Fisher Controls Intl., LLC*, 92 AD3d 1259, 1260 (4th Dept 2012); *Rodarmel v Pnuemo Abex, LLC*., 957 NE2d 107, 109 (Ill. App., Jul 15 2011); *Baccus v Atl. Richfield Co.*, No. 1063-2010, Phila. Ct. Com. Pl. LEXIS 8, 34 (Jan. 13, 2010); *Anderson v A.J. Friedman Supply Co., Inc.*, 416 NJ Super 46, 63 (Aug. 20, 2010); *Stewart v Union Carbide Corp*, 190 Cal. App. 4th 23, 27 (Nov. 16, 2010); *Boyden v Tri-State Packing Supply*, No. CV-04-452, 2007 Me. Super. LEXIS 47, at *13 (Feb. 28, 2007); *In re Seventh Jud. Dist. Asbestos Litig.*, 190 AD2d 1068 (4th Dept 1993).

12 Nebraska, New Hampshire, Michigan, and Washington all prohibit punitive damages generally. See *Distinctive Printing & Packaging Co. v Cox*, 232 Neb. 846, 857 (1989); N.H. REV. STAT. ANN. § 507.16; *Rafferty v Markovitz*, 602 NW2d 367 (Mich. 1999); *Dailey v N. Coast Life Ins. Co*, 919 P2d 589, 590 (Wash 1996).

discretion;[13]

- The availability of punitive damages in NYCAL would enhance the advantage plaintiffs already receive nationwide in asbestos litigation;
- No company should be repeatedly punished for the same wrong; CMO § XVII is warranted in light of due process constraints;
- Punitive damages pose an increased likelihood of juror confusion in consolidated asbestos trials;
- The imposition of punitive damages in NYCAL would violate the United States Constitution's Ex Post Facto Clause;
- Plaintiffs negotiated and consented to all of the CMO provisions, including the deferral of punitive damages. The lifting of the punitive damages deferral would undermine the negotiated and consented-to precepts of the CMO so irrevocably as to render the entire document invalid. The Defendants will not consent to any such alteration of the CMO. Defendants would also no longer consent to accelerated trial clusters, consolidated trials, the continuation of discovery after filing of the note of issue, and limitations on the taking of depositions, all as provided for in the CMO.

Crane joins in such joint opposition and offers the following additional arguments:

- Plaintiffs have failed to set forth a sufficient basis why punitive damages against it are warranted in the cases herein[14];
- The United States Navy, not Crane, specified the content and technical details of all gaskets and packing associated with the Crane products alleged to have been present on the ships on which these Plaintiffs worked. Crane simply manufactured and supplied equipment for the Navy in accordance with precise Naval specifications;
- Coercing so called recalcitrant defendants into reasonable settlements is not a legitimate rationale for imposing punitive damages;
- Punitive damages awards would create an unwarranted and unnecessary recovery for NYCAL plaintiffs where compensatory verdicts have already reached staggering proportions. Plaintiffs have not explained how punitive damages would be more of a deterrent than the large compensatory verdicts NYCAL plaintiffs already receive.

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13 *See In re Collins*, 233 F3d 809, 812 (3d Cir. 2000); *In re Mass Tort and Asbestos Programs*, General Court Regulation No. 2012-03 (Ct. Com. Pl., Phila. County, Pa. Feb. 15, 2012), submitted as Defendants' exhibit U.

14 As more fully set forth herein, *infra*, Plaintiffs' bases for punitive damages are more properly laid before the trial Judge as are Crane's objections thereto.

DISCUSSION

I. Plaintiffs' Motion to Lift the CMO's Deferral of Punitive Damages

In *Exxon Shipping Co. v Baker*, 554 US 471 (2008) the United States Supreme Court outlined the history of punitive damages. The Court noted that the doctrine of punitive damages dates as far back as the 18th Century when the Court of Common Pleas in England recognized the availability of damages as compensation "for more than the injury received." *Id.* at 490 (quoting *Wilkes v Wood*, Lofft 1, 18, 98 Eng. Rep. 489, 498 [1763]).[15] Some early American common law cases applied the remedy of punitive damages, also referred to as "exemplary damages", upon the perceived need to compensate for "intangible injuries". *Id.* at 491. Modern cases have recognized the remedy of punitive damages to punish for extraordinary wrongdoing and to deter harmful conduct. *Id.* at 493. The consensus today is that punitive damages are aimed not at compensation but at retribution and deterrence.

With the exception of NYCAL, punitive damage requests are generally permitted in New York State as a matter of public policy and are a societal remedy rather than a private compensatory remedy. The imposition of punitive damages is "discretionary, not mandatory . . . ." *Birnbaum v Birnbaum*, 157 AD2d 177, 192 (4th Dept 1990). Punitive relief must be emblematic of more than an individually sustained wrong, and should "reflect pervasive and grave misconduct affecting the public generally . . . ." *Fabiano v Philip Morris Inc.*, 54 AD3d 146, 150 (1st Dept 2008). This policy is reflected in several New York statutes which support

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15 The importance of punitive damages was first recognized in New York State in *Tillotson v Cheetham*, 3 Johns. 56, 61 (1808), in which a government officer was awarded punitive damages in a libel suit against a publisher.

the imposition of punitive damages in appropriate circumstances.[16]

New York's Pattern Jury Instructions provide that the "purpose of punitive damages is not to compensate the plaintiff but to punish the defendant for (wanton and reckless, malicious) acts and thereby to discourage the defendant and other (people, companies) from acting in a similar way in the future." N.Y. Pattern Jury Instr., Civil, No. 2:278, at 831 (2014). They also instruct that the "amount of punitive damages . . . must be reasonable and proportionate to the actual and potential harm . . ." and that "other evidence relevant to an award of punitive damages should not be admitted at trial unless and until the jury has brought in a special verdict that plaintiff is entitled to punitive damages . . . ." *Id.* at 832-33.

The New York plaintiff has a heavy burden to meet before punitive damages may be awarded. In New York, punitive damages are only permitted when "the defendant's wrongdoing is not simply intentional but 'evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations.'" *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 (2007) (quoting *Walker v Sheldon*, 10 NY2d 401, 405 [1961]); *see also Prozeralik v Capital Cities Communs.*, 82 NY2d 466, 479 (1993) (quoting Prosser and Keeton, Torts § 2, at 9 [5th ed 1984]) (punitive damages may be sought when the wrongdoing was deliberate "and has the character of outrage frequently associated with crime."). There are also due process "limits which a jury cannot exceed and 'it is the duty of the courts to keep a verdict for punitive damages within reasonable bounds, considering the purpose to be achieved

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16 See, e.g., Agriculture and Markets Law § 378(3)(b); Arts and Cultural Affairs Law § 31.01(4); Banking Law § 619(5); Civil Rights Law §§ 51, 70-a(1)(c); Environmental Conservation Law § 71-1205(2); Estates, Power & Trusts Law § 5-4.3(a)(2); Executive Law § 297(4)(c); General Municipal Law § 50-m; General Obligation Law § 11-103(1)(b); Public Health Law § 2801-d(2); Real Property Law § 235-a(2); Social Services Law § 131-o(3); Tax Law § 3038(2)(c).

as well as the *mala fides* of the defendant in the particular case.'" *Bell v Helmsley*, Index No. 111085/01, 2003 NY Misc. LEXIS 192, at *8 (Sup. Ct. NY. Co. Mar. 4, 2003) (quoting *Faulk v Aware Inc.*, 19 AD2d 464, 472 [1st Dept. 1963], aff'd 14 NY2d 899 [1964]).

With these precepts in mind, and in light of the safeguards imposed thereby, the Defendants' fear of large, repetitious punitive verdicts in NYCAL may be exaggerated. In *Drabczyk v Fisher Controls International, LLC*, 92 AD3d 1259 (4th Dept 2012), in addition to compensatory damages, a jury awarded the plaintiff $750,000 in punitive damages based on the decedent's exposure to asbestos-containing valves. In vacating the punitive damages award, the Fourth Department found that the evidence did not present one of the "singularly rare cases" which permitted the imposition of punitive damages. *Id.* Notably, however, the court held that the trial court did not abuse its discretion in charging the jury on the punitive damages issue. In an earlier asbestos-related case, *Maltese v Westinghouse Elec. Corp.*, 225 AD2d 414, 415 (1st Dept 1996), the First Department vacated a punitive damages verdict for the same reason. The court found that "the evidence does not show this to be one of the 'singularly rare cases' where punitive damages are warranted by 'extreme aggravating factors such as improper state of mind or malice'. . . ." (citations omitted).

As the Defendants submit, nearly all asbestos-containing products have been eliminated in this country and in that regard punitive damage awards may not serve a strictly corrective or deterrent purpose. Moreover, it is noteworthy that during the eight year period between 1988 when the CMO was first established and 1996 when CMO § XVII was implemented, Defendants have proffered only one instance where punitive damages were awarded in NYCAL (*see Maltese, supra*). As set forth above, this award was vacated by the First Department.

Defendants' argument that punitive damages awards will force businesses into bankruptcy and deplete resources that would otherwise be used to compensate future asbestos victims may similarly be unwarranted at this stage of the litigation. While the asbestos litigation phenomenon led to the bankruptcy nationwide of over one hundred companies[17], Defendants have failed to show, empirically or otherwise, that such bankruptcies were caused by punitive damages awards. Rather, available information indicates that these bankruptcies were caused by initial mass filings as well as projections of future filings and awards of compensatory damages.[18] As concerns future asbestos victims, they are protected by a fundamental element of our legal system which, following a hearing, places restraints on the maximum amount of punitive damages that is tolerable under the Due Process Clause of the U.S. Constitution, either individually or in the aggregate as against any particular defendant. *See, e.g., Simpson v Pittsburgh Corning Corp.*, 901 F2d 277, 281 (2d Cir.), *cert denied* 497 US 1057 (1990); *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 87-CV-0537, 1991 WL 4420, at *2 (EDNY Jan. 11, 1991). As for those entities that see the need to file for bankruptcy protection due to the number of asbestos claims and potential asbestos claims against them, it appears that they mainly file for Chapter 11 reorganization protection[19], which in many instances provides for the creation

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17 Defendants' joint opposition brief, dated October 31, 2013, pp. 14-15 (*citing* Mark. D. Plevin, et al., *Where are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, Mealey's Asb. Bankr. Rep., Vol. 11, No. 7, p. 31 [February 2012], submitted as Defendants' exhibit C, "Mealey's Report").

18 Lloyd Dixon and Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation*, RAND Inst. for Civil Justice, 2011, at xi, 2; *see generally* Mealey's Report, *supra*; Lloyd Dixon, Geoffrey McGovern, & Amy Coombe, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, RAND Inst. for Civil Justice, 2010, at 2, 5, *et seq.*; 2005 Rand Report, *supra*, at xxiii, *et seq.*

19 *See* Mealey's Report, *supra*.

of a trust to be applied towards compensating future asbestos-related personal injury claimants.[20] *See* 11 USC § 524(g).

Punitive damage awards indisputably are limited by constitutional constraints. *See State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 425 (2003) (". . . in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."). Contrary to Defendants' arguments such constraints are not designed to deter plaintiffs from seeking them; the caselaw highlights the fact that punitive damages may only be awarded under certain circumstances. *See BMW of N. Am. v Gore*, 517 US 559, 568 (1996) (punitive damages may "properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition . . . . Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."). Similarly, Defendants' charge that punitive damages imposed upon strict liability causes of action are unconstitutional under the Ex-Post Facto Clause[21] is diluted by the fact that, like punitive damages, the duty to warn of dangers in respect of one's products is a long-standing principle of the law of this state.[22]

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20 According to Mealey's Report (pp. 33-34), "a substantial amount of money has become available from confirmed asbestos personal injury trusts for the payment of claims - estimated to be between $25 and $40 billion . . . ."

21 *See Landgraf v Usi Film Prods.*, 511 US 244, 281 (1994) ("Retroactive imposition of punitive damages would raise a serious constitutional question."); *Rein v Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 762 (2d Cir. 1998) ("Where a retroactive law is civil rather than criminal, it is only the imposition of punitive damages that might, in particular circumstances, raise a constitutional problem.")

22 *See Thomas v Winchester*, 6 NY 397 (1852); *Loop v Litchfield*, 42 NY 351 (1870); *MacPherson v Buick Motor Co.*, 217 NY 382 (1916).

Defendants raise particular concerns about the imposition of punitive damages in clustered groups of cases because the conduct at issue will vary from claim-to-claim within a group based upon factors such as the products at issue, the years of exposure, and the plaintiff's occupation. In this regard Defendants contend that jurors can not be expected to fairly evaluate the issue of punitive damages against one or more defendants in a consolidated asbestos trial because the presentation of evidence as to one defendant's wrongful acts would improperly influence each plaintiff's claims against all of the defendants in the trial cluster. While this court appreciates the Defendants' concerns, at the end of the day the decision and the circumstances under which to consolidate lies within the discretion of the NYCAL trial Judges in accordance with the facts of the cases before them.

Technically Plaintiffs' motion is restricted to specific NYCAL cases, but the issues raised herein affect the landscape of this litigation.[23] As such, the parties' arguments have been most carefully considered. I recognize that even without punitive damages, resources available to persons injured by asbestos are naturally being depleted and that bankruptcy filings by asbestos defendants continue. While the argument could be made that priority should be given to compensatory claims over punitive damage awards, I am mindful that in this state the decision to deny plaintiffs the opportunity to seek punitive damages lies with the legislature. What I cannot ignore is the fact that victims of asbestos exposure are permitted to apply for punitive damages in every New York state court except this one. I for one cannot justify a situation in which an asbestos plaintiff is permitted to apply for punitive damages in Buffalo but not in this court. This

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[23] As one attorney suggested at oral argument, Plaintiffs' motion can be likened to a camel's nose peeking under the tent.

raises serious constitutional equal protection concerns which should not be overlooked.

I therefore hold that pursuant to CMO § XVII, following notice and a hearing, the deferral of counts for punitive damages in NYCAL cases is lifted, and CMO § XVII shall be deemed modified as hereinafter set forth. As such plaintiffs are no longer barred from applying to the NYCAL trial Judges for permission to seek punitive damages.

While Plaintiffs have evinced their intention not to abuse this opportunity, it is appropriate for the court to caution the plaintiffs' bar not to overstep this permission by attempting to seek punitive damages indiscriminately. Punitive damages should only be sought in the most serious cases to correct for the most egregious conduct, and must present a valid reference to corrective action. One need only refer to current events to understand that products harmful to consumers are still being introduced into the stream of commerce. Even in such circumstances, plaintiffs' burden is a very heavy one.

II. Defendants' Cross-Motion to Withdraw from the CMO

This court has consistently embraced the concept that the CMO is a negotiated agreement which embodies the parties' mutual consent to the various provisions toward the ultimate objective of bringing about "the fair, expeditious, and inexpensive resolution to these cases." CMO § II. As I noted in a prior decision, "[w]hile the plaintiffs' bar is not completely satisfied with some of the CMO's provisions, the defendants' bar is similarly not content with others. That is the reality of any bargained for position, to which the parties have signed on." *In re New York City Asbestos Litig.*, 37 Misc. 3d 1232(A), 2012 NY Misc. LEXIS 5646, at *31 (Sup. Ct. NY. Co. Nov. 15, 2012). Notwithstanding the great desirability of having the parties mutually

agree to a case management plan, I am also compelled to point out that I nevertheless have the authority to issue case management orders upon consultation with the parties, and am not required to obtain their consent to the CMO as a whole or for any of its parts for it to be a valid order of this court.[24] I do understand that I cannot compel either side to pay for a Special Master. But from the beginning of this litigation both sides have retained a Special Master and recognized the value to them of the Special Master's services. It is this court's hope that the parties will continue on this course to their mutual benefit.

I also appreciate the defense bar's reluctance to consent to a CMO that does not prohibit punitive damages. However, CMO § XVII was not a bargained for provision and their concern that the remainder of the CMO (which they did negotiate) unduly favors plaintiffs with respect to accelerated trial settings, consolidated trials, and standard discovery is simply unfounded.

In fact, the negotiated provisions of the CMO are in harmony with the CPLR and New York's Uniform Rules for Trial Courts. In terms of trial preferences, the overwhelming majority of the NYCAL *in-extremis* plaintiffs would ordinarily be entitled to a trial preference pursuant to CPLR 3403.[25] Considering the stated objectives of the CMO and the inordinate number of NYCAL cases in this court alone it is of no moment that the CMO creates two *in-extremis*

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24 See 22 NYCRR 202.69(c)(2), which provides *inter alia* that the "Coordinating Justice shall have authority to make any order consistent with this section and its purposes, including to remand to the court of origin any portion of a case not properly subject to coordination under the administrative order of the Panel; assign a master caption; create a central case file and docket; establish a service list; periodically issue case management orders after consultation with counsel; [and] appoint and define the roles of steering committees and counsel of parties and liaison counsel . . . ."

25 CPLR 3403(a)(4) and (a)(6) respectively provide that the court shall give a trial preference "in any action upon the application of a party who has reached the age of seventy years" and in "an action to recover damages for personal injuries where the plaintiff is terminally ill and alleges that such terminal illness is a result of the conduct, culpability or negligence of the defendant."

clusters each year. This court has always provided as many trial preferences as its diverse calendars demand.

Further, several recent decisions have determined the efficacy of consolidating asbestos cases for trial, none of which have turned on the provisions of the CMO. *See In re New York City Asbestos Litig.*, 111 AD3d 574 (1st Dept 2013); *In re New York City Asbestos Litig.*, 99 AD3d 410 (1st Dept 2012); *In re New York City Asbestos Litig.*, 2013 NY Misc. LEXIS 2080 (Sup. Ct. NY. Co. May 13, 2013, Scarpulla, J.); *In re New York City Asbestos Litig.*, 2011 NY Misc. LEXIS 2248 (Sup. Ct. NY. Co. May 2, 2011, Gische, J.). These decisions rest on the provisions of CPLR 602[26] and the criteria set forth in *Malcolm v National Gypsum Co.*, 995 F2d 346, 350-352 (2d Cir 1993)[27] which make clear that in the interest of judicial economy consolidation is preferred where there are common questions of law and fact. The Defendants' claim of prejudice if they are compelled to jointly try several cases and punitive damages at the same time is without merit. The NYCAL trial Judge has discretion whether or not in the first instance to consolidate cases, and at the conclusion of testimony whether or not to permit a punitive damages charge. Only if the charge is given and the jury determines that punitive damages are appropriate will the trial Judge hold a separate trial before the same jury to determine a suitable award. *See* 22 NYCRR § 206.19; *see also Suozzi v Parente*, 161 AD2d 232 (1st Dept 1990); *Smith v Lightning Bolt Prods.*, 861 F.2d 363, 374 (2d Cir 1988); *In re Seventh*

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26 CPLR 602(a) gives a trial court the discretion to consolidate two or more actions for joint trial if they involve common questions of law or fact.

27 Under *Malcolm*, to determine whether consolidation would be appropriate, courts should consider: (1) whether plaintiffs worked at common worksites; (2) whether they had similar occupations and (3) similar times of exposure; (4) the type of disease; (5) whether plaintiffs are living or deceased; (6) the status of discovery in each case; (7) whether all plaintiffs are represented by the same counsel; and (8) the type of cancer alleged. *Id.* at 351-52.

Judicial Dist. Asbestos Litig., 190 AD2d 1068 (4th Dept 1993); *Rupert v Sellers*, 48 AD2d 265, 272 (4th Dept 1975).

Defendants also claim prejudice concerning post note of issue discovery. I reiterate here that the CMO is designed to eliminate transaction costs for everyone. As I previously pointed out in *Swalling v American Standard, Inc.*, Index No. 190229/09, 2011 NY Misc. LEXIS 643 (Sup. Ct. NY Co. Jan. 7, 2011), post-note discovery under CMO § XVIII(c)(9) comports with 22 NYCRR 202.21(d).[28] Were the court to abandon CMO § XVIII(c)(9), which directs that "[d]iscovery shall continue after the filing of a Note of Issue," NYCAL post-note applications would surely bog down this court's docket. In the same vein, the use of standard interrogatories relieve defendants from having to craft discovery responses in every case. Taken as a whole, the CMO also benefits defendants, *inter alia*, by discouraging repetitive discovery, requiring plaintiffs to produce proofs of claim prior to trial, providing for a central repository for defendants' access to medical and other records, and imposing thresholds upon which plaintiffs may state their claims.

I acknowledge that the Defendants no longer wish to consent to the CMO if counts for punitive damages are not barred. However, CMO § XVII is but one provision in a comprehensive document which inures to the benefit of both sides whether or not counts for punitives damages are permitted. In the larger picture, NYCAL plaintiffs are being prejudiced by the CMO's prohibition against punitive damages when no such absolute prohibition exists elsewhere in this state. Accordingly, as Coordinating Justice I direct that the CMO *as amended*

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[28] 22 NYCRR § 202.21(d) provides judges with discretion to permit post-note discovery where circumstances call for it.

herein shall continue to govern all NYCAL proceedings until further order of this court.

III. Crane's Additional Arguments

In light of the discussion herein, the court declines to consider at this time Crane's individualized responses. The arguments proffered by Crane are appropriate, however, to any application Plaintiffs may bring before the trial Judges to whom their cases have been assigned, as set forth above.

IV. Railroad Defendants

The Railroad Defendants have been sued in NYCAL actions by plaintiffs seeking to recover against them pursuant to the Federal Employers' Liability Act ("FELA"), 45 USC § 51, *et seq.*, which imposes on railroads "a general duty to provide a safe workplace" *McGinn v. Burlington Northern R. Co.*, 102 F.3d 295, 300 (7th Cir. 1996). On the ground that FELA provides the exclusive remedy to railroad employees who have allegedly sustained injuries or contracted diseases while employed by a railroad carrier,[29] the Railroad Defendants seek an order denying Plaintiffs' application for permission to seek punitive damages in all cases in which they have been named as defendants.

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[29] 45 U.S.C. § 51 provides in relevant part: "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment . . . ."

Federal caselaw interpreting FELA uniformly limits recovery to pecuniary losses. Punitive damages, which are non-pecuniary, thus are not available to FELA claimants. *See Miles v Apex Marine Corp.*, 498 US 19, 32 (1990); *Wildman v Burlington N. R.R.*, 825 F.2d 1392, 1395 (9th Cir. 1987); *Kozar v Chesapeake & O. R. Co.*, 449 F.2d 1238 (6th Cir. 1971); *Frazer v City of New York*, 161 Misc. 2d 38, 42 (Sup. Ct. Bronx Co. Apr. 14, 1994). However, NYCAL actions involve many defendants who are not covered by FELA, and to continue to defer punitive damages in any case involving a FELA defendant will unfairly prevent plaintiffs from seeking punitive damages against non-FELA defendants.[30] Accordingly, the Railroad Defendants' request is denied.

CONCLUSION

From the inception of this litigation, Plaintiffs' and Defendants' counsel have zealously but respectfully litigated opposite each other under the CMO and all of its various modifications, ultimately with the ability in most instances to resolve their differences. It is my sincere hope that this will continue. I wish to thank the entire liaison committee for their professionalism and hard work over these past few years.

After careful consideration of the oral and written arguments which were put before me, I believe that the law of New York requires that NYCAL plaintiffs be given the same opportunity as any other plaintiff in this state to seek punitive relief. The law is clear, and it must be applied equally to all.

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30 If plaintiffs seek to impose punitive damages against FELA defendants, such defendants absolutely would have the opportunity to present their arguments against any such recovery to the trial Judge to whom such plaintiffs' application is made.

Accordingly, it is hereby

ORDERED that Plaintiffs' motion is granted to the extent that CMO § XVII is modified to read as follows, absolutely:

> Applications for permission to charge the jury on the issue of punitive damages shall be made on a case by case basis to the Judge presiding over the trial(s) of the action(s) at issue, who shall determine such application(s) in his or her discretion and in accordance with the particular trial schedule established by such Judge. Such applications shall be made at the conclusion of the evidentiary phase of the trial upon notice to the affected defendant(s), to which such defendant(s) shall have an opportunity to respond. Should the trial Judge, in his or her discretion, permit such charge, and the jury determines that punitive damages are warranted, the trial Judge shall hold a separate trial before the same jury solely on the issue of the amount of punitive damages to be awarded.

The CMO as amended herein shall continue to govern all NYCAL proceedings;

It is further ORDERED that Defendants' cross-motion to vacate the entire CMO is denied;

It is further ORDERED that liaison counsel shall arrange a conference with the court.

This constitutes the decision and order of the court.

ENTER:

DATED: April 8, 2014

Sherry Klein Heitler

SHERRY KLEIN HEITLER, J.S.C.