SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In Re OxyContin II	**NOTICE OF MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE*** Appellate Division No. 2009-02849 Richmond County Index No. 700000/07

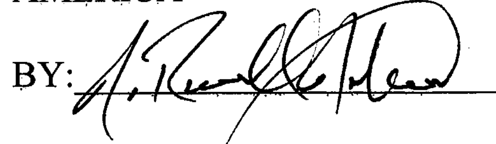
PLEASE TAKE NOTICE that, upon the annexed affirmation of J. Russell Jackson, dated the 24th day of September, 2009, and the exhibits attached thereto, the undersigned will move this Court at the Courthouse, 45 Monroe Place, Brooklyn, New York, on the 16th day of October, 2009, at 9:30 a.m., for an order granting leave to appear as *Amicus Curiae* in support of Defendants-Appellants, and for submission of the enclosed brief and arguments for consideration, and for such other and further relief as to the Court may seem just and equitable.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214(b), answering papers, if any, shall be served upon the undersigned counsel at least seven (7) days prior to the return date of this motion.

Dated: New York, New York
September 24, 2009

Respectfully submitted,

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

BY: 

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In Re OxyContin II	**AFFIRMATION OF J. RUSSELL JACKSON IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE*** Appellate Division No. 2009-02849 Richmond County Index No. 700000/07

J. RUSSELL JACKSON, an attorney duly admitted to practice before this Court, hereby affirms, under penalty of perjury pursuant to CPLR 2106, as follows:

1. I am a member of the law firm of Skadden, Arps, Slate, Meagher & Flom LLP, counsel to the Chamber of Commerce of the United States of America (the "Chamber"), proposed *Amicus Curiae*, and am in good standing in the Courts of the State of New York.

2. This affirmation is submitted in support of the motion for an order granting the Chamber permission to appear as *Amicus Curiae* in support of Defendants-Appellants.

3. Annexed to this affirmation are the following exhibits:

Exhibit A: Decision and Order of the Supreme Court, Richmond County, Joseph J. Maltese, J., dated February 10, 2009

Exhibit B: Defendants-Appellants' Notice of Appeal, dated March 24, 2009

Exhibit C: Proposed *Amicus Curiae* Brief of the Chamber of Commerce of the United States of America, dated September 24, 2009

4. The Chamber of Commerce of the United States of America is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and industries. In addition to the more than 5,000 Chamber members located in New York, countless other members do business within New York and are affected directly by the State's litigation climate. The Chamber advocates the interests of its members before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

5. The Chamber and its members are particularly concerned with the issue of forum shopping and the detrimental effect it has on the ability of businesses to defend themselves against meritless litigation. This case – in which scores of non-resident plaintiffs want a New York court to try product liability claims that are factually unrelated to New York – falls squarely within this key area of concern. Indeed, the Chamber has been especially active on *forum non conveniens* issues, having submitted *amicus curiae* briefs in *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171 (R.I. 2008), and *Gridley v. State Farm Mutual*

Automobile Insurance Company, 840 N.E.2d 269 (Ill. 2005), two cases (that are cited in the annexed brief) in which the state's highest court reversed a trial court's refusal to apply the *forum non conveniens* doctrine to dismiss claims with little or no connection to the forum.

6. This case concerns 248 product liability claims from non-resident plaintiffs involving a pain medicine, Oxycontin. None of the key facts involving these claims supplied a connection to New York. For these plaintiffs, the medicine was marketed, prescribed, consumed, and allegedly caused damage outside of New York. Defendants-Appellants moved for *forum non conveniens* dismissal.

7. The trial court did not grant Defendants-Appellants' motion to dismiss. Rather, relying on the faulty premises that "mass torts are different," *In re Oxycontin II*, 23 Misc. 3d 974, 978-81, 881 N.Y.S.2d 812, 816 (Sup. Ct. Richmond County 2009), and must have "consistent" rulings in matters of substantive law and procedure, the trial court created a "mass torts exception" to New York's *forum non conveniens* doctrine.

8. The Chamber respectfully maintains that the court below erred by refusing to dismiss on *forum non conveniens* grounds the claims of non-resident plaintiffs despite the fact that the public and private interest factors all weighed heavily for dismissal, merely because the court below already was adjudicating similar, but unrelated, claims involving New York plaintiffs.

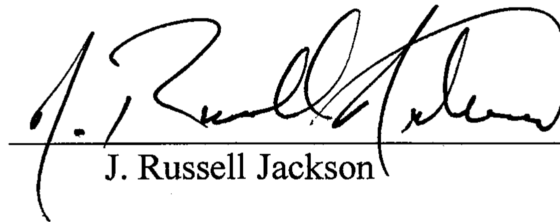
9. Although Defendants-Appellants ably support their contention that the decision below should be reversed, the Chamber believes that the enclosed brief will be of special assistance to the Court in understanding the public importance and widespread impact of the decision below. Specifically, the Chamber provides extensive support for its arguments that allowing the trial court's decision to stand would make New York the nation's Tort Court, and that litigation tourists would flock here to bring their claims. Medicines, consumer products, asbestos, silica – every conceivable mass product liability claim would qualify for the trial court's new exception to the doctrine of *forum non conveniens*.

10. The Chamber respectfully maintains that such a result would increase congestion in New York's already overburdened courts, force many New Yorkers to serve jury duty in cases with no connection to New York, violate the interest of other States to have their disputes heard locally, and enmesh New York justices in innumerable, time-consuming conflict of laws problems. Making New York the nation's Tort Court also would burden defendants with CPLR restrictions that do not exist in courts that follow different procedural rules, and make the documents and witnesses in these cases either unavailable or extremely difficult to obtain.

11. The Chamber, therefore, requests permission to appear as *Amicus Curiae* and submits, for the Court's consideration, the arguments contained in the enclosed brief.

WHEREFORE, it is respectfully submitted that the Chamber be permitted to appear as *Amicus Curiae* in these proceedings and, based upon the arguments contained herein and in the enclosed brief, that this Court reverse the decision below and dismiss the claims of the non-resident plaintiffs pursuant to CPLR R. 327(a) and the long-standing doctrine of *forum non conveniens*.

Dated: New York, New York
September 24, 2009



J. Russell Jackson

Exhibit A

C

Supreme Court, Richmond County, New York.
In the Matter of OXYCONTIN II.
Feb. 10, 2009.

Background: In-state and out-of-state plaintiffs brought various actions against manufacturer of prescription pain medication OxyContin, alleging products liability related to injuries allegedly suffered after ingestion of OxyContin. After issuance of coordination order for Supreme Court to manage all discovery and pre-trial matters, manufacturer moved to dismiss all lawsuits brought by out-of-state plaintiffs on grounds of forum non conveniens.

Holdings: The Supreme Court, Richmond County, Joseph J. Maltese, J., held that:
(1) doctrine of forum non conveniens did not require dismissal of non-resident plaintiffs
(2) greater burden on court of adding additional plaintiffs was outweighed by overall savings of time and effort;
(3) New York was a home state of manufacturer for purposes of forum non conveniens analysis, and
(4) statutory provisions demonstrated no basis for finding that manufacturer's due process rights were violated.

Motion denied.

West Headnotes

[1] Parties 287 ⚷35.69

287 Parties
287III Representative and Class Actions
287III(C) Particular Classes Represented
287k35.69 k. Tort Cases; Environmental Interests; Mass or Toxic Tort. Most Cited Cases

Torts 379 ⚷140

379 Torts
379I In General
379k140 k. Parties. Most Cited Cases
Mass tort litigation is different from litigation involving one or several plaintiffs in that a mass tort by its very nature is defined by the numerosity of plaintiffs with common defendants involving the same claims; if the specific facts of each individual claim are not "typical" of all the cases in the group, that may preclude a traditional class action lawsuit.

[2] Courts 106 ⚷28

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k28 k. Discretion as to Exercise; Forum Non Conveniens. Most Cited Cases
Doctrine of forum non conveniens did not require dismissal of 248 non-resident plaintiffs from mass products liability suit against manufacturer of prescription pain medication OxyContin; there was no federal multidistrict litigation handling OxyContin, research and development laboratories where OxyContin was created were located in forum, so that discovery of defendants' documents and deposition of their scientists was most easily accommodated in the forum, defendants' counsel was located in forum and all of plaintiffs, both residents and non-residents, were represented by law firm in forum.

[3] Courts 106 ⚷28

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k28 k. Discretion as to Exercise; Forum Non Conveniens. Most Cited Cases
Greater burden imposed on court by adding 248 out-of-state plaintiffs to the 29 in-state plaintiffs in coordinated cases against manufacturer of prescription pain medication OxyContin for products liability related to injuries allegedly suffered after ingestion of OxyContin was outweighed by overall savings of time and effort to judicial system, for pur-

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poses of forum non conveniens analysis; new plaintiffs' issues were similar and manufacturer's position on all cases was virtually identical.

[4] Courts 106 ⚷28

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k28 k. Discretion as to Exercise; Forum Non Conveniens. Most Cited Cases
Under forum non conveniens doctrine, it is within the discretion of the trial court to determine which controversies will be resolved in forum state. McKinney's CPLR 327.

[5] Courts 106 ⚷28

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k28 k. Discretion as to Exercise; Forum Non Conveniens. Most Cited Cases
Application of forum non conveniens doctrine should turn on considerations of justice, fairness and convenience, and not just on the residence of one of the parties, which is an important, but not dispositive, factor. McKinney's CPLR 327.

[6] Courts 106 ⚷28

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k28 k. Discretion as to Exercise; Forum Non Conveniens. Most Cited Cases
New York was a home state of manufacturer of prescription pain medication OxyContin, for purposes of forum non conveniens analysis in actions brought by out-of state plaintiffs for products liability related to injuries allegedly suffered after ingestion of OxyContin; even though manufacturer had offices in other jurisdictions as well as within New York and had transferred corporate headquarters to Connecticut, virtually all of manufacturer's witnesses were in New York and manufacturer still operated and conducted research and development of medication in New York. McKinney's CPLR 327.

[7] Constitutional Law 92 ⚷4003

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3999 Evidence and Witnesses
92k4003 k. Witnesses; Confrontation and Cross-Examination. Most Cited Cases

Pretrial Procedure 307A ⚷12

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak12 k. Constitutional and Statutory Provisions; Rules. Most Cited Cases
Statutory provisions demonstrated no basis for a finding of violation of due process rights of manufacturer of prescription pain medication OxyContin concerning purported inability to offer testimony of non-resident witnesses in various consumer actions alleging products liability related to injuries allegedly suffered after ingestion of OxyContin; pursuant to statutes, deposition could be conducted in deponent's home state on consent, by written questions under oath, with assistance of sister court by issuance of commission, or by letters rogatory, and such testimony would be allowed at trial if a witness were unavailable. U.S.C.A. Const.Amend. 14; McKinney's CPLR 3108, 3113, 3117(a), 4517.
****813** Chadbourne & Parke, LLP, New York City, for defendants.

The Sanders Firm, Mineola, for plaintiffs.

JOSEPH J. MALTESE, J.

***975** This court denies the defendants' motions to dismiss the non-New York plaintiffs based upon the New York Civil Practice Law and Rules (CPLR) § 327(a) because New York is the most convenient forum to adjudicate these coordinated pharmaceutical products liability mass tort cases.

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Procedural History

On July 8, 2005, the New York Litigation Coordinating Panel issued a Coordination Order that directed that this court coordinate all discovery and pretrial matters concerning all cases with the prescription pain medication OxyContin, pending before the courts of the various counties in New York. The coordination order applied to all OxyContin cases then in existence, as well as any future OxyContin lawsuits brought in New York state courts. Subsequent to the issuance of the coordination ****814** order, the plaintiffs' lawyers filed 1,117 law suits in this court of which 193 were brought by New York residents and the remaining 924 non-New York plaintiffs were from various states, as well as from Canada, Guam and the United Kingdom. In February 2006 the Purdue Defendants ("Purdue"), the manufacturer of OxyContin, moved this court to dismiss the 924 lawsuits brought by out of state plaintiffs on the ground of *forum non conveniens.* While that motion was *sub judice* the defendants conducted negotiations with the plaintiffs' attorneys to attempt a universal settlement for all of the 1,117 cases. However, on January 19, 2007, prior to the execution of the necessary settlement agreement documents, this court denied defendants' *forum non conveniens* motion to dismiss the out of state plaintiffs.[FN1]

FN1. *In Re OxyContin,* 15 Misc.3d 388, 833 N.Y.S.2d 357 [2007].

In October 2007 Purdue learned that only one plaintiff, Sharon Ann Andre-Drake, a resident of Davenport, Iowa, refused to execute the settlement documents. Subsequent to this revelation Purdue filed a motion for leave to renew its *forum non conveniens* motion because of a change of circumstances. Concurrently, Andre-Drake's counsel filed a motion to be relieved as counsel for a breakdown in communication with the client. This court issued an order dated January 11, 2008 relieving Andre-Drake's counsel and further ordered that her complaint would be dismissed unless within 30 days she obtained new counsel to continue the law suit. Ms. Andre-Drake never retained another attorney, nor did she ever communicate ***976** with this court. Based on that decision this court denied Purdue's motion for leave to renew their *forum non conveniens* motion as moot. Consequently, Purdue withdrew its appeal of the January 19, 2007 order denying dismissal of the out of state cases.

In August of 2007 the law firm of Sanders Viener Grossman LLP ("The Sanders firm") started another round of cases by filing 19 cases against Purdue, wherein only one of the plaintiffs was a New Yorker. Purdue moved to dismiss all of the 18 non-resident plaintiffs from these coordinate actions on the grounds of *forum non conveniens.* But before oral argument on those motions took place, the Sander's firm filed an additional 258 cases, bringing the total number of cases to 277, of which 29 are New York residents.

The plaintiffs have agreed to dismiss the actions against the corporate officers and the parties have agreed to have this issue of *forum non conveniens* decided for all of the now 248 non-resident plaintiffs in this second round of cases.[FN2]

FN2. Since all of the 1,117 cases in the original round of cases have been resolved, which were collectively known as "In re OxyContin," under Index Number 700000/2005, this second round of cases shall hereinafter be known as "In re OxyContin II" with a coordinated Index Number of 700000/2007.

Discussion

At the heart of the OxyContin pharmaceutical products liability actions before this court are allegations that as a result of the ingestion of OxyContin tablets the plaintiffs suffered severe physical and mental injuries to include nausea and addiction to OxyContin, which lead to numerous consequential damages to include, loss of jobs, divorce and suicide. While the plaintiffs did not ingest the drug at

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the same times, these cases are similar to other mass toxic torts. Judge Jacob Weinstein, of the U.S. District Court for Eastern District of New York, who is renowned for his handling of mass torts stated in the *DES* mass tort cases [FN3] that lawsuits such ****815** as those brought by the plaintiffs are governed by

> FN3. DES is the abbreviation for diethylstilbesterol, a synthetic estrogen prescribed to millions of pregnant women in the U.S. from 1938 to 1971.

> ... a doctrine analytically distinct from negligence in a conscious attempt to adapt tort law to the development of an economy of mass marked, mass produced consumer goods, ... modern cases and statutes operate within the parameters marked by Judge ***977** Cardozo even as they advance the cause of injured plaintiffs and seek to protect defendants against the unfair imposition of liability.[FN4]

> FN4. *In Re DES Cases,* 789 F.Supp. 552 [E.D.N.Y.1992] (internal citations omitted).

Judge Weinstein stated further that "[t]rue mass torts ... raise qualitatively different and more intractable problems. These cases typically involve the torts of a post-industrial age, the so-called mass toxic torts ... The litigation complexities raised by mass torts are legion." [FN5] By virtue of the complicated nature associated with mass tort litigation the legislature cannot create procedural rules for every possible issue that may arise during the course of a mass tort trial.

> FN5. *Id.*

Courts trying mass tort claims are placed in a position to innovate solutions for both plaintiffs and defendants that respect the rule of law and the principles of judicial economy. In the instant matter defendants argue that this court should grant their *forum non conveniens* motion, because not to do so would "... effectively created a nationwide Multidistrict (state) Litigation (MDL) venue for OxyContin litigation." [FN6] Defendants argue that should this court not find in their favor, the very core of our federal separation of powers between the state and federal judiciary will be violated. Yet, the defendants do not contest that this court has jurisdiction to decide this matter. Instead, the defendants argue that the standard of judicial scrutiny employed in evaluating claims of *forum non conveniens,* is greater than mere jurisdiction and venue issues.

> FN6. Defendants' Memorandum of Law in Support of Motion at 5.

The defendants cite to Justice Carol Robinson Edmead's trial court decision in *Jordan v. Pfizer, Inc.*[FN7] and Justice Martin Shulman's decision in *Wilson v. Pfizer, Inc.*[FN8] to support their position that New York courts should not entertain suits brought by non-resident plaintiffs against corporations that qualify as New York resident's for the purposes of litigation on the grounds of *forum non conveniens.* However, those cases are not applicable in the context of mass toxic torts. Unlike, the case at bar the *Jordan* case involved five nonresident plaintiffs, none of which was a New York resident who complained of the ill effects of Viagra, the male virility enhancing drug. Hence, in that instance, ***978** none of the cases needed to proceed in New York state courts just because the defendant, Pfizer, Inc., was a New York corporate resident.

> FN7. *Jordan v. Pfizer, Inc.* 8/17/2007 N.Y.L.J. 26, (col. 1) (N.Y. Cty. Sup. Ct., 2007).

> FN8. *Wilson v. Pfizer, Inc.,* 20 Misc.3d 1104(A), 2008 WL 2468538 (N.Y. Cty. Sup. Ct., 2008).

In Justice Shulman's decision in *Wilson,* which involved the cholesterol-lowering drug Lipitor, there was only one Georgia plaintiff involved in that case. Both Justices Edmead and Shulman were well

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within their discretion to dismiss those cases where no New York plaintiffs were present because dismissing those cases was dispositive of the entire litigation as none of them were part of a mass tort. ****816** Here, however, at least 29 New York plaintiffs will proceed to trial with or without the non-resident plaintiffs. Therefore, dismissing the non-resident plaintiffs will not dismiss the mass tort cases, but merely streamline them.

The defendants have recently disclosed that one of the Florida plaintiffs, who filed in this court has also filed a similar action with other plaintiffs in a Florida Circuit Court, to illustrate that residents of Florida and residents of other states can file suit in their own state and therefore, need not be included in this New York mass tort coordinated proceeding. While this may be true, having cases brought in the various county, district or circuit courts of the 50 states and the District of Columbia and Puerto Rico, along with the 91 U.S. District Courts is hardly an efficient means to dispose of mass tort cases and is contrary to the trend of how mass tort cases have been resolved.

Mass Torts Are Different

Mass torts involved similar claims against the same defendants and are usually coordinated before one judge to maximize judicial economy and the efficiencies of handling the discovery in an organized uniform manner, minimizing the duplication of deposing defendants' witnesses and the collection of universal data concerning the product.[FN9]

FN9. See, Manual for Complex Litigation, 4th Ed. § 22.8 et seq. (Fed. Jud. Center, 2006).

Mass torts generally are handled as either coordinated matters before one judge, pursuant to an order of the New York Litigation Coordinating Panel (LCP),[FN10] as with the case here, or, if appropriate, as a class action before one judge.[FN11] This is also true in the federal courts, where judicial economy dictates that similar cases pending in more than one federal district court be ***979** referred to the Panel on Multidistrict Litigation (MDL) for an order of coordination of all the cases before one judge.[FN12]

FN10. *See,* Uniform Rules for Trial Courts § 202.69(b)(3) et seq.

FN11. N.Y.C.P.L.R. § 901 and 902, et seq.

FN12. 28 USC § 1407.

[1] As Judge Weinstein pointed out mass tort litigation is different from litigation involving one or several plaintiffs, as was the case in *Jordan* and *Wilson.* A mass tort by its very nature is defined by the numerosity of plaintiffs with common defendants involving the same claims. If the specific facts of each individual claim are not "typical" of all the cases in the group, that may preclude a traditional class action law suit.[FN13] Indeed, in the first round of OxyContin cases, this court denied the application of five plaintiffs to establish a class action because none of the cases were "typical" of the other cases in the manner by which the several physicians prescribed the drug to each claimant and the disparate damages ranging from claims of addition to suicide. Consequently, those cases were *sua sponte* referred to the Litigation Coordinating Panel which, in turn, ordered that those cases and any other additional cases filed in any New York state court be coordinated before one judge in one county for discovery, summary judgment and possibly trials. Any trials would be conducted in the counties where the cases were originally filed or before the coordinating judge.[FN14]

FN13. *See, Hurtado v. Purdue Pharma,* 6 Misc.3d 1015(A), 2005 WL 192351 (Richmond Cty. Sup. Ct., 2005).

FN14. *Id.*

In New York, class actions are not generally employed in tort or mass tort actions.****817** Mass torts are instead coordinated pursuant to the New York

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Uniform Rules for Trial Courts.[FN15] The Rules consider whether there are common questions of fact or law, the costs to the parties, the saving of time, the risk of duplicative or inconsistent rulings, orders or judgments, the convenience of parties, witnesses and counsel, and the pendency of related matters in the federal and other state courts.[FN16]

FN15. *See,* N.Y. Unif. R., Trial Cts. § 202.69, et seq.

FN16. *Id.*

It is important to note at the outset, that these cases find themselves being litigated in this New York state court because the defendants vigorously opposed the original plaintiffs' counsel's application to coordinate the initial OxyContin cases before the Federal Judicial Panel on Multidistrict Litigation (MDL) to establish a single federal court to coordinate all of these matters nationwide. Since the defendants were successful in defeating the federal MDL application, there ***980** is no federal MDL court handling OxyContin.[FN17] In virtually every other similar pharmaceutical products liability mass tort cases there are federal MDL coordinating judges handling those cases.[FN18] Most importantly, even if there was a single coordinating federal court judge, that district court judge would still have the same logistical issues of conducting depositions in various states.

FN17. *In Re OxyContin Products Liability Litigation* (No. II) 395 F.Supp.2d 1358 (Jud. Panel on Multidistrict Lit., 2005).

FN18. The Federal MDL panel has assigned a single coordinating judge to handle the volume of the following pharmaceutical or medical device products liability cases:

Agent Orange; Showa Denko K.K. L-Tryptophan; Asbestos; Factor VII or IX Concentrate Blood Products; Orthopedic Bone Screw; Diet Drugs (Phentermine/Fenfluramine/Dexfenflura mine) (Phen Fen); Rezulin; Propulsid; Methyl Tertiary Butyl Ether; St. Jude Medical, Inc., Silzone Heart Valves; Sulzer Orthopedics, Inc., Hip Prosthesis and Knee Prosthesis; Phenylpropanolamine (PPA); Baycol; Serzone; Meridia; Prempro; Paxil; Zyprexa; Ephedra; Deep Vein Thrombosis; Accutane; Vioxx; Bextra and Celebrex; Guidant Corp. Implantable Defibrillators; Viagra; Medtronic, Inc. Implantable Defibrillator; Celexa and Lexapro; Ortho Evra; Aredia and Zometa; Human Tissue; Seroquel; Bausch & Lombe Inc. Contact Lens Solution; Fosamax; and the Kugel Mesh Hernia Patch.

[2] This court appreciates the concern of the defendants that this state court judge would be unduly burdened in handling a mass tort. Of course, the defendants' remedy to allow each of these cases to be re-initiated in the home state of the plaintiffs is somewhat disingenuous because that would defeat the efficiency achieved by coordinating similar cases in either a federal or state court. As to the burden on the New York courts, all of these cases are coordinated before one judge so that there is not a duplication of efforts in multiple courts and contradictory rulings by multiple judges. That is the very reason why similar cases pending in multiple courts of this state are coordinated before one judge.[FN19] In New York state courts at this time several judges are acting as coordinating judges in pharmaceutical mass tort cases that include numerous non-resident plaintiffs. Of course, where there is also a federal MDL coordinating some of the volume of cases is divided between the federal MDL coordinating judge and the state court coordinating judge. In the New York Bextra and Celebrex mass tort, products liability litigation in response to a motion to dismiss the non-resident plaintiffs, Justice Shirley W. Kornreich resolved that application by cooperating with the federal MDL coordinating****818** judge in California and

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the attorneys to handle all of the New York pending cases east of the Mississippi River, including Louisiana and Minnesota,***981** while the federal MDL coordinating judge would handle all of the New York cases west of the Mississippi River.[FN20] Here, no such accommodation can be reached because there is no federal MDL judge.

FN19. Uniform Rules for Trial Cts. § 202.69.

FN20. *See, In Re New York Bextra and Celebrex Products Liability Litigation* (N.Y. Cty. Sup.Ct. Index No. 560001/2005, August 2, 2006, J. Kornreich.)

[3] Adding 248 non-resident plaintiffs to the 29 New York plaintiffs in these coordinated cases may create a greater burden on this court by the volume of cases, however, the overall savings of time and effort to the judicial system far outweighs the burdens because the issues are similar and the defendants' position on all of the cases is virtually identical. Furthermore, the legislature and the courts have a long history in this state of governing business entities conducting business within its borders regardless of whether the plaintiff is a resident of this state.

In the realm of pharmaceutical products liability cases it is common that both federal and state courts act in concert to resolve litigation on such a wide scale. The alternative is to scatter the litigation of these similar cases to the various state and federal jurisdictions throughout the nation, which will create more costs to both plaintiffs and defendants and create disparate rulings on both procedural and substantive matters. While the defense tactic may be "to divide and conquer," that is against the state and national trend which is to aggregate and resolve these cases in a judicially efficient manner.

***Forum Non Conveniens* in New York**

The New York legislature's codification of the common law concept of *forum non conveniens* or inconvenient forum in CPLR § 327 which states in pertinent part:

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action ... [FN21]

FN21. CPLR § 327(a).

New York has long recognized the importance of adjudicating cases involving corporate entities operating within the boundaries of New York. Professor David D. Siegel in his treatise *New York Practice, Fourth Edition,* commented that Business Corporation Law: "Section 1314 ***982** should be deemed a *forum non conveniens* statute, although it has sometimes been referred to as going to subject matter jurisdiction." [FN22] The plain language of the statute suggests that the legislature anticipated that out of state plaintiffs may select New York courts as the forum to police the actions of corporate entities, both foreign and domestic, operating within this state. Therefore, even if this court was inclined to accept the defendants argument that they are not now domestic corporations, New York courts may still have the authority to adjudicate cases involving foreign corporations.

FN22. Siegel, N.Y. Prac. § 29, at 30 [4th Ed.] (internal citations omitted).

The defendants argue that the non-resident plaintiffs do not have a meaningful nexus with the state of New York to justify their choice of jurisdiction in this state. Defendants assert that each OxyContin plaintiff is unique in that each plaintiff ****819** requires unfettered access to certain witnesses including, each plaintiff's family, friends and doctors. Defendants strongly contend that the ap-

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pearance of these people during a trial is essential to fulfilling due process requirements.

In stark contrast, the plaintiffs' counsel strenuously oppose the defendants motion arguing that there is a substantial nexus between the defendants and New York to justify their choice of jurisdiction. To begin, the Purdue Frederick Company was incorporated in New York. The plaintiffs point out that at the time defendants created and marketed OxyContin to the public, their research and development facility was operating within the borders of New York. Counsel for the plaintiffs assert that aside from the defendants significant connections with New York, this court is best equipped to handle further OxyContin litigation because this court is well informed with the intricacies of this litigation from its previous experience with this matter. Moreover, there are several procedural devices to obtain the testimony of the necessary witnesses for these matters.

Judicial Discretion

[4] The New York Court of Appeals recognizeds that it is within the discretion of the trial court to determine which controversies will be resolved in this state:

> The question whether ... a suit should be entertained is one which is in the general committed to the discretion of the courts below [trial courts], to be exercised ***983** by reviewing and evaluating all the pertinent competing considerations.[FN23]

> FN23. *Varkonyi v. S.A. Empresa De Viacao Airea Rio Grandense (Varig),* 22 N.Y.2d 333, 292 N.Y.S.2d 670, 239 N.E.2d 542 [1968] (internal citations omitted).

The sentiments of the Court of Appeals is echoed by Professor Siegel:

> The conveniens doctrine is one of judicial discretion to be exercised by reviewing and evaluating all the pertinent competing considerations' ... It is mandatory in all cases, however, that all relevant considerations be weighed by the court.[FN24]

> FN24. Siegel, N.Y. Prac. § 28, at 30 [4th Ed.] (internal citations omitted).

The doctrine of *forum non conveniens* enjoys a long history in New York. In *Silver v. Great American Insurance Company,* the Court of Appeals evaluated a case in which a non-resident plaintiff from Hawaii sued a New York corporation authorized to do business in Hawaii. The non-resident plaintiff's complaint had two causes of action sounding in defamation and conspiracy. Specifically, the non-resident plaintiff alleged:

> ... that the defendant, in New York, Hawaii and elsewhere, conspired to injure and defame him and that, as part of the conspiracy, the defendant provided insurance protection, by means of a special libel and slander rider,' for person who spoke' of the plaintiff as being a rough technician,' intellectually dishonest,' and mentally sick.'[FN25]

> FN25. *Silver v. Great Am. Ins. Co.,* 29 N.Y.2d 356, 328 N.Y.S.2d 398, 278 N.E.2d 619 [1972].

[5] In this watershed decision the Court of Appeals reversed the judicial policy of rejecting *forum non conveniens* motions based solely on the residency of one of the parties to the action. In addressing the former rule concerning *forum non conveniens* the Court of Appeals stated:

> Further thought persuades us that our current rule-which prohibits the doctrine of forum *non conveniens* from being invoked if one of the parties is a New York resident-should be relaxed. Its application should turn on considerations****820** of justice, fairness and convenience and not solely on the residence of one of the parties. Although such residence is, of

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course, an important factor to be considered, *forum non conveniens* relief should be granted when it plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the ***984** parties.[FN26]

FN26. *Id.*

The language contained in *Silver* demonstrates that residence is an "important factor," but it is not the only factor to evaluate. Moreover, here there is no other single convenient forum-only the various sister state courts and the 91 U.S. district courts.

Islamic Republic of Iran v. Pahlavi

The plaintiffs and the defendants have both cited to the 1984 decision in the *Islamic Republic of Iran v. Pahlavi*[FN27] where the New York Court of Appeals held that there are several factors a trial court must consider when evaluating a *forum non conveniens* motion:

FN27. *Islamic Republic of Iran v. Pahlavi,* 62 N.Y.2d 474, 478 N.Y.S.2d 597, 467 N.E.2d 245 [1984].

> [a]mong the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit ... The court may also consider that *both* parties to the action are nonresidents ... And that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction ... No one factor is controlling ...[FN28] (emphasis added)

FN28. *Id.*

> "[t]he burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation."[FN29]

FN29. *Id.* at 479, 478 N.Y.S.2d 597, 467 N.E.2d 245.

The defendants point to the dismissal of the plaintiff's case in *Islamic Republic of Iran* as controlling on this court. But the facts of that case are not similar or analogous. Indeed, no deliberative state court would have ever retained such a case where a foreign government like the Islamic Republic of Iran, which was seeking to try Mohammed Reza Pahlavi, their former foreign head of state for the atrocities he allegedly perpetrated in Iran and the vast sums of money he allegedly stole while serving as the Shah of Iran. The facts in *Islamic Republic of Iran v. Pahlavi* are hardly analogous to residents of the various states of the United States, its commonwealths and territories suing an American pharmaceutical company in its home state for alleged torts and breaches of warranties committed within the United States. The facts in *Islamic Republic of Iran* are so ***985** dramatically different from the case at bar, that the conclusion that the plaintiff's case should be similarly dismissed, is not controlling.

[6] Notwithstanding the dissimilar facts, this court has applied the principal factors of *The Islamic Republic of Iran* to this case. Like many American corporations Purdue does have offices in other jurisdictions as well as within New York. But New York is where the Purdue Frederick Company was incorporated, as was Purdue Pharma, Inc. While the corporate headquarters was transferred to Connecticut, its research and development laboratories were still located in New York where OxyContin was created. Hence, New York may be treated as a home state ****821** of the defendants. Consequently, discovery of the defendants' documents and deposition of their scientists is most easily accommodated in New York. The overall judicial economy of using the defendants' documents collectively in one court that will control and limit the defendants' depositions to be taken for all cases pending in this court is an overwhelming savings of time and money.

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The defendants' counsel, the law firm of Chadbourne & Park, LLP, who is handling the OxyContin litigation, is located in New York and represents Purdue throughout the nation, regardless of where the case is filed. Moreover, all of the plaintiffs herein, both residents and non-residents, are represented by The Sanders Firm, a New York law firm.

Accordingly, it is logical that plaintiffs' counsel chose a New York state court as the forum to prosecute their claims considering that virtually all of the defendants' witnesses, coupled with the fact that defendants still operated and conducted the research and development of facilities of OxyContin within New York's border.

Procedural Factors

[7] While the plaintiffs and the defendants' officers and employees may be compelled to come to New York for a deposition or trial, an out-of-state, non-party may resist a New York Supreme Court subpoena to testify. In that event, a deposition may be conducted in the non-resident deponent's home state on consent or by written questions under oath or with the assistance of the court by the issuance of a commission to conduct a deposition out of state or by letters rogatory, where this state court seeks the assistance of a sister state court to compel the out-of-state ***986** non-party to cooperate in taking a deposition.[FN30] This process is similar to the federal practice known as a "letter of request."[FN31]

FN30. See CPLR § 3108.

FN31. See Fed. R. Civ. Pro. § 28(b).

Professor Siegel explained that commissions or letters rogatory are used to take testimony outside the state and are usually resorted to only when an ordinary deposition will not do the job."[FN32] A commission or letters rogatory may be sought by ordinary motion before this court. In describing the process for seeking a commission the Appellate Division, Second Department stated:

FN32. Siegel, N.Y. Prac. § 360, at 589-590 [4th ed].

Although preceding by deposition upon written questions is a preferred method for conducting an examination outside New York ... its efficacy, like a deposition upon oral questions, is also dependent upon the cooperativeness of the witness and the foreign court. Cognizant of this drawback, CPLR 3108 provides that a commission or letters rogatory may be issued where necessary or convenient' for the taking of a deposition outside of the State. The commission procedure is available where the notice procedure under the circumstances of the case or the place where the deposition is to be taken may be deemed impracticable or there is some doubt as to whether the deposition may be taken ... There will be occasions when the party seeking disclosure detects that the judicial imprimatur accompanying a commission will be necessary or helpful when the person he designates to conduct the deposition in accordance with CPLR 3113 seeks the assistance of the foreign court in compelling the witness to attend the examination.[FN33]

FN33. *Wiseman v. American Motors Sales Corp.,* 103 A.D.2d 230, 235, 479 N.Y.S.2d 528 [2d Dep't 1984].

****822** Furthermore, the legislature recognized that there may be occasions when a witness in a particular action may be unable to appear at the time of trial. To remedy these situations, the legislature specifically allowed for deposition testimony to be used at the time of trial when a witness is unavailable. CPLR § 3113(d) permits the parties to an action to conduct depositions by "telephone or other remote electronic means" to reduce the burdens of questioning witnesses***987** outside the borders of New York. The New York CPLR is very liberal in allowing the use of depositions by opposing parties. Indeed, CPLR § 3117(a)(2) allows a party's deposition to be used " for any purpose" by any adverse party without any foundation that the party is unavailable to testify. In addition, the traditional reas-

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ons of unavailability due to being out of the jurisdiction are also available under CPLR § 3117(a)(3). Moreover, CPLR § 3117(a)(4) allows the deposition of a medical practitioner to be utilized without the necessity of showing unavailability or special circumstances. While deposing treating physicians who are not parties to the action in New York state proceedings is a rare exception in the discovery phase of a tort case, video depositions are commonly used to capture the testimony of physicians so that the doctor need not appear for live testimony at a trial. In this case, the treating physicians would be the typical nonparty out-of-state witness. The logistics of capturing their testimony would be the same if those cases were pending in a federal or other state court.

With reference to the volume of cases and the need for the same witnesses to testify at each trial, CPLR § 4517 allows for the use of prior testimony in a civil action to be used and used again in other matters involving the same parties or their representatives and arising from the same subject matter.[FN34]

FN34. See, CPLR § 4517.

The aforementioned statutory provisions clearly demonstrate that the defendants purported due process argument concerning inability to offer the testimony of non-resident witnesses is without basis. It is clear that the state legislature not only anticipated that such instances may arise in the course of litigation, but adequately created remedies to those anticipated problems. The defense arguments that commissions are burdensome may be true, but not more burdensome than prosecuting these cases in 50 state courts and/or 91 United States District Courts.

Conclusion

It is the finding of this court that the defendants have not met their burden in proving that this court is an inconvenient forum to try the non New York plaintiffs' cases in this mass tort. Indeed, this court finds that given all the facts and circumstances, this court is a most convenient forum in which to present all of these cases.

***988** Accordingly, it is hereby:

ORDERED, that the defendant's motions to dismiss all of the non-New York plaintiffs' cases concerning the drug known as OxyContin now pending in this court are denied; and it is further

ORDERED, that all of the cases pleading and motions now filed against the defendants since August, 2007 shall be collectively known as "In re OxyContin II" under Index Number 700000/2007, without the need to refile same and without further filings fees; and it is further

ORDERED, that the counsel for the parties shall consult with each other for the purpose of revising and updating the Case Management Order Number 1 previously****823** executed by this court on April 1, 2006; and it is further

ORDERED, that the counsel for the parties shall appear in this court on **Friday, March 13, 2009 at 11:00 a.m.** for a preliminary conference, where a revised Case Management Order will be considered.

N.Y.Sup.,2009.
In re OxyContin II
23 Misc.3d 974, 881 N.Y.S.2d 812, 2009 N.Y. Slip Op. 29062

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Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

In re OXYCONTIN II	Index No. 700000/07 Hon. Joseph J. Maltese
Lourdes J. Rodriguez Carrasquillo and Eric Lalaite Purchased: -against- -Defendant- THE PURDUE PHARMA COMPANY; PURDUE PHARMACY L.P.; PURDUE PHARMA, INC.; THE PURDUE FREDERICK COMPANY; and THE P.F. LABORATORIES, INC.	Index No. 700003/07

NOTICE OF APPEAL

PLEASE TAKE NOTICE that defendants hereby appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from a Decision and Order of the Supreme Court, Richmond County (Justice Joseph J. Maltese) dated February 10, 2009 and duly entered by the Office of the Richmond County Clerk on February 23, 2009 (the "Order"), which denied defendants' motion, pursuant to CPLR Rule 327, to dismiss the

complaint herein and similarly denied the motions to dismiss the complaints of the other plaintiffs in this coordinated action listed in Appendix A to the Order.

Dated: New York, New York
March 24, 2009

CHADBOURNE & PARKE LLP

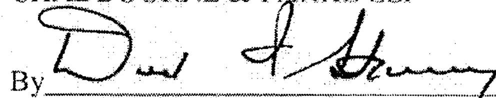
By 

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Exhibit C

To Be Submitted

New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

IN RE OXYCONTIN II

Case No. 2009-02849

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLANTS

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Richmond County Clerk's Index No. 700000/07

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and industries. In addition to the more than 5,000 Chamber members located in New York, countless other members do business within New York and are affected directly by the State's litigation climate. The Chamber advocates the interests of its members before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber and its members are particularly concerned with the issue of forum shopping and the detrimental effect it has on the ability of businesses to defend themselves against meritless litigation. This case – in which scores of non-resident plaintiffs want a New York court to try product liability claims that are factually unrelated to New York – falls squarely within this key area of concern. Indeed, the Chamber has been especially active on *forum non conveniens* issues, having submitted *amicus curiae* briefs in *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171 (R.I. 2008), and *Gridley v. State Farm Mutual Automobile Insurance Company*, 840 N.E.2d 269 (Ill. 2005), two cases (that are cited in this brief) in which the state's highest court reversed a trial court's refusal

to apply the *forum non conveniens* doctrine to dismiss claims with little or no connection to the forum.

PRELIMINARY STATEMENT

The court below was faced with 248 product liability claims from non-resident plaintiffs involving a pain medicine, Oxycontin. None of the key facts involving these claims supplied a connection to New York. For these plaintiffs, the medicine was marketed, prescribed, consumed, and allegedly caused damage outside of New York. Understandably, the Defendants-Appellants moved for *forum non conveniens* dismissal.

At least four basic principles undergird the doctrine of *forum non conveniens*: (1) a State has no legitimate interest in reaching beyond its borders to regulate extraterritorial conduct involving non-residents that has no connection to the State, (2) controversies should be addressed locally, where the conduct giving rise to the dispute occurred, (3) the judiciary's scarce resources should be preserved for use by the State's residents and taxpayers, and (4) litigants' ability to obtain evidence and present their cases should not be unfairly impeded by a plaintiff's choice of an inconvenient forum. Each of these principles would have been served if the court below had followed New York's traditional doctrine of *forum non conveniens* – as reflected in CPLR R. 327(a) and *Islamic Republic of*

Iran v. Pahlavi, 62 N.Y.2d 474, 478-79, 467 N.E.2d 245, 247-48, 478 N.Y.S.2d 597, 599-600 (1984) – and dismissed the non-resident plaintiffs' claims.

Unfortunately, it did not. Rather, relying on the faulty premises that "mass torts are different" and must have "consistent" rulings in matters of substantive law and procedure,[1] Justice Joseph J. Maltese created a "mass torts exception" to New York's *forum non conveniens* doctrine. Under his exception, a New York trial court adjudicating product liability claims involving at least some New York plaintiffs may conduct jury trials of non-residents' similar claims that have no connection with New York because "there is no other single convenient forum—only the various sister state courts and the 91 U.S. district courts." Decision (R. 16). To be clear, this is more than an MDL transferee who coordinates pretrial discovery. Justice Maltese has effectively appointed himself the nation's Oxycontin Litigation Czar who will try the claims of any State's claimants. This is – to say the least – unprecedented in New York law.

The opinion below is grounded on the misperception that it is part of "the trend of how mass tort cases have been resolved." Decision (R. 10). But it is not. A number of federal and state court judges have been tasked with managing discovery and other pre-trial issues through the *pre-trial* consolidation of cases,

---

[1] *In re OxyContin II*, 23 Misc. 3d 974, 881 N.Y.S.2d 812 (Sup. Ct. Richmond County 2009) (R. 10, 13). Citations to the decision below hereinafter will be to "Decision" and cite the page in Defendants-Appellants' Record upon which the cited language appears.

after which cases are remanded to the localities from whence they came. But no court or treatise – not even the *Manual for Complex Litigation* – has suggested that a state court may open its doors to all non-residents' suits involving a product and try them to judgment without the State having any meaningful connection to the claim.

Of course, every "mass tort" or mass product liability litigation will have New York residents by virtue of the size of this State's population. Accordingly, Justice Maltese's "mass torts" exception to the *forum non conveniens* rule is no small innovation. Rather, if allowed to stand, it would make New York the nation's Tort Court, and litigation tourists would flock here to bring their claims. Medicines, consumer products, asbestos, silica – every conceivable mass product liability claim would qualify for this new rule.

Such a result would increase congestion in New York's already overburdened courts, force many New Yorkers to serve jury duty in cases with no connection to New York, violate the interest of other States to have their disputes heard locally, and enmesh New York justices in innumerable, time-consuming conflict of laws problems. Making New York the nation's Tort Court also would burden defendants with CPLR restrictions that do not exist in courts that follow different procedural rules, and make the documents and witnesses in these cases either unavailable or extremely difficult to obtain.

For each of these independent reasons, the Court should forcefully reject any "mass torts" exception to New York's *forum non conveniens* doctrine and reverse the decision below.

STATEMENT OF QUESTION PRESENTED

Should New York adopt a "mass tort" or "product liability" exception to the common law doctrine of *forum non conveniens* and CPLR R. 327(a) that would allow New York courts adjudicating suits involving resident plaintiffs to also exercise jurisdiction over similar suits brought by non-residents whose claims are based primarily on conduct occurring outside New York, regardless of the public and private interest factors?

Answer: No. The court below erred by refusing to dismiss on *forum non conveniens* grounds the claims of non-resident plaintiffs despite the fact that the public and private interest factors all weighed heavily for dismissal, merely because the court below already was adjudicating similar, but unrelated, claims involving New York plaintiffs.

STATEMENT OF FACTS

The Chamber adopts the Defendants-Appellants' statement of facts.

ARGUMENT

I. THE PUBLIC INTEREST FACTORS WEIGH HEAVILY AGAINST MAKING NEW YORK THE NATION'S TORT COURT

Historically, *forum non conveniens* analysis typically has been broken down by courts into "public interest" factors and "private interest" factors. The "public interest" factors typically include: (1) administrative difficulties associated with court congestion; (2) the burden of jury duty when the community has no relation to the litigation; (3) the interest in having localized controversies decided at home; and (4) avoiding problems involving conflict of laws and the application of foreign law. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). Each of these factors weighs against the trial court's "mass torts" exception that would make New York the nation's Tort Court.

A. Courts Developed the Doctrine of *Forum Non Conveniens* Primarily to Preserve Public Resources

New York courts early on developed a doctrine to allow them to decline jurisdiction to preserve judicial resources for controversies related to New York. *See* Note, *New Limitations on Choice of Federal Forum*, 15 U. Chi. L. Rev. 332, 339 (1947) (collecting cases). At least as far back as the nineteenth century, New York courts recognized that New York has no legitimate interest in adjudicating disputes arising from conduct that occurred outside its borders:

> It is the well settled rule of this state that, unless special reasons are shown to exist which make it necessary or proper to do so, the courts

> will not retain jurisdiction of and determine actions between parties residing in another state for personal injuries received in that state. . . . The reason of the rule is obvious, – because the courts of this state should not be vexed with litigations between non-residents over causes of action arising outside of our own territorial limits. Our courts are not supported by the people for any such purpose. . . . It already appears that it is against the settled policy of the state to permit our courts to be used by non-residents for the redress of personal injuries received in the state of their domicile, unless special reasons are shown therefor.

Ferguson v. Neilson, 11 N.Y.S. 524, 524 (1st Dep't 1890); *see also Collard v. Beach*, 81 A.D. 582, 585-86, 81 N.Y.S. 619, 621-22 (1st Dep't 1903) (declining jurisdiction over a case where the tort occurred in another jurisdiction and involved nonresidents).

New York courts were far from alone in this sentiment. *See, e.g.*, *Disconto Gesellschaft v. Umbreit*, 106 N.W. 821, 823-24 (Wis. 1906) ("To hold that two foreigners may import, bodily, a cause of action, and insist, as a matter of right, that taxpayers, citizens, and residents shall await the lagging steps of justice in the ante-room while the court hears and decides the foreign controversy, seems, on the face of it, to be unreasonable, if not absurd.").

In early America, *forum non conveniens* was a recognized doctrine, but it was less seldom used because it often was difficult to obtain personal jurisdiction over defendants outside of the state where the conduct giving rise to a claim occurred. Joseph Dainow, *The Inappropriate Forum*, 29 Ill. L. Rev. 867 (1934). Over time, however, interstate commerce has grown, corporations have

expanded, and the doctrine of personal jurisdiction has evolved so that it is increasingly possible to obtain personal jurisdiction over a defendant far from where the conduct giving rise to the controversy actually originated. *Id.* at 868; Comment, *Forum Non Conveniens, A New Federal Doctrine*, 56 Yale L.J. 1234 (1946). The doctrine of *forum non conveniens* thus has grown in importance as means for a court that technically has jurisdiction to refuse to exercise it, where appropriate, in order to further comity and the preservation of the judiciary's resources. Today, at least 46 states have adopted the doctrine of *forum non conveniens*. *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1180 n.9 (R.I. 2008).

B. Adjudicating Non-Residents' Claims That Have No Connection To New York Will Significantly Increase Court Congestion and Expend Scarce Judicial Resources

Rest assured that if New York establishes itself as the nation's Tort Court, litigation tourists will clog New York courts. The experience in the Oxycontin litigation alone demonstrates this fact. As the trial court explained, taking the three waves of Oxycontin filings together, there were only 223 New York claimants, but 1,190 non-resident claimants. Decision (R. 7-10). Put differently, nearly 81% of the claimants in the Oxycontin litigation were out-of-state plaintiffs, and only 19% were in-state plaintiffs.

The State of Florida experienced first-hand the rush of litigation tourists after its Supreme Court issued *Houston v. Caldwell*, 359 So. 2d 858 (Fla.

1978), which announced a liberal *forum non conveniens* rule that commentators expressly said meant "that lawsuits filed in Florida courts can survive a *forum non conveniens* challenge that would result in dismissal at the federal-court level." *Kinney Sys., Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86, 88 (Fla. 1996) (citations omitted). Nearly 18 years after *Houston*, however, the Florida Supreme Court determined that having such a liberal *forum non conveniens* rule had "led to disturbing results" that required adopting a new, more restrictive, rule:

> Of greater concern, however, is the fact that the *Houston* doctrine is resulting in additional burdens imposed upon Florida's trial courts over and above those caused by disputes with substantial connections to state interests. We ourselves must continually ask the legislature for an expansion of judicial funding to meet the ever-increasing crush of litigation now coming into our courthouses. In light of the scarce tax-funded resources available for judicial activities, we must be mindful when doctrines adopted as common law now are leading to counterproductive results. . . . Today we find a strong public necessity requiring us to revisit our decision in *Houston*.
>
> * * *
>
> Nothing in our law establishes a policy that Florida must be a courthouse for the world, nor that the taxpayers of the state must pay to resolve disputes utterly unconnected with this state's interests.
>
> * * *
>
> . . . [W]e are persuaded that the time has come for Florida to adopt the federal doctrine of *forum non conveniens*. The use of Florida courts to police activities even in the remotest parts of the globe is not a purpose for which our judiciary was created. Florida courts exist to judge matters with significant impact upon Florida's interests, especially in light of the fact that the taxpayers of this state pay for the operation of the judiciary. Nothing in our Constitution compels the

> taxpayers to spend their money even for the rankest forum shopping by out-of-state interests.
>
> The rule in *Houston* led to this unintended result and is likely to lead to even further abuse of judicial resources in the future.

Kinney Sys., 674 So. 2d at 89-90, 93 (citations omitted).

As the State of Florida learned the hard way, it would be a colossally bad investment for New York to enter the business of adjudicating other States' tort cases. New York does not profit from adjudicating cases. Far from it. For example, in 2007, the court system collected fines and fees totaling $546.2 million, and an additional $29.9 million in attorney registration fees. New York State Unified Court System, *Annual Report* 2007 at 29. But the Legislature still had to appropriate $2.5 billion to cover the costs of the state judiciary for the 2007-2008 fiscal year. *Id.* By running a multibillion-dollar deficit, New York's judiciary can hardly be considered a revenue generator, and adding to the judiciary's caseload by becoming the nation's Tort Court would only compound the problem.

The United States Supreme Court cautioned that "[a]dministrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin." *Gulf Oil Corp.*, 330 U.S. at 508-09. Even without the hoards of litigation tourists that the trial court's opinion would invite, New York's courts have long been recognized as congested centers of litigation. *See, e.g.*, *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 361, 278 N.E.2d 619, 621,

328 N.Y.S.2d 398, 402 (1972) ("our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York"); *Fertel v. Resorts Int'l, Inc.*, 35 N.Y.2d 895, 897, 324 N.E.2d 360, 361, 364 N.Y.S.2d 891, 892 (1974) (affirming *forum non conveniens* dismissal, and observing that "there is little reason why New York, with its already overburdened courts, should add to the load"). Indeed, in 2007, then-Chief Judge Kaye reiterated the burden already being borne by New York's courts:

> Without question, the New York State courts are among the busiest and most productive in the nation. Yet judicial salaries remain frozen in time in 1999, when for a moment in recent history we achieved parity with our federal colleagues.

Judith S. Kaye, *The State of the Judiciary* at 2 (2007).

There were 4,535,532 cases filed statewide in New York's trial courts[2] in 2007. *Annual Report 2007* at 21. Civil filings increased 12% over the five-year period from 2003 to 2007. *Id.* There were 414,132 civil filings in New York Supreme Courts in 2007, and the average time from the filing of a request for judicial intervention ("RJI") to disposition was 27 months for standard civil cases and 30 months for complex cases. *Id.* at 22.

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[2] As the justices of the Second Department are well aware, trial courts would not be the only courts burdened by foreign tort claims. In 2007, the Second Department had 11,637 total dispositions, of which 9,833 were in civil appeals. The next closest department was the First Department, with 2,164 civil dispositions (or roughly 22% of those handled by the Second Department). *See Annual Report 2007* at 20.

If New York were to become the nation's Tort Court – as decisions of the court below would require – the additional caseload of foreign tort claims would vastly increase the stress on New York's already-overstretched judiciary and lengthen the delays litigants experience in obtaining final disposition of their cases. In 2007, then-Chief Judge Kaye warned about the negative consequences that such court delays have on the public interest:

> Undue delays – which translate into additional costs – can undermine public confidence in the justice system, and as a practical matter result in the denial of access to the courts for a significant segment of our society.

The State of the Judiciary (2007) at 15.

New York's courts repeatedly have found that adjudicating suits that have little or no contact with New York is simply unfair to New York taxpayers. *See, e.g.*, *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 483, 467 N.E.2d 245, 250, 478 N.Y.S.2d 597, 602 (1984) ("the taxpayers of this State should not be compelled to assume the heavy financial burden attributable to the cost of administering the litigation contemplated when their interest in the suit and the connection of its subject matter to the State of New York is so ephemeral"); *accord Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1188 (R.I. 2008) (reversing trial court's denial of *forum non conveniens* dismissal and noting that "we must also be cognizant of the strains such litigation places on Rhode Island's judicial resources. Courts across the country have experienced a burgeoning of products-liability and

negligence litigation, much of which . . . transcends geographical boundaries."); *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 679 (Tex. 2007) (reversing the trial court's denial of *forum non conveniens* dismissal because, *inter alia*, "it is unfair to impose upon the citizens of Cameron County the cost and administrative burden of a complex products-liability suit with no significant connection to Texas").

C. Forcing New Yorkers to Perform Jury Duty in Cases with Little Or No Connection to New York Would Be Fundamentally Unfair And Unduly Burdensome

The United States Supreme Court has recognized that "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). New York already imposes a tremendous burden on its residents to serve jury duty. As then-Chief Judge Kaye noted just last year: "In New York State, we call roughly 650,000 people for jury service, and conduct more than 10,000 jury trials, annually." Judith S. Kaye, *The State of the Judiciary 2008: A Court System for the 21st Century* at 18 (2008). Given that 81% of the litigants in the Oxycontin litigation were non-residents, it is reasonable to expect that the effect of adopting a rule establishing New York as the nation's Tort Court would require a large number of New Yorkers to serve as jurors on cases with little or no connection to this State.

The Supreme Court of Mississippi recently rejected the invitation to become the nation's Tort Court in a case brought by non-resident asbestos claimants. There, the trial court had refused to enter a *forum non conveniens* dismissal of the claims of non-resident plaintiffs, but the Mississippi Supreme Court reversed, recognizing the burden that being the nation's Tort Court would place on the State's citizens and its resources:

> The courts of Mississippi will not become the default forum for plaintiffs seeking to consolidate mass-tort actions. To allow otherwise would waste finite judicial resources on claims that have nothing to do with the state. Each trial requires the empaneling of Mississippians as jurors and the use of Mississippi tax dollars. These resources should be used for cases in which Mississippi has an interest. Therefore, we find Mississippi lacks the necessary interest to keep this case here.

3M Co. v. Johnson, 926 So. 2d 860, 866 (Miss. 2006).

D. The Interest in Having Local Controversies Decided at Home Weighs Strongly Against New York Becoming the Nation's Tort Court

The United States Supreme Court has long recognized that communities benefit from adjudicating notable cases at home, where their residents can see the justice system work. *See, e.g.*, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947) ("In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.").

Indeed, our federalist system is premised on States acting locally; States have a strong interest in regulating conduct within their borders and adjudicating disputes that impact their residents. Conversely, States have no legitimate interest in acting extraterritorially where their residents are not impacted. Even in contexts outside of the exercise of jurisdiction, courts have recognized that a State's legitimate concern involves what happens within its borders, and that it has no legitimate interest in regulating extraterritorial conduct. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003) (generally a State has no legitimate concern in punishing unlawful acts occurring outside of its borders; observing that it is "[a] basic principle of federalism . . . that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572-73 (1996) ("Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions."); *cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (as a constitutional matter, a State must have significant contacts with claims in order to have an interest in applying its law, and where a State lacks such an interest in claims unrelated to the State, it is unconstitutionally unfair and arbitrary to apply the State's law).

Simply put, New York has no interest in adjudicating a dispute involving non-residents where, as here, the relevant conduct did not occur within the State. Such disputes should be adjudicated locally, where the relevant conduct occurred and the evidence and witnesses remain.

E. The Considerable Conflict of Laws Problems Inherent in Adjudicating Non-Residents' Product Liability Claims Weigh Heavily Against New York Becoming the Nation's Tort Court

If Justice Maltese's "mass tort" exception to *forum non conveniens* were affirmed, justices around the State regularly would be asked to interpret and apply the laws of *every* State, expending scarce time and energy on issues beyond the ken of lawyers whose expertise is New York law. Indeed, one of the fundamental premises of the *forum non conveniens* doctrine is that it makes sense to have courts apply local law, "rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251 (1981) ("The doctrine . . . is designed in part to help courts avoid conducting complex exercises in comparative law. . . . [T]he public interest factors point towards dismissal where the court would be required 'to untangle problems in conflict of laws, and in law foreign to itself.'") (citing *Gulf Oil*). It is abundantly clear that where, as here, New York has no significant connection to the underlying dispute, it cannot – consistent with the Constitution – apply its own law to the

claims of non-residents where the law of their residence differs from New York law. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985).

Mass tort law and product liability law are constantly evolving. They differ from state to state – even in the nuances of negligence[3] – and involve fundamental policy choices about what activities to encourage or discourage, and how to compensate people who are injured. Where, as here, New York has no interest in the underlying dispute, basic principles of comity suggest that New York courts should refrain from wading into the interpretation and application of such policy-laden law. *Cf. Coca-Cola Co. v. Hamar Bottling Co.*, 218 S.W.3d 671, 686 (Tex. 2007) (where the suit did not affect forum residents, but rather impacted consumers in other states, comity required the trial court to abstain from applying the other states' antitrust laws because "when the forum court must determine policies that broadly impact the public of another state in order to adjudicate rights claimed under that state's statutes, interstate comity is protected by abstention, not enforcement").

Justice Maltese's opinion reflects a desire to achieve absolute consistency in rulings of both substance and procedure. Decision (R. 12) ("all of these cases are coordinated before one judge so that there is not . . . contradictory rulings by multiple judges"), (R. 14) ("[t]he alternative is to scatter the litigation of

[3] *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300-02 (7th Cir. 1995).

these similar cases to the various state and federal jurisdictions . . . and create disparate rulings on both procedural and substantive matters").[4]

But for one court to arrogate to itself the power to decide *all* cases regarding a product for consistency's sake ignores the very nature of the laboratory that is our federalist system. As the United States Supreme Court has recognized, "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979). Indeed, each judge, each jury, and each state's common and statutory law brings its own set of tools to bear in adjudicating product liability cases and the policy questions they present.

As Judge Richard Posner explained in the seminal case of *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995), our "decentralized process of multiple trials, involving different juries, and different standards of liability in different jurisdictions" is not designed to promote consistency. Rather, as the sample size of trials from across the country continues to become more robust, patterns emerge that represent a "maturing of judgment" that may allow the

[4] To the extent that Justice Maltese's opinion's advocacy of "consistent" rulings would result in a New York court imposing its own policy and regulatory choices on conduct occurring in other States, that would be beyond New York's power in a federalist system. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) ("While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.").

parties to value the cases and foster informed settlements. *Id.* at 1300. Artificially altering this process merely to achieve "consistency" is certainly not New York law or within New York's legitimate interest.

II. THE PRIVATE INTEREST FACTORS WEIGH HEAVILY AGAINST NEW YORK BECOMING THE NATION'S TORT COURT

The "private interest" factors typically taken into account in *forum non conveniens* analysis include: (1) the burden on the defendant that is unnecessary to the plaintiff's own right to pursue his remedy; and (2) the relative ease of access to sources of proof and the availability of compulsory process for obtaining attendance of unwilling witnesses. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). Each of these factors weighs heavily against establishing New York as the nation's Tort Court.

A. New York's CPLR May Limit Discovery Procedure in Ways that Negatively Impact Litigants' Preparation and Presentation of Their Case

If New York were to become the nation's Tort Court, it effectively would be exporting its own CPLR to govern civil procedure in cases that otherwise would be governed by different procedural rules. The differences in these procedural rules can have a dramatic impact on how the parties prepare and present their respective cases. Of course, the opinion of the court below does not consider the impact of imposing New York's CPLR on litigants who otherwise would conduct discovery under civil procedure systems that, for the most part, resemble

the Federal Rules of Civil Procedure. And it certainly does not articulate any legitimate interest that New York could have in altering the procedure that otherwise would govern these foreign-based claims.

New York's CPLR is generally considered to be more restrictive than the Federal Rules and their state counterparts. *See* David S. Siegel, *New York Practice* § 616(15) (4th ed. 2005). These differences can put litigants in New York courts at a distinct disadvantage *vis-à-vis* where they would be in other courts. *See generally id.* at §§ 636-39. For example:

- *Expert Depositions:* Unlike the Federal Rules of Civil Procedure, the CPLR generally does not permit parties to depose testifying expert witnesses without a court order, and then only upon a showing of "special circumstances." *Compare* CPLR § 3101(d)(1)(iii) *with* Fed. R. Civ. P. 26(b)(4)(A). Moreover, the expert reports obtained under the Federal Rules and their state counterparts generally are much more detailed than anything that may be required by New York courts. *See generally New York Practice* § 637. Given that product liability suits involving medicines typically involve a battle of the experts, this "procedural" difference has dramatic practical effect. Indeed, in most Federal Rules jurisdictions, the defendant may at least attempt to avoid trial by bringing a summary judgment motion premised on the

inadmissibility of the expert's testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) or *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). But in New York, without the discovery tools of adequate expert reports and depositions, such motions become next to impossible to make.

- *Non-Party Discovery:* In product liability suits involving defenses of product misuse or abuse – like Oxycontin litigation – non-party witnesses can be crucial to the defense of the case. Indeed, Defendants-Appellants' brief highlights the importance of testimony from family, friends, neighbors, and law enforcement in establishing intentional substance abuse and suicidal behavior in Oxycontin litigation. (Def. Br. at 27-30, 43-44, 48-52.) But a party seeking discovery from a nonparty under New York's CPLR must, under certain circumstances, "state the 'circumstances or reasons' warranting discovery from such nonparty witness." *Tenore v. Tenore*, 45 A.D.3d 571, 571, 844 N.Y.S.2d 704, 704 (2d Dep't 2007) (quoting CPLR § 3101(a)(4)) (internal citations omitted). The Federal Rules contain no similar requirement. Professor Siegel notes that "this freer availability of discovery from nonparties [under the federal rules] is often cited as a factor when a lawyer with a choice of forum chooses the federal court." *New York Practice* § 637.

- *Interrogatories vs. Depositions:* In certain negligence actions, the CPLR requires a party to choose between deposing the opposing party or serving interrogatories on them. *See* CPLR § 3130(1). The Federal Rules contain no similar restriction.

- *Extraterritorial Discovery:* As Professor Siegel explains, "[t]he use of [extraterritorial discovery] devices is freer in the federal courts, where it is not necessary to show, when applying for a commission or letter of request, that a conventional deposition would be impractical or inconvenient. That kind of showing may be required in a New York court." *New York Practice* § 638 (footnotes, internal quotation marks omitted).

- *Inevitable Delays:* In New York practice, discovery is stayed automatically during the pendency of motions to dismiss and motions for summary judgment. CPLR § 3214(b). And interlocutory orders may be appealed as of right. That is not the case in most systems based on the Federal Rules. Accordingly, imposing New York's procedural rules on foreign-based claims is likely to add to significant delays to the litigation.

Applying New York's procedural rules to foreign-based cases fundamentally alters litigants' decision calculus, but serves no legitimate interest of

New York State. This factor weighs heavily against adopting Justice Maltese's "mass torts" exception to the traditional *forum non conveniens* doctrine.

B. Where, as Here, Witnesses and Documents Are Located Outside New York, *Forum Non Conveniens* Should Apply

In the cases subject to this appeal, the witnesses *and* the documents lie outside of New York. And these are product liability cases involving medicines, where the learned intermediary doctrine will play a major role. That means key witnesses (e.g., treating physicians,[5] pharmacists) and key documents (e.g., medical records) are outside the subpoena power of the court below and may be unavailable for trial. Moreover, as the Defendants-Appellants' brief demonstrates, issues of product misuse and abuse are key defenses in Oxycontin cases, and thus a variety of non-parties (e.g., law enforcement personnel, friends, and neighbors) may be necessary to prove that the plaintiff intentionally abused the pain medicine. One can hardly imagine that these are eager witnesses who will volunteer to come

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[5] Even if the physicians would agree to travel to New York, courts have found that the necessary inconvenience to their patients and communities is a public interest factor weighing against retaining the case. *See, e.g.*, *In re Aredia & Zometa Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 17906, at *12 (M.D. Tenn. Mar. 6, 2008) ("Even if the [medical] witnesses need not be compelled to testify, . . . which the Court finds most unlikely, the inconvenience imposed upon them by requiring them to travel from their home states . . . weighs in favor of transferring the cases"); *Vista Healthplan, Inc. v. Amgen, Inc.*, 2007 U.S. Dist. LEXIS 85149, at *18 (C.D. Cal. Nov. 13, 2007) ("[E]ven if the . . . prescribing physicians agree to travel to California voluntarily, they will still be inconvenienced by having to travel to California, and so will their patients back [in the physicians' home states]."); *Bridgeman ex rel. Bridgeman v. Bradshaw*, 405 F. Supp. 1004, 1007 (D.S.C. 1975) (transferring the case to the doctors' district because the physicians' convenience is "important to the community and to their attention at a hospital where their services are of great value and moment").

to New York; yet they are beyond the subpoena power of the court below. To secure any form of testimony, Defendants-Appellants must endure the costly and cumbersome process of obtaining commissions from the court below, filing a foreign action to secure issuance of the subpoenas, and then arranging for personal service.

The United States Supreme Court has recognized that the alternatives to live testimony – such as reading a deposition taken in another state – are inferior to the ability to call a live witness and have the jury contemporaneously evaluate his or her credibility. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947) ("Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury, or most litigants."); *accord 3M Co. v. Johnson*, 926 So. 2d 860, 865 (Miss. 2006) (holding that *forum non conveniens* dismissal should have been granted in an asbestos product liability case because, *inter alia*, plaintiffs' doctors, medical records and employment information all were outside the State, creating difficulties for the defendant to subpoena them and for the court to compel their production); *In re Aredia & Zometa Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 17906, at *13 (M.D. Tenn. Mar. 6, 2008) ("Trial by videotape is simply not preferable to live examination in front of a jury"); *In re Iridium Operating LLC*, 373 B.R. 283, 295 n.3 (Bankr. S.D.N.Y. 2007)

(acknowledging that a videotaped deposition was possible, but observing that "there is no substitute for observing the demeanor of the witnesses who are testifying in person").

As one court recently recognized, "[a] significant drawback of videotaped testimony is that 'counsel cannot revise their examination to take account of unexpected developments at trial . . . .'" *See Wilson v. Pfizer, Inc.*, 20 Misc. 3d 1104(A), 2008 WL 2468538, at *5 (Sup. Ct. N.Y. County June 13, 2008) (citation omitted), *appeal docketed* (1st Dep't July 17, 2008).

The private interest factors and the public interest factors all compel the conclusion that the court below erred in refusing to apply *forum non conveniens* to dismiss the non-residents' claims. Just a few years ago, the Illinois Supreme Court reached the same conclusion in *Gridley v. State Farm Mutual Automobile Insurance Company*, 840 N.E.2d 269 (Ill. 2005). There – unlike in this appeal – the defendant was even headquartered in Illinois. Nevertheless, all of the remaining contacts pointed to Louisiana: the named plaintiff was a Louisiana resident, the transaction had occurred in Louisiana, the harm was allegedly suffered in Louisiana, the witnesses and documentary evidence were in Louisiana, and Louisiana law clearly applied. After weighing the public and private interest factors, the Illinois Supreme Court concluded:

> Based on the foregoing factors, we find that the circuit court abused its discretion in denying State Farm's motion based upon *forum non*

> *conveniens*. Balancing all the relevant factors, it is clear that those factors strongly favor dismissal in favor of a Louisiana forum . . . .

Gridley, 840 N.E.2d at 277; *accord Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1188 (R.I. 2008) (reversing trial court's denial of *forum non conveniens* dismissal); *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 679 (Tex. 2007) (same); *3M Co. v. Johnson*, 926 So. 2d 860, 866 (Miss. 2006) (same).

The facts of this appeal command the same result. This Court should forcefully reject the invitation of the court below to craft a "mass tort" exception to the standard *forum non conveniens* doctrine in New York. The failure to do so clearly will foster continued increases in filings by non-resident plaintiffs, and threatens to fundamentally alter New York jurisprudence on this important issue.[6]

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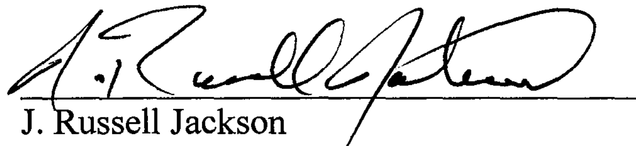
[6] Justice Maltese's decision below is the primary authority relied upon by plaintiffs in an appeal pending in the First Department, *Avery v. Pfizer Inc.*, Index No. 115492/07 (1st Dep't). There, the trial court – which was presiding over product liability claims arising from use of a medicine – had considered all of the *Pahlavi* factors and granted *forum non conveniens* dismissal. *See Wilson v. Pfizer, Inc.*, 20 Misc. 3d 1104(A), 2008 WL 2468538 (Sup. Ct. N.Y. County June 13, 2008), *appeal docketed* (1st Dep't July 17, 2008).

CONCLUSION

For the reasons stated herein, the Chamber respectfully requests that this Court reverse the decision below and dismiss the claims of the non-resident plaintiffs pursuant to CPLR R. 327(a) and the long-standing doctrine of *forum non conveniens*.

Dated: September 24, 2009
New York, New York

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 670.10.3(f)

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