APL-2014-00317
New York County Clerk's Index No. 190134/10

Court of Appeals
STATE OF NEW YORK

In Re: New York City Asbestos Litigation

RUBY E. KONSTANTIN, Individually and as Executrix of the Estate of DAVE JOHN KONSTANTIN, deceased,

Plaintiffs-Respondents,

—against—

630 THIRD AVENUE ASSOCIATES, ET AL.,

Defendants,

TISHMAN LIQUIDATING CORPORATION,

Defendant-Appellant.

JOHN CRANE INC.'S MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT

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Attorneys for *Amicus Curiae*

PLEASE TAKE NOTICE THAT, upon the annexed affirmation of Suzanne M. Halbardier, dated March 15, 2016, John Crane Inc. seeks leave to appear and file a brief as *amicus curiae* in the above captioned action and will move this Court at the courthouse thereof, located at 20 Eagle Street, Albany, New York 12207, on the 28th day of March, 2016 at 10:00 a.m. or as soon thereafter as counsel may be heard, for an order granting John Crane Inc. such leave to appear as *amicus curiae* on the appeal of Defendant-Appellant Tishman Liquidating Corporation, from the decision and order of the Appellate Division, First Department, dated July 3, 2014, and file the Brief of John Crane Inc. as *amicus curiae* in support of Defendant-Appellant Tishman Liquidating Corporation's appeal. The brief of John Crane Inc. as *amicus curiae* is attached hereto as Exhibit 1.

Dated: New York, New York
March 15, 2016

BARRY MCTIERNAN & MOORE LLC

By: _____

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Plaintiffs-Respondents,

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TISHMAN LIQUIDATING CORPORATION,

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AFFIRMATION OF SUZANNE M. HALBARDIER

SUZANNE M. HALBARDIER, an attorney admitted to practice in the State of New York, hereby affirms under penalty of perjury:

1. I am a partner in the law firm of Barry, McTiernan & Moore, LLC, counsel for John Crane Inc. ("JCI").

2. I submit this affirmation in support of JCI's motion for leave to appear and file a brief as *amicus curiae* in support of defendant-appellant Tishman Liquidating Corporation's appeal to this Court. JCI's motion should be granted as it possesses a substantial interest in preventing further

consolidation orders that unduly prejudice NYCAL defendants by depriving them of their right to a fair and impartial trial. In the court below, the Appellate Division, First Department granted JCI permission to appear as *amicus curiae*.

3. I am authorized by JCI to bring this motion and submit the proposed *amicus curiae* brief filed together with this motion.

4. In compliance with N.Y. Ct. Rules § 500.1(f), JCI is a wholly owned subsidiary of John Crane Group, Ltd. (UK), a wholly owned subsidiary of Smiths Group Inter. Holdings, Ltd., which is wholly owned by Smiths Group PLC, a company publicly traded on the London Stock Exchange. JCI has been a defendant in thousands of NYCAL cases, as well as thousands more asbestos-related disease lawsuits across the country. *Amicus* intends to address one of the issues before this Court on Tishman Liquidating Corporation's appeal, namely, the impropriety of the trial court's consolidation of this matter with *Doris Kay Dummitt v. A.W. Chesterton, et al.*, 190196/10.

5. In its brief, JCI will explain how the trial courts' application of case law relating to consolidation procedures employed within New York is inconsistent and prejudicial. JCI has been sued in thousands of NYCAL cases,

and has extensive experience litigating within New York's court system. JCI is positioned to offer a unique viewpoint on consolidation procedures.

6. JCI will explain that the inconsistent or, in some cases, nonexistent application of the seven factors regarding consolidation orders set out in *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993), leads to inequities for defendants, particularly JCI, who is inundated with numerous cases, many of which are ultimately consolidated. JCI will explain what the rule should be.

7. JCI will further explain that this Court has never once commented on, or even cited *Malcolm* in any of its decisions, which has understandably led to confusion and inconsistency among the trial courts and lower appellate courts in the application of the several *Malcolm* factors. To remove the uncertainty, this Court should consider and decide the propriety of using the *Malcolm* factors and instruct the lower courts on the proper application of each of them or others. JCI believes this Court should rule that cases should not be consolidated where there are no common worksites, and the Malcolm factors should be interpreted narrowly, not broadly, as some of the lower courts have held.

8. Given JCI's substantial interest in uniform application of precedent relating to consolidation of NYCAL cases and what the rules should

be, it respectfully requests the opportunity to brief the issue before this Court. The impact of the inconsistent application of *Malcolm* and what the factors should be are addressed fully in the brief, which is attached as Exhibit 1 to the Notice of Motion.

WHEREFORE, JCI respectfully requests that this Court grant its motion and for an order (i) granting JCI leave to appear and submit its brief as *amicus curiae* in support of Defendant-Appellant; (ii) accepting the brief as filed and served along with this motion; and (iii) granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
March 15, 2016

BARRY MCTIERNAN & MOORE LLC

By: _____

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Counsel for proposed Amicus Curiae *John Crane Inc.*

EXHIBIT 1

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STATE OF NEW YORK

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—against—

630 THIRD AVENUE ASSOCIATES, ET AL.

Defendants,

TISHMAN LIQUIDATING CORPORATION,

Defendant-Appellant.

BRIEF OF JOHN CRANE INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

John Crane Inc. ("JCI" or "*amicus*") is a wholly owned subsidiary of John Crane Group, Ltd. (UK), which itself is a wholly owned subsidiary of Smiths Group Inter. Holdings, Ltd. Smiths Group Inter. Holdings, Ltd. is wholly owned by Smiths group PLC, which is traded on the London Stock Exchange. *Amicus* has been a defendant in thousands of NYCAL cases, and thousands more asbestos-related disease lawsuits across the country. *Amicus* intends to address one of the issues before this Court on Tishman Liquidating Corporation's appeal, namely, consolidation.

This case is exceptionally important to *amicus*, because it is routinely subject to inappropriate, inconsistent and prejudicial consolidation orders in NYCAL that negatively impact its right to a fair and impartial trial. *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) ("An amicus brief should normally be allowed . . . when the amicus has an interest in some other case that may be affected by the decision in the present case . . . or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide"). Because *amicus* has been trying cases in NYCAL since its inception, it has a well-informed opinion, derived from extensive litigation experience in New York courts, about the propriety of consolidation that will be of assistance to this Court.

SUMMARY OF ARGUMENT

This Court should reverse the trial court's consolidation order and hold that consolidation is improper in asbestos cases where, as here: (1) the plaintiffs/decedents were exposed to different asbestos-containing products at different work places, in different ways, at different times; (2) the plaintiffs/decedents suffered from different disease types; and (3) the legal theories of liability are different. Ignoring these critical distinctions, the trial court consolidated this case with Ronald Dummitt's by misapplying a multi-factor test that was first articulated by the Court of Appeals for the Second Circuit over twenty years ago in *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350-52 (2d Cir. 1993). (July 3, 2014 Decision and Order ("Order") at 15.)

This Court has never addressed, much less applied, the *Malcolm* factors in any case, asbestos or otherwise. In applying *Malcolm*, however, the First Department noted in the Order that the trial courts have repeatedly interpreted and applied the *Malcolm* factors differently over the years, with trial courts "rul[ing] inconsistently" with regard to proposed joint trials involving plaintiffs with disparate disease types. (*Id.* at 16-18.) The First Department also recognized numerous additional inconsistent distinctions that trial courts have drawn over the years when deciding whether and how to join asbestos-related disease cases for trial. (*Id.*)

The First Department was correct to make these observations, because a review of the body of available case law reveals that NYCAL trial courts, including the trial court here, are routinely granting requests for joint trials with little regard for the "seminal" *Malcolm* factors. JCI submits that this Court should: (1) determine that the *Malcolm* factors, plus certain additional factors are the appropriate issues to consider in evaluating a request for consolidation and joint trial; and (2) provide much needed guidance to the trial courts on how to apply them consistently in evaluating consolidation requests in asbestos disease cases that have the potential to violate defendants' right to a fair and impartial trial – namely, that the factors are meaningful and should not be loosely applied. Given the First Department's broad interpretation of those factors so as to make them meaningless, this Court should reverse the trial court's order of consolidation.

JCI believes that consolidation should only be permitted where the cases being considered share the same worksite, the same exposure years, and the same defendants, diseases and plaintiffs' firms. By same worksite, JCI submits that this should require, as in *Malcolm*, closely related sites; *Malcolm* involved Con Edison powerhouses. Dummitt/Konstantin had no common worksites, and the trial courts in NYCAL have regularly interpreted "worksite" to mean any site where asbestos exposure occurred, rather than the same worksites as confronted by the Second Circuit in *Malcolm.*

ARGUMENT

I. The *Malcolm* Factors Must Be Applied Meaningfully To Ensure A Fair Trial.

N.Y.C.P.L.R. §602 (CONSOL. 2014) permits the trial court, within its discretion, to join cases for trial when there are common questions of law and fact. Although not all of the facts or issues in the cases proposed for joint trial need to be identical, there must be some identity of issues such that the salutary goal of judicial economy is served. *Cummin v. Cummin*, 56 A.D.2d 400 (1st Dep't 2008); *Bradford v. John A. Coleman*, 110 A.D.2d 965 (3d Dep't 1985). Once the requirement of commonality has been satisfied, the opponent needs to demonstrate that a joint trial will unduly prejudice a substantial right. *Geneva Temps. Inc. v. New World Communities*, 24 A.D.3d 332 (1st Dep't 2005). That right is typically the right to a fair and impartial trial.

The chief policy considerations behind consolidation or joinder are efficiency and the conservation of judicial resources. *Sokolow v. Lacher*, 299 A.D.2d 64 (1st Dep't 2002); *In re New York City Asbestos Litig.*, 188 A.D.2d 214 (N.Y. App. Div. 1993), *aff'd*, 625 N.E.2d 588 (N.Y. 1993). However, "considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *Johnson v Celotex Corp.*, 899 F.2d 1281, 1284 (2d Cir. 1990).

The First Department has recognized that joint trials are ill advised when, as in this case, "individual issues predominate, concerning particular circumstances applicable to each plaintiff." *Bender v. Underwood*, 93 A.D.2d 747, 748 (1st Dep't 1983). Thus, although a joint trial has the potential to reduce the cost of litigation, make more economical use of the trial court's time, and speed the disposition of cases as well as encourage settlements, *Malcolm*, 995 F.2d at 354, it is "possible to go too far in the interests of expediency and to sacrifice basic fairness in the process" of joinder. *Ballard v. Armstrong World Industries*, 191 Misc.2d 625 (N.Y. Sup. Ct. 2002).

Without citation to any New York authority, the First Department stated that "[*Malcolm*] is the seminal case concerning consolidation in asbestos cases." (Order at 15.) But the Appellate Division has cited *Malcolm* only three times prior to the instant case, and only two of those cases involved liability issues arising from the use of asbestos. Moreover, in the twenty-two years since *Malcolm* was decided, it has never been relied upon by this Court in any respect.

Nevertheless, in the case of asbestos litigation, joint trials of more than one plaintiff at a time against more than one defendant at a time have been routinely permitted through the misapplication of the *Malcolm* factors. Indeed, the trial courts' purported reliance upon *Malcolm* in NYCAL consolidation orders has become ubiquitous over the past ten years. *See, e.g.*,

In re New York City Asbestos Litig., No. 190323/10, 2011 N.Y. Misc. LEXIS 5012, at *2-4 (N.Y. Sup. Ct. Sept. 7, 2011); *In re New York Asbestos Litig.*, No. 102968/99, 22 Misc.3d 1109(A) (N.Y. Sup. Ct. Jan. 9, 2009); *In re New York City Asbestos Litig. v. A.O. Smith Water Products*, No. 112742/04, 9 Misc.3d 1109(A) (N.Y. Sup. Ct. Sept. 15, 2005); *In re New York City Asbestos Litig.*, No. 190102/2008-003, 2009 N.Y. Misc. LEXIS 5289 (N.Y. Sup Ct. Sept. 9, 2009); *Bauer v. A.O. Smith Water Products*, No. 115756/07, et al, 2008 N.Y. Misc. LEXIS 9058 (N.Y. Sup. Ct. Aug. 21, 2008); *In re New York City Asbestos Litig.*, No. 114483/02, 2011 N.Y. Misc. LEXIS 2248 (N.Y. Sup. Ct. May 2, 2011).

The *Malcolm* case involved Con Edison powerhouses; yet, the trial courts are regularly approving consolidations in cases where there are no common worksites, let alone similar worksites such as the powerhouses at issue in Malcolm. Accordingly, JCI believes that this Court must limit consolidations to cases where the same worksites are involved. The lower courts should not be joining cases unless there are common worksites where similar exposures occurred (i.e., powerhouses or shipyards[1] or the World Trade Center); where the exposure years are the same (e.g., all the cases involve pre-OSHA exposures); where the exposures are the same (e.g.,

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[1] It may be appropriate to join cases arising from exposure in the same shipyard or class of ship.

carpenters directly using asbestos products); where the defendants are the same (to avoid a defendant in one case being required to participate in a trial where it is not a defendant in the other cases); where the plaintiff firm is the same; where plaintiffs are all living or all deceased; and where the disease is the same.

II. The Factors Should Not Be Applied In A Way That Abrogates Their Meaning.

In *Malcolm*, the Court of Appeals for the Second Circuit delineated specific factors that are relevant in determining whether to jointly try cases based upon asbestos exposure. The factors include: (1) common work site; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs are living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs are represented by the same counsel; and (8) type of cancer. *Bischofsberger v Ploeckelmann*, No. 107352/2005 2012 N.Y. Misc. LEXIS 4544 (N.Y. Sup. Ct. Sept. 19, 2012). The weight accorded to the several different *Malcolm* factors should be defined by this Court, because the reasoning and orders of the trial courts across NYCAL that are applying them vary considerably. In fact, many recent trial court decisions erode, or simply ignore, the *Malcolm* factors and the facts of *Malcolm* itself. In *Malcolm,* "[t]he thread upon which all 600 cases hung was that each plaintiff had been exposed to asbestos in one or more of over 40 power-generating stations, or

'powerhouses' as they are called, in New York State." 995 F.2d at 348. In contrast, NYCAL courts routinely consolidate cases when plaintiffs were exposed in any work site in the tri-state area.

For example, with regard to the first and second *Malcolm* factors, the First Department expressly recognized:

> some trial courts have rejected a narrow focus on the specific locations of the exposures and types of work in favor of an analysis that considers whether two or more plaintiffs were engaged in an occupation related to maintenance, inspection and/or repair and [were] exposed to asbestos in the 'traditional' way, that is, by working directly with the material for years.

(Order at 16, citing *Matter of New York City Asbestos Litig. [Batista],* 2010 WL 9583637, *2 (N.Y. Sup. Ct. 2010) (joining cases of residential drywaller, Navy pipefitter, home renovator, plant electrician, powerhouse worker, and Navy electrician for trial, where their injuries "resulted from 'insulation exposure from boilers, valves, pumps and other insulated equipment'"). Other trial courts, however, have focused on the types of asbestos product to which the plaintiffs were exposed, and whether they were manufactured and distributed by different defendants, but have reached different conclusions. *Compare Bischofsberger,* 2012 N.Y. Misc. LEXIS 4544 (holding that differences between products used by the workers was reason to deny a joint trial) *with In re New York City Asbestos Litig.*, No. 114483/02, 2011 N.Y. Misc. LEXIS 2248, at *3-4 (N.Y. Sup. Ct. May 2, 2011) (finding that joinder

was proper where seven of eight workers had been exposed to boilers and pumps, and only five of eight workers had been exposed to packing and firebrick).

Moreover, some trial courts have refused to join cases involving bystander exposure with those involving tradesmen who worked with asbestos-containing products directly. *In re New York City Asbestos Litig.*, No. 190486/2011, 2013 N.Y. Misc. LEXIS 4732, at *12-13 (N.Y. Sup. Ct. Oct. 17, 2013); *Begim v Certainteed Corp.*, No. 190125/12 *et al*, 2014 N.Y. Misc. LEXIS 1133 (N.Y. Sup. Ct. Mar. 14, 2014). The trial court in this case, however, improperly allowed the claims of Konstantin – a bystander – to be tried with Dummitt's – a pipefitter. This case, therefore, demonstrates the lack of consistency among the trial courts.

There is also no consensus among the trial courts as to what types of workers should have their cases tried together. Some trial courts have found that claims of workers who were exposed to asbestos in the Navy should not be joined with workers who have exclusively land-based exposure, and that plaintiffs who worked exclusively with automobiles should not be joined with workers exposed through home renovation and construction. *Bauer v A.O. Smith Water Products Co.*, No. 115756/07, et al., 2008 N.Y Misc. LEXIS 9058, at *9-18 (N.Y. Sup. Ct. Aug. 21, 2008); *see also In re New York City Asbestos Litig.*, No. 102968/99, 22 Misc. 3d 1109(A), at *3 (N.Y. Sup. Ct.

Jan. 9, 2009) (declining to consolidate claim of Navy seaman with high seas exposure with claims of workers without Navy work history); *In re New York City Asbestos Litig.*, No. 190486-2011, 2013 N.Y. Misc. LEXIS 4732, at *14-15 (N.Y. Sup. Ct. Oct. 17, 2013) (refusing to join plaintiff who was exposed to asbestos during his service in the Navy because of risk of jury confusion if consolidated with cases that do not involve federal law); *In re New York City Asbestos Litig.*, No. 106509/02, 2011 N.Y. Misc. LEXIS 6200, at *10-12 (N.Y. Sup. Ct. Dec. 21, 2011) (severing all plaintiffs with Navy and shipyard exposure from those with only land-based exposures). Yet the trial court in this case allowed the claims of Konstantin, who was exposed only on land while working a construction job, to be tried jointly with Dummitt's – a Navy sailor. Again, the unpredictability of the trial courts is striking.

JCI believes that the most important Malcolm factor is the "common worksite," with the lower courts too broadly interpreting what may be considered "common" worksites. Each worksite may be subject to different rules (union versus non-union, shipyards subject to military guidelines, powerhouses where contracts dictate the method and manner of the work). Each worksite may involve different companies whose products were used in the original construction or renovation. Further, the defendant will need to present evidence of all companies, products and exposure at each site for purposes of allocation under Article 16. This is a daunting task where joined

cases share no common worksite. The Malcolm factors should not be interpreted so broadly as to permit joinder of any case with "commercial" locations, but this is exactly what occurred in Dummitt/Konstantin and other groups regularly joined for trial. JCI urges this Court to tighten the requirements of "common worksites" to require joinder of only those cases which truly share the same worksite.

Trial courts have also ruled inconsistently where plaintiffs who propose joint trials have different types of mesothelioma. *Compare In re New York City Asbestos Litig.*, No. 190181/11, 2012 NY Misc. LEXIS 3828, at *27 (N.Y. Sup Ct. Aug. 7, 2012) (finding that peritoneal mesothelioma is a "distinct disease from . . . pleural mesothelioma"), *with Bischofsberger*, 2012 N.Y. Misc. LEXIS 4544 at *6 (pleural mesothelioma and peritoneal mesothelioma "are the same disease, albeit they present in different parts of the body"). Likewise, some courts have refused to join cases involving lung cancer with cases involving mesothelioma, *In re New York City Asbestos Litig.*, No. 190486-2011, 2013 N.Y. Misc. LEXIS 4732, at *14-15 (N.Y. Sup. Ct. Oct. 17, 2013), while others have found no significance in the distinction for consolidation purposes. *In re New York City Asbestos Litig.*, No. 114483/02, 2011 N.Y. Misc. LEXIS 2248, at *4 (N.Y. Sup. Ct. May 2, 2011). Defendants often offer scientific and medical opinions disputing the relationship between non-pleural mesothelioma cases and asbestos exposure.

Complicated causation arguments are also presented in lung cancer cases, as a plaintiff's lung cancer may be caused by a number of carcinogens, including cigarettes. JCI believes that joining different diseases together is improper and prejudicial.

In determining the fifth *Malcolm* factor, the effect of different plaintiffs' "statuses" (i.e., living or dead), trial courts have been similarly divided. *Compare In re New York City Asbestos Litig.*, No. 102968/99, 22 Misc. 3d 1109(A), at *3 (N.Y. Sup. Ct. Jan. 9, 2009) (declining to join cases involving deceased plaintiffs with living plaintiffs who were not at risk of imminent death) *and Seventh Judicial Dist. Asbestos Litig. v. Armstrong World Indus.*, 191 Misc.2d 625 (N.Y. Sup. Ct. 2002) (refusing to join cases involving deceased workers with claims of workers still living) *with In re New York City Asbestos Litig.*, No. /02, 2011 N.Y. Misc. LEXIS 2248, at *4 (N.Y. Sup. Ct. May 2, 2011) (joining trials of living and dead workers because "plaintiffs will still require common expert testimony on toxicity of asbestos"); *Matter of New York City Asbestos Litig.*, No. 102034/05, 816 N.Y.S.2d 698 (N.Y. Sup. Ct. Jan. 19, 2006) (observing that there was no prejudice in joining deceased plaintiffs with terminally ill plaintiffs); *In re New York City Asbestos Litig.*, No. 112742/04, 9 Misc.3d 1109(A) (N.Y. Sup. Ct. Sept. 15, 2005) (observing that "[w]hether plaintiffs are living or dead is not a factor here . . . all the plaintiffs suffer from the same fate from this fatal

disease...."). JCI believes that this Court should clarify that only plaintiffs with the same health status (i.e. all living and able to testify at trial, all deceased or all living but incapacitated) are appropriate for a consolidated trial.

The third, sixth and seventh factors are often rubber-stamped by the trial courts in NYCAL, and, in practice, have no real meaning in the analysis. *See, e.g., In re New York City Asbestos Litig.*, No. 190102/2008-003 *et al*, 2009 N.Y. Misc. LEXIS 5289 (N.Y. Sup Ct. Sept. 9, 2009).

Against this backdrop, a review of the consolidation orders that have been entered over the past decade reveal the following disturbing trends that are demonstrated by the instant case: (1) joint trials are routinely ordered regardless of the distinctions that should be made between the products and, therefore, the defendants; (2) joint trials are routinely ordered regardless of the different disease types at issue; and (3) joint trials are routinely ordered where some claimants are living and others are dead. *Amicus* submits that the unfairness to defendants caused by these consolidation decisions substantially outweighs the benefits of consolidation.

In this case, for example, the asbestos-containing products to which plaintiffs Konstantin and Dummitt were exposed were different in each case. The asbestos to which Mr. Dummitt was exposed was contained in gaskets and pads for valves and pumps on Navy ships. The asbestos to which Mr.

Konstantin was allegedly exposed was contained in joint compound. The gaskets and pads for valves and pumps were made by different manufacturers than were the joint compound, These disparate facts alone should have the trial court to deny the request for consolidation. *See In re New York City Asbestos Litig.*, No. 0103121/2007, 2008 N.Y. Misc. LEXIS 8397, at *12 (N.Y. Sup. Ct. Apr. 7, 2008) (severing plaintiff in part due to lack of commonality of product exposure); *Bischofsberger v. AO Smith Water Prods.*, Index No. 107352/2005, 2012 N.Y. Misc. LEXIS 4544, at *6-7 (N.Y. Sup. Ct. Sept. 20, 2012) (declining to consolidate cases that involved "similar products" because products were "largely manufactured and/or distributed by different defendants").

Moreover, Mr. Dummitt suffered from pleural mesothelioma, which affects the lining of the lungs and chest cavity. Mr. Konstantin, in contrast, suffered from mesothelioma of the tunica vaginalis, which affects the lining around the testicles. The record contains evidence establishing that the manifestation of the disease in the tunica vaginalis is different from mesothelioma of the pleura. (A1390, A1477, A1481). Because Mr. Dummitt and Mr. Konstantin suffered from different disease subtypes, their actions involved, among other things, different medical evidence, different evidence of causation, and different proof of damages. Thus, consolidation was improper. Indeed, a defendant is prejudiced when there is a risk that, by

consolidating multiple actions, the jury will become confused, or evidence presented by one plaintiff will bolster claims brought by another plaintiff. *See In re New York City Asbestos Litig.*, No. 102034/05, 11 Misc.3d 1063(A) (N.Y. Sup. Ct. Jan. 19, 2006) (severing case where "possibility for such confusion could greatly prejudice" defendants); *Assenzio v. A.O. Smith Water Prods.*, No. 190008/12, 2013 N.Y. Misc. LEXIS 1630, at *6 (N.Y. Sup. Ct. Apr. 19, 2013) (risk that evidence will bolster unrelated claims is prejudicial).[2]

The Second Circuit Court of Appeals has recognized that consolidating individual tort cases when plaintiffs allegedly suffer injuries that occurred at different times, in different places, and in different ways "render[s] the label mass tort into a self-fulfilling prophecy." *In re Repetitive Stress Litig.*, 11 F.3d 368, 373-74 (2d Cir. 1993) (reversing consolidation order). And the *Malcolm* court recognized that a trial court abuses its discretion if it

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[2] Other courts have recognized that pleural mesothelioma cases should not be tried together with cases involving other mesotheliomas. *See, e.g., In re Mass Tort and Asbestos Programs*, General Court Regulation No. 2012-01 (Ct. Com. Pl., Phila. County, Pa. Feb. 15, 2012), available at http://www.courts.phila.gov/pdf/regs/2012/cpajgcr2012-01.pdf ("Pleural mesothelioma is a disease that is distinct from mesotheliomas originating in other parts of the body, and will not be tried on a consolidated basis with non-pleural mesothelioma cases and not necessarily tried on a consolidated basis. Non-pleural mesothelioma cases will be further classified for trial, so that non-pleural mesothelioma cases allegedly caused by occupational exposure will not be tried on a consolidated basis with non-pleural mesothelioma cases allegedly caused by para-occupational (bystander) exposure.")

consolidates cases involving different workplaces, different occupations, different exposure periods, different disease types and living and dead plaintiffs. *Malcolm*, 995 F.2d at 351-52. Consistent with these pronouncements, *amicus's* experience is that joint trials inherently favor plaintiffs, create substantial and irreparable jury confusion, and make trials longer, more complicated and more expensive.

Although the *Malcolm* court stated that no single factor is dispositive on its own, if the factors are to be used, each should serve as a guideline in assisting the trial court in deciding whether to combine all, some or none of the cases presented for trial. *Malcolm*, 995 F.2d at 350. The current state of the law, however, leaves the trial court with such wide and unfettered discretion in weighing the seven factors that they in reality serve as no guideline at all, but rather a means to an end. The malleability of the *Malcolm* factors leaves the litigants, and in particular, defendants, unable to predict with any certainty how cases will ultimately be joined for trial, if at all. This unpredictability creates inefficiency—contrary to the primary goal of consolidation—and, as the Defendant-Appellant has ably demonstrated, substantial prejudice to defendants' right to a fair trial.

Accordingly, this Court should resolve the conflicts and inconsistencies among the trial courts in the application of the *Malcolm* factors in reversing the trial court's ruling on consolidation. JCI suggests that this Court must

restrict the lower courts' determinations of "common worksites" and impose the limitations anticipated by *Malcolm*, which all involved the Con Edison powerhouses. Unless the cases truly share a common worksite, then the cases should not be joined for trial.

This Court should also rule that consolidation is improper under any one or all of the following circumstances: (1) where the plaintiffs/decedents were exposed to different asbestos-containing products at different work places; (2) where different disease types are at issue; and (3) where some claimants are living and others are deceased. The *Malcom* factors, under any reasonable application, do not support consolidation under such circumstances, and it is inherently unfair for defendants to be subject to consolidation of such disparate cases.

III. Joint Trials Have Increasingly Led To Excessive Awards.

JCI's experience in defending asbestos-related disease cases in NYCAL teaches that consolidated trials lead to excessive awards. For example, in a joint trial that JCI tried to verdict, the jury's total awards of $8 million and $14 million were later reduced on appeal to $3 million and $4.5 million respectively for plaintiffs Noah Pride and Bernard Mayer. *See In re New York Asbestos Litigation (Marshall)*, 28 A.D.3d 255 (1st Dep't 2006). Here, the First Department affirmed an already once remitted award for Mr.

Konstantin that is nearly twice and large as Mr. Mayer's. Unfortunately, this case is indicative of the trend in cases involving joint trials where the awards have grown even more excessive over the past ten years.

For example, in two actions consolidated for a joint trial involving decedent-plaintiffs who claimed they contracted terminal lung cancer from asbestos exposure, the jury awarded $13,650,000 (later remitted to $6,500,000) and $8,500,000 (award sustained) to the claimants. *See Koczur v. A.C.C & S., Inc.*, Index No. 122304/09, and *McCarthy v. A.C. & S., Inc.*, Index No. 100490/99. In the consolidated case, *Assenzio v A.O. Smith Water Prods. Co.*, 2015 N.Y. Misc. LEXIS 355 (N.Y. Sup. Ct. Feb. 5, 2015), the trial court substantially remitted the jury's awards to five plaintiffs that totaled $190 million in the aggregate.[3]

In *Assenzio*, the defendants argued that the cases had been improperly consolidated. *Id.* at *47. Specifically, defendants argued that, based on the number of plaintiffs, lack of commonality of work sites, the extensive period of time covered in the state of the art evidence, and a purported disjointed or

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[3] In *Assenzio*, the trial court remitted the verdict from $20 million for past pain and suffering to $5.5 million, and for loss of consortium from $10 million to $500,000; in *Brunck*, from $20 million for past pain and suffering to $3.2 million; in *Levy*, from $50 million for past pain and suffering to $7.5 million, and for loss of consortium from $10 million to $650,000; in *Serna*, from $60 million for past and future pain and suffering to $7.5 million; and in *Vincent*, from $20 million for past pain and suffering to $5 million.

fragmented order in which the evidence was presented, the jurors were unable to differentiate, and fairly and objectively evaluate the evidence with respect to the individual plaintiffs and defendants. *Id.* In addition, defendants argued that the consolidation of five cases resulted in the evidence in each case improperly bolstering the evidence in the other cases. *Id.* The trial court rejected these arguments. *See Assenzio v A.O. Smith Water Prods.*, 2013 N.Y. Misc. LEXIS 1630 *6-10 (N.Y. Sup. Ct. Apr. 17, 2013). JCI submits that for the reasons advanced in *Assenzio*, and those discussed above, this Court must carefully review the trial court's practice of routinely consolidating asbestos-disease cases under C.P.L.R. § 602(a) through an inconsistent and inequitable application of the *Malcolm* factors that consequently leads to improperly inflated damages awards.

CONCLUSION

This Court's decision involves important issues that are common to the majority, if not all, of the cases pending in NYCAL today. Because consolidation and joint trials by their very nature raise the "paramount concern for a fair and impartial trial," it is important that this Court end the rough justice that is meted out for defendants on a daily basis. This Court should provide much needed guidance on the weight to be given to the relevant *Malcolm* factors in making a decision on joint trials.

JCI requests that this Court direct that cases be joined for trial only if they truly comply with the Malcolm factors: that there is an actual common worksite such as a powerhouse or a shipyard, and not simply commercial sites; that the product exposures are the same; that diseases not be mixed together for trial; that the exposure years be the same; that plaintiffs are all living or all deceased; that the same defendants are inculpated in all the cases; and that the cases are all brought by the same plaintiff's firm.

Respectfully submitted,

Dated: New York, New York
March 15, 2016

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Joyce Nieves, being duly sworn, deposes and says:

I am not a party to this action, am over 18 years of age and reside in Middlesex County, New Jersey.

That on March 15, 2016, a true copy of the annexed **AMICUS MOTION and AFFIRMATION with exhibit** was served in the following manner upon:

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by depositing a true copy thereof, enclosed in a wrapper addressed as shown above, into the custody of ***Federal Express*** for overnight delivery, prior to the latest time designated by that service for overnight delivery.

Joyce Nieves

Sworn to before me this
15th day of March 2016.

Notary Public

AYEESHA BERTE
Notary Public, State of New York
No. 01BE6325471
Qualified in Bronx County
Commission Expires May 26, 2019