

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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**IN RE NEW YORK CITY ASBESTOS
LITIGATION**

**ALL CASES IN THE FOLLOWING FIFO TRIAL
GROUPS:**

RECOMMENDATION OF THE
SPECIAL MASTER

JUNE 2009 FIFO GROUP
JULY 2009 FIFO GROUP
AUGUST 2009 FIFO GROUP
SEPTEMBER 2009 FIFO GROUP
NOVEMBER 2009 FIFO GROUP
DECEMBER 2009 FIFO GROUP

-against-

A.W. CHESTERTON COMPANY, et al.

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Weitz & Luxenberg (“Weitz”) served more than 40 defendants with notices to videotape trial testimony depositions of Drs. Barry Castleman and Steven Markowitz to be taken in 137 NYCAL cases in five FIFO clusters and to be used at the trials of these cases in lieu of live testimony. This proposed procedure is unprecedented in NYCAL.

Defendants object to the deposition notices and request that the depositions be cancelled because, among other reasons, the proposed pre-recorded trial testimony would deprive them of their rights to cross-examine the expert witnesses live at trial and, under the circumstances present here, the depositions would create an undue and costly burden on defendants.

Weitz claims that allowing the depositions to go forward will accomplish two purposes: 1) it will reduce the number of duplicative expert witness depositions to be taken in these 137 cases and in NYCAL cases generally and; 2) it will also ensure the availability of the testimony of these two expert witnesses in case they are unable to testify live at certain trials given the large volume of Weitz cases that have been sent and are still being sent to NYCAL trial judges.

With respect to Weitz’s claim that its proposal will avoid duplicative expert witness depositions, duplicative depositions of expert witnesses are prohibited in NYCAL. (CMO Sect. X.C) Drs. Castleman and Markowitz have testified numerous times and it is unlikely that I would permit either to be deposed again absent some extraordinary situation.

Weitz's assertion that the pre-recorded trial testimony depositions will avoid the risk of these experts being unavailable at trial when so many Weitz & Luxenberg cases are pending before so many trial judges is unavailing. First, defendants assert and Weitz concedes that these proposed videotaped depositions may never be admissible under New York law. *See generally* CPLR 3117; *see, e.g., Cohen v. City of New York*, 111 A.D.2d 604 (1st Dep't 1995) (expert who is "too busy" to attend trial may not testify via videotape). *See also Dailey v. Keith*, 1 N.Y.3d 586 (2004) (voluntary absence from the jurisdiction fails to satisfy CPLR 3117). Second, discovery in many of these cases is incomplete, yet Weitz proposes that defendants take trial testimony prematurely. Third, defendants have the right to live cross-examination at trial.

Most significantly, Weitz urged that 75 FIFO trial cases per month be assigned to judges and in so urging asserted that they could handle the large volume of trials. Drs. Markowitz and Castleman are two of many state-of-the-art-experts available to them. They do not give plaintiff-specific testimony. If Weitz wants to ensure that they have sufficient experts for multiple concurrent trials, their remedy is to retain more state-of-the-art expert witnesses to be available to testify at more trials and to request trial dates that coincide with their witnesses' schedules. Defendants have the same burden, as they share various expert witnesses with their colleagues on a national scale. In the event expert witness availability issues arise during trial, there are various practical resolutions judges routinely utilize (e.g., taking witnesses out of order, briefly adjourning the trial to accommodate witness schedules, having backup witnesses). In fact, on many occasions Weitz has listed multiple expert witnesses for a single purpose, stating they will call the witness who happens to be available at time of trial.

Weitz & Luxenberg should not be permitted to pre-record its expert witness trial testimony any more than it should be permitted to pre-record an opening statement on the ground that it wishes to ensure that the opening statement can be presented to the jury in the event that none of Weitz & Luxenberg's trial lawyers is available on the opening day of trial. I remind the parties that when certain defendants claimed that they could not cover the increasing number of depositions necessitated by the increased number of trial cases, I instructed defendants to hire more staff. The solution for plaintiffs is no different.

Additionally, allowing the two expert trial testimony depositions to go forward in these 137 cases with over 40 defendants, all of whom would have the right to cross-examine the witnesses, would place an unreasonable and costly burden on defendants, especially given that the purported trial testimony would almost certainly not be admissible at trial anyway.

Upon hearing the arguments from Weitz & Luxenberg and counsel for defendants, it is hereby declared that Weitz & Luxenberg's January 15, 2010 Notice of Videotaped Deposition of Dr. Steven Markowitz and January 25, 2010 Notice of Videotaped Deposition of Dr. Barry

Castleman, for the cases in the FIFO trial groups listed in the above caption and individually listed in the notices are null and void and that the depositions may not go forward.

SO ORDERED

_____/s/____

Laraine Pacheco
Special Master
February 8, 2010