To Be Argued By:
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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

IN RE NEW YORK CITY ASBESTOS LITIGATION,

This Document Relates To:
ALL NYCAL CASES

JOINT BRIEF FOR PLAINTIFFS-RESPONDENTS

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PRELIMINARY STATEMENT

In their instant appeal,[1] a subset of the defendants in the New York City Asbestos Litigation ("NYCAL")[2] do little other than restate claims already made in their 2015 appeal to this Court from the Supreme Court's (Hon. Sherry K. Heitler) entry of an amended Case Management Order ("CMO"). Precisely as in their present appeal, defendants in 2015 speciously claimed that:

> First, Supreme Court improperly exercised its discretion by eliminating the deferral of punitive damages that has been the settled procedure in NYCAL for almost two decades and in the process of doing so violated defendants' due process rights. Second, the amended CMO improperly deprives defendants of their rights under rules set forth in the CPLR without their consent.[3]

By Decision and Order entered July 9, 2015, this Court unanimously rejected defendants' instant claims and thereby effectively mooted their present appeal.[4] Specifically, this Court held that "[t]he motion court had the authority to modify the CMO. . . . The court reached its determination after consulting with counsel, and

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[1] By the instant Brief, the NYCAL plaintiffs collectively respond to the Joint Brief for Defendants-Appellants. With regard to the individual briefs filed by defendant Crane Co., and by defendants The City of New York, the instant plaintiffs join in the separately filed Brief for Plaintiffs-Respondents in Response to Both Crane Co. and The City of New York.

[2] The Joint Brief for Defendants-Appellants (hereinafter "D/JB") concedes that one-third of the defendants do not join in this appeal [D/JB, at 3 fn.1].

[3] Joint Brief for Defendants-Appellants, *In re New York City Asbestos Litig.: All NYCAL Cases*, № 40000/88 (App. Div., 1st Dept, filed Mar. 6, 2015) (hereinafter "Joint 2015 Brief for Defendants-Appellants"). Regarding this Court's ability to take judicial notice of such prior court filings, *see infra* note 25.

[4] *In re New York City Asbestos Litig.: All NYCAL Cases v. A.O. Smith Water Prods.*, 130 AD3d 489 (1st Dept 2015).

hearing and considering defense counsel's objections."[5] This Court did not find a single deprivation of defendants' "rights under rules set forth in the CPLR." Nor did this Court's July 9, 2015 Decision find any flaw in the NYCAL court's April 2014 conclusion that "a situation in which" all other New York personal injury plaintiffs, and asbestos victims in all other counties, could apply for punitive damages under appropriate circumstances, "but not in this court," could not be justified.[6]

Defendants' instant Brief is based on a red herring mischaracterization of the revised CMO entered by the then NYCAL Coordinating Justice, Honorable Peter H. Moulton, as somehow "explicitly superseding" the CPLR [D/JB, at 1, 19, & *passim*]. The revised CMO does no such thing. The CMO explicitly provides that the CPLR, together with the CMO, "shall govern all proceedings herein. When this CMO's provisions *differ* from the CPLR's, the CMO shall govern" [R. 302 (emphasis added)]. A case management order's provisions must, by their very nature, "differ" from pre-existing rules of practice, else there would be absolutely no reason for, or benefit to be derived from, a case management mechanism. As was exactly the case in 2015, there is nothing about the CMO that "supersedes" or violates any right provided by

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[5] *Id.* at 490.

[6] *NYC Asbestos Litig. v. All Weitz & Luxenberg Cases*, № 40000/1988, 2014 WL 10714009, at *6, 8 (Sup. Ct., NY County, Apr. 15, 2014) ("NYCAL plaintiffs are being prejudiced by the CMO's prohibition against punitive damages when no such absolute prohibition exists elsewhere in this state").

the CPLR.

In these and other critical respects, defendants' joint appeal is utterly incoherent. Hence, they insist that the CMO language just cited – by which case management provisions may "*differ*" from the CPLR – somehow constituted an unlawful "abrogat[ion] of defendants' CPLR rights" [D/JB, at 1, 17, 23, 30], and yet elsewhere highlight the fact that "[t]he New York Constitution unambiguously declares that "*[n]othing herein contained shall prevent adoption of regulations by individual courts consistent with the general practice and procedure as provided by statute or general rules*" [D/JB, at 19-20 (defendants' emphasis) (citing N.Y. CONST. art. VI, § 30)]. While defendants point to a number of reasonable "differences" in the language of the CMO and the CPLR (hence providing a *raison d'être* for the case management mechanism, in full compliance with the constitutional language), they fail to point to a single "inconsistency," but simply untenably assume throughout that any "difference" is somehow necessarily an inconsistency.

Additionally, defendants state, for instance, that they insisted upon "an entirely new CMO" when Justice Moulton became the Coordinating Justice, whereas plaintiffs sought solely beneficial "revisions" [D/JB, at 14]. They criticize the NYCAL court because it "agreed with Plaintiffs and decided not to start on a clean sheet of paper" [*id.*]. Yet defendants later concede that, in its 2015 Decision and Order, this Court held that "[t]he motion court had the authority to *modify* the CMO,"

affirming Justice Heitler's ruling that the supervising court had "the authority to *amend* the CMO" [D/JB, at 29 (defendants' emphases)].

Further, defendants hold out positions taken by their "representatives" during the 2015 and 2016 case management negotiations as their own [D/JB, at 14-15, 36 ("as Defendants' representatives consistently maintained throughout the negotiating process before Supreme Court")], yet then object that "[t]he NYCAL defendants' liaison counsel were never empowered *by all defense counsel* to consent to the appointment of a Special Master" [D/JB, at 36 fn. 23 (emphasis added)]. In support, defendants cite to a letter submitted by a small group of defendants making that assertion [R. 738]. Yet when questioned by Justice Moulton during the May 9, 2017 hearing [R. 1382] whether "that mean[s] that a single defendant can stop the CMO" [R. 1390], one signatory to the letter was unable to respond coherently [*id.*]. Nor do defendants, in their instant joint submission, even purport to now represent "all defense counsel" in their appeal from the revised CMO [JD/B, at 3, fn. 1 (admitting that one-third "of all NYCAL defendants" have not sought to appeal from the CMO)].

Not only utterly incoherent, but absolutely false and misleading yet forming the core plaint in their instant appeal, is defendants' further assertion that, when the Supreme Court denied reargument of its ruling ending the automatic and constitutionally infirm deferral of all punitive damages claims in this one litigation,

"Supreme Court acknowledged at the time that granting Plaintiffs' motion created a 'fundamental inequality' in the CMO" [D/JB, at 4 (citing R. 643)]. The Supreme Court's well-considered Decision and Order entered December 18, 2014, reaffirming its order ending the automatic deferral [R. 643], said *exactly the opposite*! The court emphasized that defendants' claim that the Coordinating Justice did not have the authority to "issue an order affecting the CMO without defendants' consent . . . defies credulity" [R. 643]. The Decision continued that the rules of court "do[] not require the court to seek the defendants' permission *to correct a fundamental inequality in the CMO*" [R. 643 (emphasis added)]. In other words, it was not the "granting" of plaintiffs' motion to end the automatic deferral that created any "fundamental inequality," but rather the existing automatic deferral that posed a "fundamental inequality," an inequality that was *remedied by the granting* of plaintiffs' then-motion.

Hence, this Court's July 9, 2015 Decision modified the IAS court's order amending the CMO in one respect only, namely, only "to the extent of . . . remanding the matter to the Coordinating Justice for a determination of procedural protocols on the issue of punitive damages."[7]

The revised CMO issued by the Coordinating Justice fully and comprehensively responds to this Court's 2015 Order requiring "procedural

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[7] 130 AD3d at 489.

protocols on the issue of punitive damages" such that a defendant against which such a claim is asserted "be provided with an opportunity to conduct discovery and establish a defense with respect to this damages claim."[8] In fact, the revised CMO introduces deeper and more detailed procedural protections for the NYCAL defendants than have been instituted in any other litigation or in any other geographic venue.[9]

Although the revised CMO allows a plaintiff to assert a claim for punitive damages against a named defendant under tightly-delineated circumstances "where there is a good faith basis for doing so," in all other respects the Coordinating Justice bent over backwards to introduce further CMO modifications that "are designed to balance the return of punitive damages with changes to the CMO that benefit the defendants" [R. 376].

As just noted, for instance, the modified CMO conditions a plaintiff's right to assert a claim for punitive damages upon plaintiff's compliance with a host of

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[8] *Id.* at 490 (omitting citation).

[9] *Compare* CMO (entered June 23, 2017) §§ VII(C) (setting time limits and conferral requirements for pleading punitive damages) [R. 304-05], IX(M) (discovery and further conferral requirements) [R. 312], XXIV (establishing further procedural protocols regarding trial of punitive damages claims) [R. 333-34], XXV(C) (precluding plaintiff's right to seek joinder when advancing punitive damages claims, and establishing further procedural protocols) [R. 335], *with Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007) (instructing that proper and adequate jury instructions afford a punitive damages defendant procedural due process); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19-20 (1991) (explaining that appropriate instructions "enlighten[ing] the jury as to the punitive damages' nature and purpose," and the availability of the trial court's "meaningful and adequate review" and subsequent appellate review, are the centerpieces of procedural due process).

procedural safeguards as well as relinquishment of any right to joinder for trial with a similarly-situated plaintiff.[10] In other respects, for the first time in NYCAL's history, and notwithstanding the court's recognition that "many plaintiffs are dying, rapidly, and need to get to trial" [R. 363], the modified CMO effectuates the following exclusively defense-friendly measures:

– regularizes numerical limitations upon joinder for trial [R. 334-35];

– affords defendants the use of certain hearsay evidence to attempt to limit their share of culpability [R. 319, 367-70]; and

– heightens judicial supervision of plaintiff's filing of bankruptcy trust compensatory claims [R. 336, 370-76].

At the same time, the revised CMO continues to include such provisions, also favoring defendants, that preclude multi-plaintiff complaints [R. 363], and that permit defendants to "bring summary judgment motions on the eve of trial" [R. 363]. All of the provisions just referenced "differ" from the CPLR – a status defendants mistakenly claim invalidates the CMO. Defendants' claim is untenable. As stated, if case management guidelines did not "differ" from CPLR provisions, then case management orders would be of no use, and there would be no possible justification for them. Were "differences" in the language of the CMO and the CPLR to

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[10] *See* supra note 9.

invalidate the former, then all case management orders would be invalid. The point, however, as shown in this Court's resolution of defendants' 2015 appeal, is that there is neither any "contradiction" between CPLR and CMO provisions, nor any alleged deprivation of CPLR rights.

Hence, the defendants' instant appeal at bottom comes down to one complaint: the ability of the NYCAL plaintiff to assert a claim for punitive damages. Although the highly constrained ability to assert punitive damages claims clearly motivates the defendants' instant appeal, the ability of plaintiffs to seek punitive damages was precisely defendants' principal issue in their 2015 appeal. This Court fully and finally resolved that claim by virtue of its July 9, 2015 Order "remand[ing] the matter to the Coordinating Justice for a determination of procedural protocols [such] that a defendant be provided with an opportunity to conduct discovery and establish a defense with respect to this damages claim."[11] In all relevant respects, this Court has already, by virtue of its 2015 Decision and Order, resolved the issues that defendants now raise.

Nor, importantly, does the modified CMO restrain the trial court's broad discretion in adjusting the parameters in appropriate ways in any individual case or group of cases. Flexibility and efficiency continue to be the hallmarks of the case

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[11] 130 AD3d at 490.

management apparatus in this litigation. Trial court and appellate review of any punitive damages award in any particular case are fully available to defendants, for instance.[12] Moreover, the revised CMO includes at the outset a mechanism for flexibly applying or departing from any CMO provision in any particular case, if needed or appropriate. Specifically, introductory Section I affords every litigant the opportunity to "apply" to the "Coordinating Judge upon motion" for relief from any provision of the CMO when appropriate [R. 296].[13]

Accordingly, defendants have no cause to complain about the present version of the CMO. Defendants' appeals are, in all events, premature given that the CMO incorporates a mechanism for flexible relief if appropriate, and also given that their claims are abstract, generalized and academic. Nor do defendants' persistent claims that the document "abrogates defendants' CPLR rights" [D/JB, at 1, 17, 23, 30] have any merit whatsoever; these claims have already been flatly rejected by this Court.

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[12] *See* supra note 9.

[13] *See generally Strudley v. Antero Resources Corp.*, 350 P.3d 874, 881 (Colo. Ct. App. 2013) ("where a case is complex or requires special treatment, the Rules provide flexibility so that the parties and Court can alter the procedure"); *cf. Kigin v. State Workers' Compensation Bd.*, 109 AD3d 299, 305 (3d Dept 2013) (noting that the Board is authorized to promulgate guidelines allowing for its "regulatory flexibility" so as to "reduce litigation costs and disputes," among other benefits).

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Where the NYCAL Coordinating court, in its broad discretion, upon notice and two years of hearings, issued a flexible and revised case management order that fully comports with this Court's 2015 Decision and Order, and not a single sentence of which deprives defendants of any CPLR right, should defendants' instant appeals be rejected and the CMO affirmed?

2. Did the Coordinating Justice presiding over this litigation have the authority, upon notice, hearing and "more than a year's discussion between the Court and the plaintiffs' and defendants' bars that regularly appear in NYCAL," to issue a modified CMO that "embodies a balancing of plaintiffs' and defendants' interests" [R. 346, 375]?

COUNTERSTATEMENT OF THE CASE

Since asbestos-related disease was identified by the medical profession in the late 1920s, lawsuits against companies manufacturing asbestos-containing products commenced as early as 1929, with a great deal of litigation starting in the United States in the 1970s. This mass tort litigation resulted from that fact that, as a result of one of the biggest corporate cover-ups in American history, every year approximately 10,000 Americans die from excruciatingly painful diseases linked to asbestos. Given the twenty- to fifty-year latency period of these diseases, large numbers of citizens

will tragically continue to be diagnosed with, and die from, such exposures.

Because of the horrific nature of the asbestos-caused diseases, and the wanton and deliberate corporate disregard of human health and safety, juries have at times assessed companies manufacturing and distributing asbestos products large compensatory and punitive damages awards. At other times, juries have rendered defense verdicts when the facts so warranted. Awards favoring the plaintiffs, though, were a function of the grievous victimization on a mass scale of America's working men and women owing to preventable corporate misconduct in the form of defendants' egregious failure to warn product users of known information concerning the disabling and inevitably fatal hazards of breathing asbestos and the precautionary measures necessary to prevent disease.[14] The Johns-Manville Corporation, for instance, one of the largest asbestos product manufacturers, filed for reorganization and protection under the United States Bankruptcy Code in August 1982.

Asbestos litigation in New York, however, and in New York City, lagged behind that in other jurisdictions. It was not until 1986 that New York enacted its

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[14] *See, e.g., Fischer v. Johns-Manville Corp.*, 472 A.2d 577, 581 (N.J. App. Div. 1984) (documenting correspondence between asbestos defendants Raybestos-Manhattan and Johns-Manville wherein the principals, while fully knowing the ultrahazardous nature of their products, agreed that "'the less said about asbestos, the better off we are'"), *aff'd*, 512 A.2d 466, 473 (N.J. 1986) (emphasizing that punitive damages "serve to express the community's disapproval of outrageous conduct").

Toxic Tort Revival Statute,[15] reviving for a one-year window previously time-barred asbestos and other toxic tort injury cases, and thereafter reasonably, and in line with other jurisdictions, permitting claims to be filed within three years of a plaintiff's discovery of his or her disease caused by corporate misconduct and failure to warn.

The 1986 reform statute was designed to remedy the injustices caused by the application of the time-of-exposure rule of accrual adopted in the context of traditional tort causes of action. Under the old exposure rule, many deserving persons who had been exposed to hazardous substances, including asbestos, but did not discover their injury or its cause until years later because of the latent effects of the injury, were barred from recovery. A distinguishing feature of asbestos-related harm is the long latency period between exposure and manifestation of disease, sometimes exceeding fifty years.

At the same time, in response to recommendations proffered by the Governor's Advisory Commission on Liability Insurance, the legislature conferred huge benefits on defendants. For instance, the legislature modified the longstanding joint and several liability rules by virtue of the limitation placed on liability for non-economic damages of joint tortfeasors found fifty percent or less responsible for a particular injury. This provision, at CPLR 1601, was in derogation of the common

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[15] N.Y. CPLR § 214-c (McKinney 1986).

law rule.

At the same time, the legislature modified the standard by which the court reviews jury verdicts at the threshold, replacing the common law shocks-the-conscience standard with statutory review of whether the award "deviates materially from what would be reasonable compensation."[16]

The new standard for reviewing verdicts and the new limitation on defendants' joint and several liability was now combined with the legislature's prior codification, by amendment in 1974, of the most stringent settlement set-off mechanism in the country, already affording the trial defendant a substantially reduced judgment. In this regard, the "substantial majority of jurisdictions" followed the "pro tanto" rule, "under which the subsequent judgment attained by the plaintiff against the remaining defendants will be reduced by the amount set forth in the release or by the consideration paid."[17]

By contrast, just a small minority of states applied a pro rata, or apportioned share, approach, reducing the plaintiff's judgment by the released tortfeasor's equitable share of fault as determined by the trier of fact.[18] Somewhat harshly, New

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[16] CPLR 5501(c).

[17] Jean M. Eggen, *Understanding State Contribution Laws and Their Effect on the Settlement of Mass Tort Actions*, 73 TEXAS L. REV. 1701, 1709 (1995) (marshaling state provisions).

[18] *Id.* at 1712-13.

York was "alone among the states in combining the pro tanto and apportioned share rules into a direct statutory set-off rule,"[19] by which the "greater" of the settling defendants' aggregate equitable shares or their aggregate settlement amounts recited or paid must be subtracted from the judgment.[20]

It was under this regime that the Honorable Helen E. Freedman subsequently managed all of the NYCAL cases, as well as other mass torts, from 1987 to 2008. Justice Freedman issued the first NYCAL CMO in 1988, with the main stated objectives of standardizing pleadings and standardizing and coordinating discovery, fostering settlements, and "clustering" cases for "pretrial procedures and trial." The CMO placed no restrictions on a plaintiff's ability to seek punitive damages when appropriate. Nor did the original CMO depart from New York's statute permitting consolidation of cases for trial "to avoid unnecessary costs or delay."[21]

As Justice Freedman explained in her published article titled "Selected Ethical Issues in Asbestos Litigation,"[22] the vast numbers of severely and usually fatally injured Americans, and the large numbers of defendants alleged to have engaged in enormous corporate misconduct, informed her case management decisions in the

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19 *Id.* at 1713.

20 N.Y. GENERAL OBLIGATIONS LAW § 15-108.

21 CPLR 602(a).

22 37 SW. L. REV. 511 (2008).

1990s, including those deeming consolidations of cases for trial a systemic necessity.[23]

Indeed, as the New York state and federal cases were proceeding to trial in the separate systems, the Honorable Jack B. Weinstein suggested a consolidated state and federal court trial, presided over by Justice Freedman and himself, involving all cases that arose from exposure to asbestos at the Brooklyn Navy Yard. In January 1990, the Brooklyn Navy Yard cases on the docket of the Honorable Charles Sifton, and those of other federal judges, were transferred to Judge Weinstein. Judge Weinstein and Justice Freedman coordinated all pretrial matters, including settlement negotiations, and jointly appointed a settlement master in the first wave of New York asbestos cases.[24]

As defendants concede in the instant Joint Brief [D/JB, at 9], then defendant Owens-Corning Fiberglas ("OCF"), and only OCF, moved in 1994 to amend the then-existing NYCAL case management order to defer claims for punitive damages.

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[23] *See id.* at 518 ("In my first consolidation of some 500 Brooklyn Navy Yard cases in 1990, I devoted four and one half months to a complex trial. At the same time, Honorable Jack B. Weinstein tried a Brooklyn Navy Yard consolidation of about 64 cases. In my second consolidation in 1991, called the Power House consolidation because all the plaintiffs were former workers in electric generating plants, I spent an equivalent amount of time on about 500 to 600 cases. At the same time, the United States District Court for the Eastern District of New York, Honorable Charles Sifton, also tried a large consolidation of Power House cases").

[24] This approach followed an already-developed asbestos litigation practice that had been established in Ohio in the 1980s.

As OCF wrote in its July 12, 1994 Memorandum in Support (p. 2),[25] the punitive damages issue "uniquely implicates Owens-Corning, as the principal defendant and target of punitive damages claims in New York." In support of its proposed amendment to the case management order, defendant OCF emphasized that "courts have an inherent power over the control of their calendars, and the disposition of business before them" (p. 6) (citing *Plachte v. Bancroft*, 3 AD2d 437, 438 (1st Dept 1957)).

Largely because the court believed that "no company should be punished repeatedly for the same wrong," Justice Freedman issued an amended CMO in 1996, which included a clause "deferring" punitive damages claims pending "notice and hearing" at some later time.[26] Juries and courts in other jurisdictions had been assessing those damages against the most culpable defendants for decades, and continued to do so. In 1992, for instance, punitive damages were assessed by a Baltimore jury against GAF Corp., Keene Corp., Pittsburgh Corning Corp. and Porter-Hayden Co. on behalf of plaintiffs who had worked as pipe-fitters,

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[25] This Court may take judicial notice of such filings, available in the Index № 40000/1988 file, Supreme Court, New York County. *See* EDITH L. FISCH NEW YORK EVIDENCE § 1065, p. 603 (2d ed. 1977) ("judicial notice of proceedings in other courts has been taken when one or more of the parties were the same or the subject matter closely connected") (footnotes omitted); *cf. Chateau Rive Corp. v. Enclave Dev. Assocs.*, 22 AD3d 445, 446-47 (2d Dept 2005) (taking judicial notice of the record in a related action because "the issues raised . . . involved the nature and regulation of the same parcels of land in dispute in the instant appeal").

[26] 1996 CMO, at § XVII [R. 455].

boilermakers, shipbuilders or steelworkers, and who proved they had sustained cancer, lung diseases and other illnesses because those companies had wantonly refused to warn them about the extreme hazards of asbestos exposure on the job.

Yet Justice Freedman acknowledged that "deferral of all punitive damage 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."[27] Justice Freedman's recitation of the actual facts and circumstances surrounding the 1996 amendment deferring punitive damages claims, namely, the insertion of the automatic deferral clause by judicial fiat, demonstrates the utter inaccuracy of defendants' instant claim that this amendment derived from a "1996 compromise," or an "essential bargain struck" between the parties [D/JB, at 9]. There was no such "compromise" or "bargain," simply judicial fiat based on the court's supervisory efforts at the time, and notwithstanding its cognizance of the "ethical and possible equal protection issues" at stake.

Indeed, beginning in September 1996, New York City had been the only venue in our State in which victims of asbestos exposure were barred from advancing a claim of punitive damages. Plaintiffs in other civil cases in New York City, and asbestos victims in other parts of New York State, and in almost every other state in

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[27] 37 SW. L. REV., at 528.

America, were and are entitled to pursue punitive damages.[28] In her article, Justice Freedman clearly indicated that deferral of punitive damages claims was intended from the start to be a temporary measure based on then-existing practical and policy considerations related to then-existing defendants, and also acknowledged that this deferral did not rest on a sound legal or constitutional footing.

Nor were the provisions in the 1996 case management order that defendants now claim they agreed to as part of a "bargain" in exchange for a deferral of punitive damages [D/JB, at 9] new to the 1996 order at all. The original, 1988 CMO already provided for the "standardization of pleadings and discovery" [R. 378, 383],[29] and expedited trial rights "to efficiently and expeditiously manage the large number of cases" [R. 387-88].[30] Fair, expeditious, and efficient consolidation for trial of dozens of cases was the norm prior to any such 1996 "compromise."[31] Hence, the defendants are simply revising history when they claim that a certain bargained-for balance was upset by the termination of the discriminatory automatic deferral of

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[28] *Sclafani v. Brother Jimmy's BBQ, Inc.*, 88 AD3d 515, 516 (1st Dept 2011) ("punitive damages have been sanctioned under New York law in actions based on negligence and strict liability").

[29] 1988 CMO, at §§ II(1), VI(C) ("Plaintiffs' Liaison Counsel shall file in the NYCAL Master File and serve on defendants a complaint or set of complaints containing standard allegations generally applicable to all claims of a similar nature") [R. 378, 383].

[30] 1988 CMO, at § VIII [R. 387-88].

[31] *See, e.g., In re New York City Asbestos Litig.*, 151 Misc.2d 1, 3 (Sup. Ct., NY County, 1991) ("A representative sample of thirty-five cases were selected for a reverse bifurcated trial").

punitive damages.

Indeed, for the next nineteen years, the only personal injury plaintiffs in the State of New York who were not permitted to pursue their punitive damages claims were those who brought suit for asbestos-related injuries in New York City. Apart from defendants' instant claims, it was undisputed that this deprivation of rights was *not* the product of bargaining, negotiation or consent. Rather, it was inserted into the 1996 CMO by the "judicial fiat" of the then-Coordinating Justice. At the same time, however, this clause exhibited the flexibility that has been the NYCAL case management apparatus's defining feature from the outset. Hence, by its plain language, CMO § XVII (1996) was not intended to be an outright, unassailable ban on punitive damages, as the defendants claimed in their 2015 appeal to this Court. Rather, that clause was a mere deferment predicated on the clear expectation that it be revisited at some point in the future. Thus, the 1996 CMO expressly recited: "Counts for punitive damages are deferred until such time as the Court deems otherwise, upon notice and hearing" [R. 455].

In 2008, the Honorable Sherry K. Heitler was assigned to the Center for Complex Litigation, taking on responsibilities that included the administration of all NYCAL matters, with an inventory of more than 30,000 cases, and in 2009 was appointed as Administrative Judge for Civil Matters, First Judicial District. Eventually, by Order to Show Cause entered July 25, 2013, plaintiffs, pursuant to the

CMO, requested a hearing on the question of their ability to raise the punitive damages issue at trial as against defendants remaining in one small trial group.[32] In opposition, many of the NYCAL defendants intervened, and transformed the proceedings into a referendum on the CMO.

In their collective cross-motion, defendants then broadly set their sights on a wholesale "vacating" or abandoning of the NYCAL CMO, summarizing their rationale (*i.e.*, threat) as follows:

> should this Court grant Plaintiffs' request, Defendants would collectively withdraw their consent to the CMO in its entirety – an outcome that would inevitably entail the lengthy and protracted litigation of virtually every aspect of the CMO, including the clustering of *in extremis* cases and the appointment of a Special Master.[33]

The "upheaval" that defendants therein actually invited was less than coherent, for it remained the case that, but for the CMO deferral provision, punitive damages would be fully available to the asbestos tort plaintiffs, pursuant to longstanding New York law; without the CMO, plaintiffs would have been entitled all along to allege and prove at trial the very punitive damages they then sought permission to pursue by the motion. Notwithstanding defendants' reactive claims, plaintiffs then demonstrated that the landscape in NYCAL had dramatically changed since 1996,

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[32] Order, *In re New York City Asbestos Litig.: Chidester et al.*, Nos. 190293/2011, *et al.* (Sup. Ct., NY County, July 25, 2013).

[33] Defendants' Joint Brief, *In re New York City Asbestos Litig: All Cases* (Sup. Ct., NY County, submitted Oct. 31, 2013), at p. 3; Defendants' *Amici Curiae* Brief, at p. 3.

and that the considerations and policies underlying the introduction of Section XVII now pointed in a different direction.[34]

Eventually, after having overseen NYCAL for many years, and being intimately familiar with the litigants and the intricacies of resolving cases expeditiously, and after heavy briefing from both sides and an extensive public hearing in early 2014, Justice Heitler issued her April 15, 2014 Decision and Order, in which she addressed concerns originally expressed by Justice Freedman. Justice Heitler thereby concluded that, given the ability of all other New York plaintiffs to seek punitive damages in appropriate cases, and the ability of all asbestos-related plaintiffs outside of New York City to do so as well, the asbestos victims had a right to equal treatment when they could prove that the company had acted wantonly.[35] It was further clear that

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[34] Factors established by plaintiffs included the following: (1) asbestos plaintiffs in other states are permitted to assert their claims for punitive damages; (2) asbestos plaintiffs in New York in other counties are likewise permitted to assert punitive damage claims; (3) not a single defendant in the present NYCAL had ever been faced with a trial encompassing punitive damages in this litigation, even where juries found them to have acted "recklessly" and New York law would otherwise have supported the imposition of such damages; (4) the cases being actively prosecuted involve *in extremis* living, as well as deceased, cancer victims, the most tragically aggrieved individuals; (5) the deferral of punitive damages had the unfortunate effect of frustrating efforts at engaging in reasonable settlement discussions, which in turn tended to clog up the court's dockets, to waste judicial and litigant resources, and to severely prejudice many in extremis victims by delaying the resolution of their claims; (6) since 1996 CPLR 1603 has been construed to afford defendants the opportunity to further reduce their compensatory exposure by placing bankrupt tortfeasors on the verdict sheet; and hence (7) to the extent that current asbestos defendants are ultimately found to have acted wantonly and in reckless disregard of human health and safety, by the appropriate standard of evidence, a rule effectively immunizing them from punitive damages claims was no longer justified.

[35] *Haslip*, 499 U.S. at 15.

none of the defendants now answering for their misconduct in the New York courts has ever actually paid a single penny in punitive damages.

In their subsequent appeal to this Court in 2015, defendants claimed that, "[g]iven that the NYCAL defendants did not consent to the entry of the amended CMO . . ., Supreme Court did not have the power to enter the amended CMO."[36] At the core of defendants' instant appeal is their rehashing of the very same claim [D/JB, at 19, & *passim*]. This Court has already finally resolved this question, unequivocally emphasizing in its July 9, 2015 Decision and Order that "[t]he motion court had the authority to modify the CMO. . . . The order modified the CMO, something which the court was empowered to do."[37]

During the pendency of the 2015 appeal, Justice Moulton was appointed as the new Coordinating Justice to oversee the NYCAL litigation. The court and the parties thereafter agreed to review the CMO and to discuss possible revisions.[38] The court regularly convened a representative committee of plaintiffs' and defendants' counsel

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[36] Joint 2015 Brief for Defendants-Appellants, *supra* note 3, at 1.

[37] 130 AD3d at 490. Nor is there any merit to defendants' conjured claim "Uniform Rule 202.69 does not even apply here," purportedly because "NYCAL was formed before the adoption of the Uniform Rule" [D/JB, 11-12, & *passim*]. As this Court stated in its July 9, 2015 Decision, Rule 202.69 allowed the Coordinating Justice to "issue case management orders after consultation with counsel," 130 AD3d at 490, and as in 2015 the court's entry of the modified CMO fully comported with this provision.

[38] As the IAS court explained, "[p]rior case management orders have been amended from time to time" [R. 346].

to negotiate a revised CMO, held "Town Hall" meetings for the public airing of the parties' positions, and issued multiple CMO drafts.[39]

As explained in the IAS court's June 23, 2017 Decision and Order, notwithstanding all such meetings, negotiations, and expenditures of judicial and attorney resources, "a considerable number of defendants' firms stated that their clients would not consent to *any* CMO that contained a provision allowing for a plaintiff's assertion of punitive damages" under any circumstances whatsoever [R. 361-62 (emphasis added)]. This recalcitrant position effectively reinstated defendants' stance taken in 2015 by which they threatened to collectively and unilaterally "withdraw" from the CMO.[40]

Quite as improperly, the instant defendants have claimed that their absolutist stance with regard to plaintiffs' equal protection right to assert a claim for punitive damages somehow entitles them to treat the revised CMO as "a nullity" [R. 362]. Yet, as the IAS court's June 23, 2017 Decision demonstrates, defendants' position "fails for several reasons," most notably because "this argument has been considered, and rejected, by Justice Heitler and the First Department" [R. 362]. This Court's

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[39] As the IAS court's June 23, 2017 Decision and Order recites, in 2015 the defendants "sought to initiate a complete overhaul of the case management order. . . . [P]laintiffs stated that the CMO required at most some minor touch ups, and not the major surgery contemplated by defendant's letter" [R. 352]; *see supra* text at pp. 3-4. Regarding the current version defendants now appeal from, the court stated, "[a]fter consulting with counsel, as described above I have made certain changes that are embodied in the new Case Management Order" [R. 364].

[40] *See, e.g.,* Joint 2015 Brief for Defendants-Appellants, *supra* note 3, at 9 n.4.

2015 Decision unequivocally held that "[t]he motion court had the authority to modify the CMO" and to amend it to end the automatic deferral of punitive damages claims.[41]

As shown below, the other aspects of the CMO defendants now assail involve provisions and guidelines rooted in all prior CMO versions, and about which they have not historically complained. For instance, defendants' claim that "[t]he NYCAL Special Master regime is already unworkable and unjust in the present environment, and it will become even more so if punitive damages return" [D/JB, at 37]. For years and years, the highly beneficial availability of a Special Master to informally help the parties resolve small disputes, and to issue "recommendations" when needed (from which any party has the right, upon notice to all, to object and appeal to the court), has clearly been a *workable and just* feature of the NYCAL system, with recommendations as frequently going in defendants' favor as in plaintiffs'. There is nothing about the limited and highly monitored assertability of punitive damages claims that would impair this mechanism.

In this regard as well, defendants' invocation of this Court's ruling in *In re Hochberg v. Davis,*[42] is entirely misplaced. The issue in that case was whether the trial

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41 130 AD3d at 490.

42 171 AD2d 192 (1st Dept 1991).

court could wholly shut off the litigants' rights to engage in motion practice.[43] Precisely like the prior NYCAL case management orders, the instant CMO fully protects each party's right to make any motion it sees fit to make, including upon objecting to the Special Master's recommended resolution of any discovery dispute [R. 298]. The Special Master is then required to "promptly reduce the *recommended* ruling to writing" [R. 298 (emphasis added)], all motion and appellate rights are preserved, and the defendants can make whatever record they deem necessary. But none of this implies that there is any infirmity whatsoever in the mechanism by which initial application is made to the Special Master for efficient resolution, should none of the parties at issue choose to object or appeal. As with defendants' other claims, this Court has long approbated the mechanism at issue.[44]

Moreover, contrary to defendants' collateral claims – and precisely as established in the 2015 appeal – the instant CMO provisions about which defendants complain do not conflict with the CPLR, deprive defendants of any legislatively guaranteed rights, or "usurp the power of the Legislature" [D/JB, at 5]. Nor does defendants' appeal take any note of the CMO's broad discretion allotted to the trial

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[43] *Id.* at 195.

[44] *See, e.g., In re New York City Asbestos Litig.: Weitz & Luxenberg, P.C. v. Georgia-Pacific LLC*, 109 AD3d 7, 9 (1st Dept 2013) ("we find that the motion court providently exercised its discretion when it denied GP's motions to vacate the Special Master's recommendations"); *In re New York City Asbestos Litig.: McCloskey v. A.O. Smith Water Prods. Co.*, 133 AD3d 463, 463 (1st Dept 2015) (unanimously affirming order denying party's motion "to vacate a recommendation of the Special Master . . . directing it to produce certain documents, and for a protective order").

court, at Section I and elsewhere, to flexibly adjust and conform application of its provisions to the specific circumstances that may arise in any particular case or cluster of cases, and encouraging the parties' cooperative efforts toward managing the progression of the cases [*e.g.*, R. 336-37].

STANDARD OF REVIEW

Although the revised Case Management Order – following two years of intensive and comprehensive discussion and negotiation – clearly passes muster under any standard of review, including *de novo*, the standard of review is abuse of discretion. None of the authorities cited by defendants in support of their claim that *de novo* review should apply are remotely apposite.

Rather, it is well settled that "[t]rial courts have considerable discretion in administering litigation and in managing their dockets." *People v. Brewer*, 91 NY2d 999, 1000 (1998). Even more to the point, in *In re New York County Diet Drug Litig.: Elliott v. A.H. Robins Co.*, 262 AD2d 132 (1st Dept 1999), this Court emphasized that "[t]he court properly exercised its discretion in issuing the Case Management Orders" coordinating some 250 diet drug cases. *Id.* at 132; *see also Brothers v. Bunkoff Gen. Contractors*, 296 AD2d 764, 765 (3d Dept 2002) (discussing "case management decisions, which are based on the discretion of the court"); *Allstate Ins. Co. v. Buziashvili*, 71 AD3d 571, 572 (1st Dept 2010) (addressing "discretionary rulings such

as case management decisions").

ARGUMENT

POINT I

THE COURT SUPERVISING A COMPLEX LITIGATION HAS THE AUTHORITY TO AMEND CASE MANAGEMENT PROVISIONS

A. Background Concerning Issuance of the Modified CMO

As determined over the years by the judges and justices who have painstakingly established New York's court rules and procedures, and as reaffirmed by this Court in the specific context of the NYCAL CMO, 130 AD3d 489, the Coordinating Justice assigned the demanding task of overseeing a mass tort litigation has the discretion and authority to fashion case management rules and guidelines. Ideally, the many parties together with the court reach a consensus about all of the provisions comprising the resulting case management order. Sometimes, however, a unanimous consensus cannot be attained, and any requirement that there be full agreement on the part of each and every litigant would run the risk of holding the entire process hostage even to a solitary dissenting voice, and would as a practical matter defeat the system's capability of achieving a rational case management protocol [*see* R. 1390].

Nevertheless, in *nearly* all respects, the provisions of the instant CMO in NYCAL expressly pattern the CPLR. Whenever the CMO "differs" from the CPLR

in the ways to which defendants object, this is done to accommodate or address specific circumstances peculiar to administering this mass tort litigation. Any such differences harmonize with the CPLR and, contrary to defendants' meritless claims, do not conflict with it. In this regard, the defendants are very much mistaken in claiming that the revised CMO "exceeds Supreme Court's authority because it explicitly states that it supersedes the CPLR" [D/JB, at 23]. The revised CMO clearly does not state any such thing. In fact, not a single CMO provision discussed by the defendants at pages 32 through 55 of their Joint Brief alters or conflicts the CPLR.

While defendants falsely claim that the revised CMO "abrogates" certain of their "fundamental" CPLR rights, in actuality it is the case that the *differences* between the modified CMO and CPLR principally benefit the defendants. Most notably, while the Coordinated Justice recognized that "the First Department has generally allowed NYCAL trial courts broad discretion in joining cases for trial" under CPLR 602(a) [R. 364], the new CMO accedes to defendants' remonstrations and limits the number of cases that may be consolidated for trial to two, or sometimes three [R. 364-66]. Ultimately, even these limitations are flexible, pursuant to revised CMO § I's authorization of motion practice in circumstances in which departing from the CMO's terms may be appropriate [R. 296].

On the issue of consolidation, though, it is fully telling that a principal objection proffered by these defendants in their 2015 appeal was to "permitting both

punitive damages claims and consolidation of cases for trial." Joint 2015 Brief for Defendants-Appellants, *supra* note 3, at 25. They insisted that "[d]efendants also must be afforded the opportunity to challenge consolidation of cases that include punitive damages claims . . . ." *Id.* at 38-39. Now that the instant revised CMO prescribes that, "[w]here a plaintiff has asserted a punitive damages claim against one or more defendants, that case may not be joined with any other plaintiff's case for jury trial" [R. 335], defendants disingenuously claim in this appeal that the limitations on joinder for trial "offer[] little or no benefit to Defendants" [D/JB, at 14]. Defendants' moving target, and the incoherence of their claims, is mind-boggling.

In all events, modifications to a case management order are clearly within the discretion of the court charged with overseeing the litigation to which that order pertains. *See* 22 NYCRR § 202.69(c)(2). The reason that defendants do not offer any support for their main claim, that the court "did not have the power" to modify the CMO provision, is that the law and rules of court are to the contrary. Accordingly, in the Decision and Order accompanying the instant CMO, the Supreme Court explained that,

> this argument has been considered, and rejected, by Justice Heitler and the First Department. . . . She held that she had "the authority to issue case management orders upon consultation with the parties, and [was] 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."

[R. 362].

B. THE CMO PROVISIONS ABOUT WHICH DEFENDANTS COMPLAIN ARE, AND HAVE ALWAYS BEEN, IN HARMONY WITH THE CPLR

Defendants' claims that the revised CMO "abrogates," or "opts out" of the CPLR [D/JB, at 21], are baseless. They are flatly mistaken in citing to a laundry list of CPLR provisions which they allege the CMO "abrogates" [D/JB, at 17, & *passim*]. Nor do defendants acknowledge that, historically, they have not alleged that the CMO provisions about which they now complain violate any of their "fundamental rights" by virtue a supposed conflict with the CPLR. For the most part, and except in a few instances, the CMO fully incorporates longstanding and practicable provisions that have traditionally guided the NYCAL litigation.

As one example, defendants claim that CMO pleading standards "contrast" with CPLR 3013 and 3014 and "eliminate Plaintiffs' CPLR burden of pleading" is utterly baseless [D/JB, at 34]. The CMO does no such thing but rather provides the same pleading guidelines as all CMOs have consistently prescribed in fulfillment of their salutary function of rendering mass tort litigations efficient. In short, the CMO effectively standardizes well-particularized and CPLR-compliant allegations [R. 302-05].

Regarding CMO "accelerated trial" guidelines, defendants appear to concede that these longstanding and basic case management provisions are fully in accord with CPLR §§ 3403 and 3407, which afford special trial preferences and expedited

trial dates to terminally ill plaintiffs. Yet defendants incoherently insist that the CMO's provisions are somehow "*in practice* inconsistent" with those prescriptions [D/JB, at 48], the use of "in practice" indicating that the CMO provisions are clearly not at odds with the CPLR, but rather that "plaintiffs counsel" can somehow "manipulate the schedule" [*id.* at 50].

As a further example, defendants also claim that the modified CMO, by virtue of standardizing consolidated discovery, "restricts" their CPLR rights to take what they suggest would otherwise be an *unlimited* number of depositions [D/JB, at 47]. However, in this respect, the instant CMO does not alter longstanding CMO provisions that have historically and consistently applied, without objection by defendants. Nevertheless, as in their 2015 appeal, defendants isolate certain language in one CPLR provision in support of their specious claim, citing to a clause in CPLR 3106(a) to the effect that "any party may take the testimony of any person by deposition" [D/JB, at 47].

In this regard, defendants transparently ignore the larger context in which that right is afforded, and in particular wholly neglect to mention the moderating authority of the court, under CPLR 3103(a), to issue a supervisory order "denying, limiting, conditioning or regulating the use of any disclosure device." Hence, in reality, the instant CMO does not "run afoul of" or depart from the CPLR at all, but instead

implements the CPLR in a mass tort-appropriate manner.[45]

Defendants objections to the longstanding CMO provisions appointing and utilizing a Special Master are similarly meritless, and similarly duplicative of their claims in the 2015 appeal already rejected by this Court. They suggest that the Special Master's supervisory authority somehow "limits Defendants' right to engage in motion practice" pursuant to CPLR 2214 and CPLR 3104(c) [D/JB, at 39]. This red herring claim has been addressed above, and ignores CPLR 3104's further language that goes so far as to authorize the court or a referee to "supervise all or part of any disclosure procedure . . .on its own initiative without notice," CPLR 3104(a). Indeed, under Section 4201, referees are empowered, *inter alia*, "to direct the parties to engage in and permit such disclosure proceedings as will expedite the disposition of the issues." CPLR 4201; *see also* CPLR 4312(1) (authorizing the court, without consent, to designate as a referee "an attorney admitted to practice in the state and in good standing"); CPLR 4001 (broadly affording the court with power to appoint a referee "to determine an issue, perform an act, or inquire and report" in any context as exercised historically); CPLR 4301 ("A referee to determine an issue or to perform an

[45] In numerous additional respects, defendants simply rehash their contentions voiced in their 2015 appeal that "the amended CMO contains numerous provisions that alter the CPLR" [Defendants 2015 Joint Brief, *supra* note 2, at 43]. In fact, inasmuch as the vast majority of provisions in the 2011 CMO were merely carried through to the 2017 CMO, the provisions that defendants now argue are in derogation of the CPLR are the exact same provisions they asserted were in derogation of the CPLR in the 2015 appeal.

act shall have all the powers of a court in performing a like function").

Defendants further ignore the fact that any decision made by the Special Master is simply a "recommended ruling" under the CMO [R. 298], and also that, upon any party's objection to any such recommended ruling, "the Special Master shall promptly reduce the recommended ruling to writing" and enable the parties to engage in the sort of motion practice defendants claim to be seeking. Use of the Special Master in a coordinated mass tort litigation creates substantial efficiencies and speedy decision-making that consistently benefit both sides. Moreover, in practice, most Special Master recommendations are not controversial and *not* appealed, notwithstanding the CMO provision allowing for prompt appeal.

In sum, as the Supreme Court noted, "CMOs in NYCAL have always differed from the CPLR in numerous ways. . . . These departures from the CPLR, and many others, which have long been included in NYCAL case management orders, attempt to address issues that permeate asbestos litigation, including the fact that many plaintiffs are dying, rapidly, and need to get to trial, and the fact that defendants have a legitimate interest in avoiding needlessly repetitive discovery" [R. 363].

Indeed, if the CMO did not "differ" from the CPLR (albeit without any conflict), then the CMO would be redundant and unnecessary. Courts in New York and nationwide are authorized to issue case management orders precisely because management or administration of the complex or mass litigations covered by those

orders require certain specialized guidelines not otherwise set forth in the usual statutes or court rules.

Hence, the Uniform Rules for the New York State Supreme Courts prescribe that "[t]he Coordinating Justice shall have authority to make any order consistent with this section and its purposes," and this authority includes the power to "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. . . ." 22 NYCRR § 202.69(c)(2); *see, e.g., In re OxyContin*, 15 Misc.3d 388, 391 (Sup. Ct., Richmond County, 2007) ("On December 29, 2005, this court issued an Order wherein all 1,117 pending coordinated actions, together with any other similar actions filed thereafter, shall be captioned collectively for purposes of handling common issues and shall be known as '*In Re OxyContin* under Index № 700,000/2005.' On March 31, 2006, this court issued Case Management Order № 1 to govern discovery and other matters").

This Court has therefore long approbated the supervising court's authority to issue or amend case management orders as it deems necessary or appropriate. In *In re New York County DES Litig.*, 168 AD2d 50 (1st Dept 1991), for example, the plaintiffs protested the action of the Honorable Ira Gammerman, in amending the DES case management order such that all complaints would thereafter be deemed amended so

as to allege market share several liability without further need of motion practice, thereby in effect dismissing plaintiffs' concerted action theories of liability. 168 AD2d at 51. This Court upheld Justice Gammerman's modification of the DES case management order. *Id.* at 52-53.

For similar reasons, notwithstanding defendants' efforts below, litigants cannot unilaterally withdraw from case management orders, which have the force and effect of court orders generally. *E.g.*, *In re New York County Diet Drug Litig.*, 262 AD2d at 132 (unanimously affirming order that "denied plaintiffs' cross motions to exempt them from Court's Case Management Orders"); *In re New York City Asbestos Litig.: Ames v. Kentile Floors, Inc.*, 66 AD3d 600, 600 (1st Dept 2009) ("the motion court had full authority, under the controlling Case Management Order, to issue its discovery order"); *see also Andrea v. Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C. (Habiterra Associates)*, 5 NY3d 514, 518, 521 (2007) (agreeing that "counsel have demonstrated such a disregard for the case management order and scheduling order that one would not believe such orders existed," and affirming the dismissal of cases based on the "disregard for the case management order").

POINT II

THE AVAILABILITY OF THE RIGHT TO SEEK PUNITIVE DAMAGES IS THE NONCONTROVERSIAL NORM

The defendants' principal objection to the revised CMO arises from its allowance, *under tightly defined parameters with rigorous procedural protocols in place*, of claims for punitive damages in appropriate circumstances. While defendants understandably do not go so far as to claim that the availability of the right to request punitive damages departs from the norm in tort cases, they now cavalierly call the CMO's extensive and well-considered protocols "valueless" [D/JB, at 56], and otherwise seem to suggest by innuendo that the ability to seek such damages in appropriate circumstances is a sort of aberration. This is not the case. For in tort litigations throughout New York State and the nation, a defendant is rendered vulnerable to the imposition of punitive damages when the evidence establishes that it acted with an exceptionally high level of culpability and wanton disregard of human safety.

Indeed, in response to this Court's order requiring "procedural protocols on the issue of punitive damages," 130 AD3d at 490, the Supreme Court introduced more detailed and comprehensive procedural protections into the CMO than have been instituted in any other litigation or in any other geographic venue.[46]

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[46] *See supra* note 9.

A. THE WELL-SETTLED RIGHT TO SEEK PUNITIVE DAMAGES

Because defendants in the present appeal persist, as they did in 2015, in their principal claim – and as the underlying motivation for their entire objection to the new CMO – that "Supreme Court should not have ended the deferral of punitive damages" [D/JB, at 6, n.3], it should be useful to summarize the standing law of New York, which allows plaintiffs to seek punitive damages under appropriate circumstances. In its April 15, 2014 Decision, the NYCAL court examined both the history of punitive damages in the American common law, as detailed by the United States Supreme Court, as well as the well-settled status of punitive damages under New York law. *NYC Asbestos Litig.*, 2014 WL 10714009, at *4.

More specifically, in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), the Supreme Court explained that "[t]he modern Anglo–American doctrine of punitive damages dates back at least to 1763, when a pair of decisions by the Court of Common Pleas recognized the availability of damages 'for more than the injury received.' . . . Early common law cases offered various rationales for punitive-damages awards, which were then generally dubbed 'exemplary' . . . ." 554 U.S. at 490-91. The *Baker* Court further noted that, "[a]s for procedure, in most American jurisdictions the amount of the punitive award is generally determined by a jury in the first instance, and that 'determination is then reviewed by trial and appellate courts to ensure that it is reasonable.'" 554 U.S. at 495 (quoting *Haslip*, 499

U.S. at 15).

> Indeed, in *Haslip*, the Court taught that:
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> > [p]unitive damages have long been a part of traditional state tort law. . . . Blackstone appears to have noted their use. 3 W. BLACKSTONE, COMMENTARIES 137-38; *see also Wilkes v. Wood, Lofft* 1, 98 Eng. Rep. 489 (C. P. 1763) (the Lord Chief Justice validating exemplary damages as compensation, punishment, and deterrence). Among the first reported American cases are *Genay v. Norris*, 1 Bay 6 (S. C. 1784), and *Coryell v. Colbaugh,* 1 N. J. L. 77 (1791).

Haslip, 499 U.S. at 15.

> Historically, these damages
>
> > are as ancient as the law itself and can be traced back to 2000 B.C. The theory of punitive damages has continued to be relevant throughout history with authorities calling for punitive-like penalties when there were "certain especially harmful acts." Such punishment damages were first explicitly recognized in England, when fines could be imposed "for more than the injury received" and were later adopted into American common law.

David R. Nolte, Exxon v. Baker: *Legislating Spills into the Judiciary: How the Supreme Court Sunk Maritime Punitive Damages*, 5 J. BUS. & TECH. L. 377, 385 (2010) (citing *Wilkes*, 98 Eng. Rep. at 498); *see also* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U.L. REV. 1269, 1309 (1993) ("The consistent historic function of punitive damages has been to control the abuses of the powerful. Today, the pragmatic rationale for punitive damages has been extended to punish and deter extremely careless actions by corporate managers.

This extension is justified because the radius of the risk to the public is very great in many of these cases").

In this vein, as the April 15, 2014 Decision further emphasized, New York has always been in the mainstream on this issue, firmly recognizing a tort plaintiff's right to seek punitive, or exemplary, damages when the evidence supports this claim. *NYC Asbestos Litig.*, 2014 WL 10714009, at *4. As one court explained several decades ago:

> The public policy of New York does not prohibit exemplary or punitive damages. The right to award such damages was upheld in a very early New York case [*Tillotson v. Cheetham*, 3 Johns 56 (1806)], and the rule is now well established in our state, in accordance with that prevailing in most jurisdictions in this country, that in a proper action and under proper circumstances damages beyond the actual injury sustained may be awarded for the sake of the example and to punish the wrongdoer. Accordingly, as a general rule, exemplary damages may be awarded in all actions of tort in which actual malice or wantonness is in fact involved, including what is known at common law as an action on the case. Exemplary damages may be awarded in a proper case though no actual damages are proved, and the recovery of compensatory damages is consequently restricted to nominal damages.

Robert v. Ford Motor Co., 417 N.Y.S.2d 595, 598 (Sup. Ct., Lawrence County, 1979) (citing 9 FUCHSBERG, ENCYCLOPEDIA OF NEW YORK LAW, Damages § 61, at 47-48; *Chase Manhattan Bank, N.A. v. Perla*, 65 AD2d 207 (4th Dept 1978)); *see also Sclafani*, 88 AD3d at 516 ("The court also properly declined to dismiss plaintiff's request for punitive damages. Contrary to Bacardi's contention, punitive damages have been sanctioned under New York law in actions based on negligence and strict liability") (omitting citation).

As this Court has previously explained, "[i]n the United States, while compensatory damages remains the established basis for all sorts of claims sounding in tort, punitive damages are not only well rooted in the law, but seem to be expanding in acceptance, as well as in size of recovery, including cases involving industrial and products liability [where] the action of a defendant manifested a flagrant indifference to public safety." *Camillo v. Oympia & York Properties Co.*, 157 AD2d 34, 46 (1st Dept 1990) (omitting citations).

Plaintiffs bringing asbestos-related lawsuits in New York, in the instant litigation and in other counties, were afforded the same right – the opportunity to meaningfully address the enormity of the misconduct giving rise to their grievous injuries. *In re New York City Asbestos Litig.*, 660 N.Y.S.2d 803, 807 (Sup. Ct., N.Y. County, 1997) (agreeing with the Second Circuit's analysis of New York law that "'liability should be apportioned according to relative degrees of fault for the injury, which may include not only the strength of the causal link but also the magnitude of the fault,' and that evidence of the defendant's 'knowledge of the hazards of asbestos supported not only a finding of liability, but also punitive damages'") (quoting *Kreppein v. Celotex Corp.*, 969 F.2d 1424, 1426-27 (2d Cir. 1992) (applying New York law)); *In re New York City Asbestos Litig.*, 572 N.Y.S.2d 1006, 1008 (Sup. Ct., N.Y. County, 1991) (noting verdict finding "Owens-Illinois liable in two cases and Keene Corporation liable in fourteen cases for punitive damages"), *aff'd in part, rev'd in part on*

other grounds, 188 AD2d 214 (1st Dept 1993); *In re Seventh Judicial Dist. Asbestos Litig.: Wambach v. Armstrong World Indus.*, 190 AD2d 1068, 1069 (4th Dept 1993) ("*Wambach*") (approving the Supreme Court's jury instructions "for proving entitlement to punitive damages").

Accordingly, New York law permits and warrants punitive damages when the plaintiff has made a sufficient showing of harm resulting from the reckless disregard for the safety of other, innocent individuals. The Pattern Jury Instructions ("PJI"), prepared by a committee of esteemed New York jurists on the basis of their informed reading of the state of the law both nationally and in this jurisdiction, offers the following jury charge sanctioning the award of punitive damages:

> In addition to awarding damages to compensate the plaintiff AB for (his, her) injuries, you may, but you are not required to, award AB punitive damages if you find that the act(s) of the defendant CD that caused the injury complained of (was, were) (wanton and reckless, malicious). . . . 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. . . . An act is wanton and reckless when it demonstrates conscious indifference and utter disregard of its effect upon the health, safety and rights of others. . . . The amount of punitive damages that you award must be both reasonable and proportionate to the actual and potential harm suffered by AB, and to the compensatory damages you awarded AB.

N.Y. PJI 2:278.

As the April 15, 2014 Decision further noted, 2014 WL 10714009, at *5, the Fourth Department in *In re Eighth Judicial District Asbestos Litig.: Drabczyk v. Fisher*

Controls Int'l LLC, 92 AD3d 1259 (4th Dept 2012) ("*Drabczyk*"), reviewed the Supreme Court's instructions to the jury affording plaintiff the opportunity to seek punitive damages, as well as the evidentiary support in that case for the jury's award of such damages. The Court "held that the Supreme Court did not abuse its discretion in charging the jury on the punitive damages issue," but deemed the evidence insufficient to sustain that particular punitive damages award. 92 AD3d at 1260.

In the original April 15, 2014 Decision ending the automatic and across-the-board deferral of any punitive damages claim under any circumstance, the court concluded:

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

2014 WL 10714009, at *6.

Thus, it is the plaintiffs who have commenced asbestos actions in New York City since 1996, not the defendants, who have been deprived of their fundamental rights, namely, the right to seek a measure of damages available to any other plaintiff prosecuting an asbestos action in any other part of this State, and available to any

other plaintiff in any other sort of tort action within New York City and New York County.[47]

B. DEFENDANTS' DUE PROCESS CLAIMS ARE WITHOUT MERIT

Defendants falsely and misleadingly allege that "ending the punitive-damages deferral, thereby eliminat[ed] the CMO's principal benefit to Defendants while continuing to curtail Defendants' due process rights" [D/JB, at 3-4]. This claim duplicates defendants' 2015 claim clearly rejected by this Court, that the CMO's restoration of plaintiffs' right to assert punitive damages renders the CMO non-consensual, hence in turn rendering the CMO's "stripping" defendants of their CPLR rights a due process violation. As was fully true in 2015, defendants' premise is simply wrong, because there is nothing about the CMO that "strips" defendants of any rights guaranteed to them under the CPLR.

Plaintiffs take the due process issue seriously; after all, it was they who demonstrated that the continued deferral of their right to seek punitive damages, unique to NYCAL, arguably impinged upon their constitutional protections.

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[47] It is also notable that, contrary to defendants' contention, the policy justification of "deterrence" is certainly supported in this litigation. Defendants make the myopic claim that, since asbestos is no longer used, there is no conduct to deter. The conduct to deter, however, is not the use of asbestos, but the wanton failure to warn of product-related hazards that a defendant knows to be lethal, especially where the resulting disease at issue has a long latency period and the defendant may otherwise be inclined simply to choose to continue to reap profits unfettered by immediate liability, knowing that no causative disease will be developed for decades.

Although defendants speculatively claim some such threat, they wholly fail to allege, let alone establish, that any defendant's due process right has ever actually been violated.

Faced with virtually all of the claims defendants now repeat in this appeal, this Court's 2015 Decision modified the Supreme Court's order solely "to the extent of . . . remanding the matter to the Coordinating Justice for a determination of procedural protocols on the issue of punitive damages." 130 AD3d at 489. Defendants no longer complain that such protocols themselves impinge on any due process or other right, and any such claim would be meritless, although they label them "valueless" [D/JB, at 56]. Indeed, with regard to protocols and procedures important to administering litigation involving punitive damages, it is clear that the CMO's instant provisions – *see* supra note 9 – far surpass in depth and range any procedural due protections previously afforded any other litigants. *See, e.g., Drabczyk,* 92 AD3d at 1260 ("because the jury found that defendant acted with reckless disregard for decedent's safety, the court did not abuse its discretion by charging the jury on the issue of punitive damages"); *see generally In re Welding Fume Prods. Liab. Litig.*, № 1:03-CV-17000 (MDL Docket № 1535), 2010 U.S. Dist. LEXIS 146067, at *524-25 (N.D. Ohio, June 4, 2010) (holding that a determination on the propriety of a plaintiff's claim for punitive damages "should normally be entered only after all of the evidence has been presented at trial"); *St. Paul Mercury Ins. Co. v. Coucher,* 837 So.2d

483, 488 (Fla. App. 2002) ("when there is a claim for punitive damages in a negligence action, the jury should hear evidence on negligence, compensatory damages, and liability for punitive damages in phase one, and then the same jury should determine the amount of punitive damages in phase two"); *Greenbaum v. Svenska Handelsbanken*, 979 F. Supp. 973, 982 (S.D.N.Y. 1997) (Sotomayor, J.) (punitive damage claims are "inextricably linked to the underlying cause of action").

The above-referenced decisions are in accord with the longstanding protocol and practice in New York for the handling of punitive damages claims. *See, e.g., Loughry v. Lincoln First Bank*, 67 NY2d 369, 379 (1986) ("Had plaintiff at that point perceived that a 'superior officer' finding in particular furnished the necessary predicate for punitive damages against the bank, he might have sought such an instruction"); *Drabczyk,* 92 AD3d at 1260 ("because the jury found that defendant acted with reckless disregard for decedent's safety, the court did not abuse its discretion by charging the jury on the issue of punitive damages"); *Rivera v. City of New York*, 40 AD3d 334, 336 (1st Dept 2007) ("The jury was instructed to calculate compensatory damages and, without fixing an amount, to determine only whether plaintiffs would be entitled to punitive damages")[48]; *Rozwell v. Philanz Oldsmobile, Inc.*, 187 AD2d 938, 938-39 (4th Dept 1992) ("In the first phase of the trial, the only issue

[48] In *Rivera*, this Court concluded that punitive damages were not warranted because the evidence did not sufficiently establish "that defendants were motivated by actual malice or acted in reckless disregard of" plaintiffs' rights. 40 AD3d at 344 (omitting citations).

with respect to punitive damages was whether plaintiff was entitled to them. The charge on that issue properly informed the jury on the quality of proof necessary to support an award of punitive damages"); *see also Marinaccio v. Town of Clarence*, 20 NY3d 506, 511 (2013) ("As conceded by plaintiff, the Supreme Court correctly charged the jury that punitive damages may only be awarded if defendant's acts were, 'wanton and reckless or malicious'"); *Ferguson v. City of New York*, 73 AD3d 649, 650-51 (1st Dept 2010) ("the jury was properly charged that punitive damages could only be awarded if it found Officer['s] conduct to be wanton, reckless or malicious"). And historically, punitive damages claims in the asbestos litigation were also handled in the manner stated in those cases, with appropriate jury instructions and the availability of post-verdict and appellate review functioning as due process guarantors. See *Philip Morris*, 549 U.S. at 355 (proper and adequate jury instructions afford a punitive damages defendant procedural due process); *Haslip*, 499 U.S. at 19-20 (appropriate instructions and the availability of "meaningful and adequate review" are the centerpieces of procedural due process).

As a further matter, when defendants refer to "due process," they are necessarily speaking solely of procedural due process. Substantive due process claims may arise following a verdict, depending on the size or nature of any punitive damages award. *E.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996) ("the most important indicium of the reasonableness of a punitive damages award is

the degree of reprehensibility of the defendant's conduct"); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994) ("Our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damages awards"); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993) (finding that the fact that the 'award was reviewed and upheld by the trial judge' and unanimously affirmed on appeal gave rise 'to a strong presumption of validity'"). Concurring in the *TXO* opinion, Justice Scalia (joined by Justice Thomas) considered it sufficient that traditional common-law procedures were followed. In particular, he noted that "procedural due process" requires judicial review of punitive damages awards for reasonableness. *Id.* at 471; *Honda Motor*, 512 U.S. at 420-21.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court reject the instant appeals, affirm the orders below, and grant plaintiffs such other and further relief as the Court deems proper.

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Respectfully submitted,

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