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

In Re OxyContin II

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SECOND DEPARTMENT

REPLY AFFIRMATION OF J. RUSSELL JACKSON IN SUPPORT OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA'S MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE*

Appellate Division No.
2009-02849

Richmond County Index No.
700000/07

J. RUSSELL JACKSON, hereby affirms, under penalty of perjury pursuant to CPLR 2106, as follows:

1. I am a member of the law firm 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. I submit this Reply Affirmation in response to Melissa C. Ingrassia's Affirmation in Opposition to the Chamber's Motion for Leave to Appear as *Amicus Curiae*.

2. Ms. Ingrassia cites 22 N.Y.C.R.R. 500.11(e) as providing the standard governing the Chamber's motion in this Court. It does not. It is, instead, a rule of the Court of Appeals. Nevertheless, the criteria within this rule counsel for

liberally granting motions for leave to file friend-of-the-court briefs. Indeed, for the five-year period from 2004 through 2008, the New York Court of Appeals used this rule to grant such motions 94.7% of the time. Court of Appeals of the State of New York, *Annual Report of the Clerk of Court 2008* at Appendix 7 (available at: http://www.nycourts.gov/ctapps/news/annrpt/AnnRpt2008.PDF).[1] And this was in a court that typically received over 100 *amicus* submissions per year. *Id.* Notably, the Court of Appeals has routinely granted the Chamber leave to file friend-of-the-court briefs. *See, e.g.*, *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 863 N.E.2d 1012, 831 N.Y.S.2d 760 (2007); *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 857 N.E.2d 1114, 824 N.Y.S.2d 584 (2006).

3. Rule 500.11(e) suggests leave should be granted where: (1) the parties are incapable of a full and adequate presentation of the arguments, (2) the proposed *amicus* "would invite the court's attention to the law or arguments which might otherwise escape its consideration," or (3) the "*amicus curiae* briefs would otherwise be of special assistance to the court."

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[1] The practice in the federal courts of appeals is in accord: they grant leave to file *amicus* briefs in most circumstances. *See* Eugene Gressman, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop, Edward A. Hartnett, SUPREME COURT PRACTICE 735 (9th ed. 2007) ("Virtually all timely motions to file an amicus brief [in the U.S. Supreme Court] are granted in any event, and a party does not want to appear to the Court as having been fearful of the content of the proffered amicus brief or unreasonable in withholding consent."); Michael E. Tigar and Jane E. Tigar, FEDERAL APPEALS: JURISDICTION AND PRACTICE 181 (3d ed. 1999).

4. Ms. Ingrassia premises much of her opposition to the Chamber's motion on the competence of Appellant's counsel. But no one here invokes Rule 500.11(e)'s first criterion or challenges the capability of Chadbourne & Parke.

5. Rather, the second and third criteria apply to the Chamber's motion. Contrary to Ms. Ingrassia's summary assertions that the Chamber's proposed brief presents nothing new, in fact it is the only brief to cite for this Court the relevant policymaking experience of other states on the *forum non conveniens* issue, and it is the only brief to catalogue the ways in which imposing New York's CPLR on cases with foreign plaintiffs will deprive product liability defendants of procedural tools available to them in other states – such as expert depositions – that may be key to the defense of the action. It also provides valuable information on how the broader impact of an affirmance of the opinion below would burden the New York court system. These are issues that might otherwise escape the Court's attention, and which will be of special assistance to the Court.

6. Ms. Ingrassia argues that the proposed *amicus* briefs contain "misstatement[s] of facts regarding this litigation" that Appellees should not have to address. But the facts in the Chamber's proposed brief present no additional burden to Ms. Ingrassia because they are derived solely from the trial court's opinion below and the Appellant's brief; she will have to respond to them regardless of whether the Chamber's motion is granted.

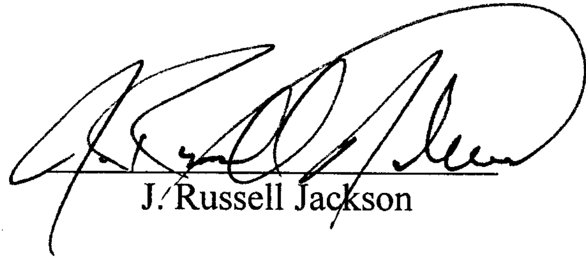
7. Ultimately, the decision that the Court renders in this case will transcend the particular factual circumstances presented by this dispute and will be applied to cases involving many other business defendants. Many of those businesses are Chamber members, and they deserve the right to be heard on a decision that will directly impact them and could result in a vast increase in forum shopping.

8. Ms. Ingrassia's affirmation confirms the seriousness of the Chamber's forum shopping concern about trial courts which retain cases that have no meaningful contact with New York. After making the specious argument that there could be no forum shopping because plaintiffs' counsel also brought some New York residents' claims in New York, Ms. Ingrassia admits in paragraph 7 of her affidavit that counsel chose their forum based on the trial court's prior success in forcing over 1,100 other OxyContin cases into settlement – the vast majority of which involved non-New York plaintiffs. Decision (R.2) (of 1,117 cases settled, defendant had unsuccessfully moved to dismiss 924 of them on *forum non conveniens* grounds). That is classic forum shopping, and the Chamber's proposed brief addresses how that will impact New York courts and business defendants.

WHEREFORE, because the Chamber's proposed brief addresses law and arguments that might otherwise escape the Court's attention and will otherwise be of special assistance to the Court, the undersigned respectfully requests that the

Chamber's Motion for Leave to Appear as *Amicus Curiae* be granted in all respects.

Dated: New York, New York
October 29, 2009



J. Russell Jackson

AFFIDAVIT OF SERVICE

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

Julie M. Tamburro , being duly sworn, deposes and says:

1. That deponent is over eighteen years of age, not a party to the action and employed by Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY 10036.

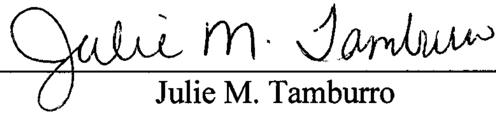
2. That on the 29th day of October 2009, deponent served a true copy of the **Reply Affirmation of J. Russell Jackson in Support of the Chamber of Commerce of the United States of America's Motion for Leave to Appear as *Amicus Curiae*** *dated October 29, 2009* by first-class mail by depositing same in a post-paid properly addressed envelope, in an official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York upon:

Meryl Sanders Viener, Esq.
Sanders Viener Grossman LLP
100 Herricks Road
Mineola, NY 11501

Donald I. Strauber, Esq.
Chadbourne & Parke LLP
30 Rockefeller Plaza
New York, NY 10112

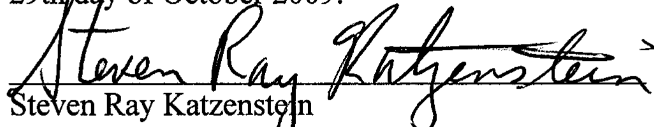
David W. Ichel, Esq.
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017

Aaron D. Twerski
Irwin and Joel Cohen Professor of Law
Brooklyn Law School
250 Joralemon Street, Room 715M
Brooklyn, NY 11201



Julie M. Tamburro

Sworn to before me this
29th day of October 2009.



Steven Ray Katzenstein
Notary Public, State of New York
No. 01KA4745340
Qualified in Queens County
Certificate Filed in New York County
Commission Expires June 30, 2011

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SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

COUNSEL TO AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

FOUR TIMES SQUARE
BOROUGH OF MANHATTAN
CITY OF NEW YORK
NEW YORK 10036-6522
(212) 735-3000