Case No. B318822

IN THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

SCOTT PEEBLES,

Plaintiff and Respondent,

v.

SIMMONS HANLY CONROY, LLC,

Defendant, Appellant and Cross Respondent,

J-M MANUFACTURING COMPANY, INC.,

Respondent and Cross-Appellant

Los Angeles Superior Court, Case No. 20STCV18513
Hon. Armen Tamzarian

APPLICATION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT AND CROSS-APPELLANT J-M MANUFACTURING COMPANY

EIMER STAHL LLP
*Robert E. Dunn (SBN: 275600)
Florence Liu (SBN: 338324)
99 South Almaden Boulevard, Suite 600
San Jose, CA 95113
Tel: 408.889.1690
rdunn@eimerstahl.com
fliu@eimerstahl.com

Attorneys for Amicus Curiae
Chamber of Commerce of the United States of America

Application to File Amicus Curiae Brief

Amicus curiae the Chamber of Commerce of the United States of America (the "Chamber") hereby applies pursuant to California Rules of Court 8.200(c) and this Court's inherent powers, for leave of Court to file the attached amicus curiae brief in support of J-M Manufacturing, Inc. (See *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1595 ["Courts have inherent power, separate from any statutory authority, to control the litigation before them and to adopt any suitable method of practice, even if the method is not specified by statute or by the Rules of Court."].) "Amicus curiae presentations assist the court by broadening its perspective on the issues raised by the parties." (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn. 14.)

As explained below, amicus has a significant interest in the outcome of this case and believes that the Court would benefit from additional briefing on the issues addressed in the attached brief.[1]

Interest of Amicus Curiae

[1] No party or counsel for a party in the pending case authored the proposed amicus curiae brief in whole or in part, and no entity or person, aside from amicus, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members are in California or subject to the jurisdiction of California courts. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a significant interest in monitoring instances of abusive activity by plaintiffs' law firms, and asbestos litigation is rife with examples of plaintiffs' law firms causing waste, abusing courts, and engaging in misconduct. In the last forty-five years, at least 100 companies have been forced into bankruptcy by asbestos-related litigation, thereby preventing these companies from providing economic value to their communities, employees, and consumers. The well-documented malfeasance of the plaintiffs' bar has also depleted asbestos trusts, depriving legitimate victims and their estates of just compensation. This unethical activity poses a direct threat to the legal

system and thus to the Chamber's members, who rely on that legal system to impartially resolve disputes.

The redacted pleadings in the underlying case may contain detailed descriptions of the types of fraudulent practices that have plagued asbestos litigation. The Chamber's members have been targeted by plaintiffs' firms and subjected to these abusive practices. The Chamber thus has a strong interest in shining a light on potentially fraudulent activity. Due to the impact of this Court's decision on the business community, the Chamber believes that its perspective will assist the Court in resolving this case.

Case No. B318822

IN THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

SCOTT PEEBLES,

Plaintiff and Respondent,

v.

SIMMONS HANLY CONROY, LLC ,

Defendant, Appellant and Cross-Respondent,

J-M MANUFACTURING COMPANY, INC.,

Respondent and Cross-Appellant

Los Angeles Superior Court, Case No. 20STCV18513
Hon. Armen Tamzarian

AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT J-M MANUFACTURING COMPANY

EIMER STAHL LLP
*Robert E. Dunn (SBN: 275600)
Florence Liu (SBN: 338324)
99 South Almaden Boulevard, Suite 600
San Jose, CA 95113
Tel: 408.889.1690
rdunn@eimerstahl.com
fliu@eimerstahl.com

Attorneys for Amicus Curiae
Chamber of Commerce of the United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

This case implicates the public's First Amendment right to access trial court filings in an area where public scrutiny is especially needed: asbestos litigation. In the proceeding below, the Plaintiff, Scott Peebles, alleged that his former employer, Simmons Hanly Conroy LLC, "had previously and unlawfully engaged in conduct" that "could constitute a crime or crimes involving moral turpitude" and violated "unequivocal ethical norms." (1 CT 34, 36.) The public unquestionably has an interest in learning whether law firms are using the courts to engage in criminal conduct, but Plaintiff redacted nearly all the factual allegations in his initial Complaint and First Amended Complaint. Peebles never even attempted to justify these redactions through a properly filed sealing motion. Nor could he, as allegations of fraudulent conduct are not the type of information subject to sealing under the rules of civil procedure. The trial court thus should have required Peebles to file an unredacted version of the complaint on the public docket, and its denial of J-M Manufacturing's motion was reversible error.

This Court should correct that error both to enforce the proper application of sealing rules and to shed sunlight on the sordid underworld of asbestos litigation. For too long, plaintiffs' attorneys in this practice area have flooded the courts with meritless claims, often based on perjured testimony,

and deployed numerous strategies to extort lucrative settlements from companies with little connection to plaintiffs' alleged injuries. Accordingly, asbestos litigation has often (and rightly) been identified as a source of "widespread fraud."[2] Courts, commentators, and even the United States Department of Justice have recently highlighted the egregious misconduct of some plaintiffs' firms in litigating asbestos cases. It is past time for courts to put an end to this abuse, and transparency is a necessary first step in that process. This Court should thus reverse and order Peebles to file unredacted pleadings on the public docket.

ARGUMENT

I. The Allegations in the Underlying Complaint Are Not Appropriate for Sealing or Redaction

The First Amendment grants a presumptive right of access to "ordinary civil proceedings" to every member of the public. (*NBC Subsidiary (KNBC–TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1209; see also *Press-Enterprise Co. v. Superior Court of California, Riverside County* (1984) 464 U.S. 501, 508–11 (*Press-Enterprise*).) Given its constitutional basis, courts should "not take lightly the public's right of access to court proceedings and the interests served

[2] Peggy L. Ableman, *The Garlock Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases* (2014) 37 Am. J. Trial Advoc. 479, 485 [hereinafter *Required Reading*].

by public access." (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1028.) The presumption of access can be overcome only by some "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." (*Press-Enterprise*, 464 U.S. at p. 510.) Consistent with this constitutional principle, the California Rules of Court recognize only a narrow category of documents that may be protected from public disclosure. (Cal. Rules of Court, Rule 2.551(b)(1).) For example, trade secrets, sensitive commercial information, and personal identifying information can be sealed if a party presents "facts sufficient to justify the sealing." (*Ibid.*) The party seeking a sealing order bears the burden of overcoming the presumption of public access. (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298 & fn. 3 (*Providian*).)

A presumptive right of access is "even more important" than normal where the issues in the case "will have a broad impact on the public." (*Perry v. City and County of San Francisco* (9th Cir., Apr. 27, 2011, No. 10-16696) 2011 WL 2419868, at *21 [citing *CBS, Inc. v. U.S. Dist. Court for Cent. Dist. of California* (9th Cir. 1985) 765 F.2d 823, 825.].) Public disclosure is especially important where the alleged misconduct likely involves an *abuse of the judicial system*. In such cases, public access is imperative to prevent "losing the public's confidence in the system." (*Ibid.*) After all, "[i]f there is one singular

characteristic of the American system of jurisprudence, it is the relentless pursuit of truth." (*Kananian v. Lorillard Tobacco Company* (Ohio Com. Pl. Jan. 19, 2007) 2007 WL 4913164, at *18.)

It should go without saying that there is no exception to the general right of access for allegations of fraudulent activity. Peebles's complaint in the underlying case alleges that "upper management" and senior members of Simmons Hanly Conroy, LLC had engaged in "crimes involving moral turpitude" that could lead to "disbarment" under California Business and Professions Code § 6101." (1 CT 33, 55.) If any of the parties had filed a formal motion asking the trial court to seal that information, the trial court undoubtedly would have denied it because there is no "overriding interest" in protecting fraudulent business practices from disclosure. (*Press-Enterprise*, 464 U.S. at p. 510.) And sealing "based solely on the agreement or stipulation of the parties" is not allowed. (Cal. Rules of Court, Rule 2.551(a).) But the specific factual allegations that formed the basis of Peebles's complaint against Simmons Hanly Conroy were never subject to a sealing motion. Instead, Peebles unilaterally redacted the allegations of malfeasance and filed the complaint on the docket without obtaining the trial court's permission or satisfying any of the criteria for sealing. The trial court then improperly refused to order Peebles to file an unredacted copy of the complaint on the

public docket. Because the complaint, which involves issues of public importance, was never properly sealed (and could not have been sealed under the rules) this Court should reverse and direct the trial court to order Peebles to refile an unredacted version of the Complaint.

To be clear, the Chamber has no issue with properly justified sealing orders. Sealing motions are often necessary to protect trade secrets and other confidential information. The problem here is the *improper* use of sealing to conceal allegations of misconduct and fraud—information that is especially important both to the public and the judicial system. Given the overwhelming evidence that asbestos litigation is rife with abuse and misconduct (see *infra* Part II) and that none of this conduct is properly sealable, this Court should reverse and allow the public to review the unredacted allegations. Such transparency is necessary to ensure justice in ongoing cases, to guarantee First Amendment protections, and to restore the public's confidence in our judicial system and the legal profession.

II. Transparency Is Especially Necessary Here Given the Well-Documented History of Fraud and Other Misconduct in The Context of Asbestos Litigation

The Fifth Circuit kicked off an avalanche of asbestos litigation in 1973 when it held, for the first court time, that asbestos manufacturers were strictly liable for injuries caused by exposure to asbestos. (See *Borel v. Fibreboard*

Paper Products Corporation (5th Cir. 1973) 493 F.2d 1076.) In the aftermath of *Borel*, tens of thousands of personal injury cases were filed nationwide. Although many of these cases undoubtedly involved legitimate claims, asbestos litigation quickly developed a reputation for corruption, fraud, and deception. The unsavory tactics adopted by plaintiffs' firms pushed many companies into bankruptcy and eroded confidence in both the judicial system and the legal profession. Although Congress attempted to reform asbestos litigation in the mid-1990s through the creation of the trust system, there continues to be widespread misconduct in the asbestos-litigation ecosystem, as courts, commentators, and the Department of Justice have all documented. Given the damage that unscrupulous plaintiffs' attorneys have done to the judicial system, the legal profession, corporate defendants, and injured individuals, it is imperative that the specific allegations of malfeasance at issue here be disclosed to the public.

A. Plaintiffs' attorneys bringing asbestos claims have abused the tort system for decades.

Enticed by the "low burden of proof" and the number of "deep-pocketed defendants," plaintiffs' firms began "canvassing aggressively" for clients in the

immediate aftermath of *Borel*.[3] While some individuals undoubtedly suffered from asbestos-related disease, "the existence of actual injury and proof of substantial product exposure" were "irrelevant" to many of these claims.[4] One estimate found that up to 90% of plaintiffs that filed suit had not experienced *any* symptoms of asbestos-related disease or suffered any illnesses affecting their daily functions.[5] In fact, many of the plaintiffs' lung conditions were "not medically distinguishable" from the rest of the "adult male population of the United States of similar age" who did not have any asbestos exposure.[6]

To overcome this hurdle, Plaintiffs' attorneys routinely hired experts or "litigation doctors" who were "so biased that their readings were simply unreliable." (*Owens Corning v. Credit Suisse First Boston* (D. Del. 2005) 322

---

[3] Texans for Lawsuit Reform Foundation, *The Story of Asbestos Litigation in Texas & Its National Consequences* (2017) 4 [hereinafter *Asbestos Litigation*] https://tinyurl.com/yc3bnhte.

[4] Lester Brickman, *An Analysis of the Financial Impact of S. 852: The Fairness in Asbestos Injury Resolution Act of 2005* (2005) 27 Cardozo L. Rev. 991, 993.

[5] Tex. S.B. 15, 79th Leg., R.S., ch. 97, § 1(f), 2005 Tex. Gen. Laws 169; see also James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring* (2002) 53 S.C. L. Rev. 815, 823 ["By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who…are completely asymptomatic."].

[6] Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?* (2003) 31 Pepp. L. Rev. 33, 43 [hereinafter *On the Theory*].

B.R. 719, 723.)[7] These so-called "B Readers"—individuals hired to read X-rays produced at litigation screenings—were "not hired to actually read X-rays."[8] Instead, they were effectively "selling" positive readings to "lawyer-buyers" regardless of any evidence of asbestos exposure.[9] Studies found that "B Readers provided positive readings for 50–90% of the screening-generated X-rays they read—percentages far exceeding the results of most clinical studies of the prevalence of asbestosis in occupationally exposed workers."[10]

In addition to purchasing fake medical diagnoses, plaintiffs' firms would often coach their clients to lie about which asbestos-containing products they had used and how those products supposedly affected their health. The curtain hanging over this unethical practice was briefly pulled back when one plaintiffs' firm accidently disclosed a memo detailing its methods. In 1997, a Texas plaintiffs' firm that had handled thousands of asbestos personal injury cases, accidently handed defense counsel a document that contained pages of specific answers for clients to use when responding to questions. It also

---

[7] See also Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation* (2014) 88 Tul. L. Rev. 1071, 1091 [hereinafter *Fraud and Abuse*]; ABA Comm'n on Asbestos Litig., *ABA Report to the House of Delegates* (2003) *at* https://tinyurl.com/bdea8s2y.; Mark Behrens, *Asbestos Litigation Screening Challenges: An Update* (2009) 26 T.M. Cooley L. Rev. 721.

[8] *Fraud and Abuse*, *supra* note 7, at p. 1092.

[9] *Ibid.*

[10] *Ibid.*

provided a list of products that contained asbestos, what those products looked like, and what clients should avoid saying.[11] The document would thus "enable someone who never worked with an asbestos product to give convincing testimony that he did, and was harmed by it."[12] These unethical tactics resulted in "unimpaired workers" with no injuries being "awarded billions of dollars in judgments and settlements."[13]

This abuse of the judicial system drove many companies into bankruptcy. One company, a successor to Georgia-Pacific Corporation, "spent approximately $2.9 billion defending and resolving more than 430,000 asbestos personal injury lawsuits" in the years after *Borel*, with claims escalating rapidly after 2000.[14] Few companies can sustain such costs, and dozens of companies were forced into bankruptcy in the 1980s and 1990s.[15] It was

---

[11] *Asbestos Litigation*, *supra* note 4, at p. 5. The memo provided "specific instructions to clients as to the answers to give during the course of depositions about which products they were exposed to and which products they were to deny exposure to (even if they had been exposed to that product)." *Civil RICO: an Effective Deterrent to Fraudulent Asbestos Litigation?* (2019) 40 Cardozo L. Rev. 2301, 2345. Clients were also "warned never to say that they had seen warning labels on product packages." *Id.*

[12] *Asbestos Litigation*, *supra* note 4, at p. 5.

[13] *On the Theory, supra* note 6, at p. 59.

[14] Chamber of Com. Inst. Legal Reform, *Dubious Distribution: Asbestos Bankruptcy Trust Assets and Compensation* (2018) 16 [hereinafter *Dubious Distribution*]. https://tinyurl.com/3vtukx69

[15] *On the Theory, supra* note 6, at p. 55.

estimated that if asbestos litigation continued uncontrolled, approximately 400,000 jobs would be lost due to corporate bankruptcies.[16]

Following a company's bankruptcy, firms would often counsel their clients to downplay their exposure to the bankrupt company's asbestos-containing products. For example, most asbestos claims in the immediate aftermath of *Borel* focused on Johns-Manville Corporation, which was the "leading manufacturer of asbestos-containing materials."[17] But after John-Mansville declared bankruptcy in 1982, plaintiffs' attorneys targeting "other deep pockets" coached their clients to avoid naming John-Mansville as responsible for their alleged injuries.[18] Studies have shown that "[w]hen a defendant company goes bankrupt, party and witness testimony as to the percent of that company's products at various work sites" decline dramatically in order to "maximize plaintiff recoveries."[19]

Plaintiffs' attorneys have "cast a wide net to capture solvent defendants, ensnaring many innocent companies in the process."[20] Companies responsible

---

[16] Tex. S.B. 15, 79th Leg., R.S., ch. 97, § 1(g), 2005 Tex. Gen. Laws 169.

[17] *On the Theory*, *supra* note 6, at p. 54.

[18] *Id.* at p. 55.

[19] *Id.* at p. 42

[20] Mark A. Behrens et al., Ill. Civil Justice League, *Illinois Asbestos Trust Transparency: The Need to Integrate Asbestos Trust Disclosures with the*

for only a minimal amount of asbestos exposure have found themselves named in nearly every asbestos case. One judge compared a defendant's alleged responsibility for the plaintiff's asbestos exposure as "akin to saying one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume." (*Moeller v. Garlock Sealing Technologies, LLC* (6th Cir. 2011) 660 F.3d 950, 955.) A 2017 study found that out of 122 asbestos cases filed in Illinois, "20% of the defendants were dismissed in 100% of the cases in which they were named."[21] One company in particular, Avocet, was named in 400 asbestos suits between 2008 to 2018 and incurred "more than $720,000 in defense costs."[22] Avocet was dismissed in "virtually all of the cases," and ended up settling in 1% of the cases in which it was originally named.[23]

In short, Plaintiffs' attorneys deploying unethical practices have forced dozens of companies into bankruptcy and filed frivolous suits against countless other companies.

Illinois Tort System (2017) 36 Mealey's Litig. Rep.: Asbestos 3 [hereinafter *Illinois Asbestos Trust Transparency*].

[21] *Illinois Asbestos Trust Transparency*, supra note 20, at p. 3, 4.

[22] *Id.*

[23] *Id.*

B. Plaintiffs' attorneys have grossly abused the bankruptcy trust system Congress enacted to preserve assets for legitimate claims

In response to the "avalanche of litigation" set off by *Borel* and subsequent corporate bankruptcies, Congress created a nationwide system to address asbestos-related injuries as part of the Bankruptcy Reform Act of 1994. (See 11 U.S.C. § 524(g).) Under this system, a company that files for bankruptcy can create a trust that will assume all existing and future asbestos liabilities. Although this can be "an efficient mechanism to aggregate claims into a single forum and pool assets from a variety of available sources to compensate claimants,"[24] the same plaintiffs' firms that had been shaking down companies for lucrative settlements began exploiting these trusts by filing false claims, delaying claims until after judgment to maximize judgments, and purposely failing to disclose former trust claims.

In the period from 2006 through 2011, bankruptcy trusts paid out claims "in excess of $14 billion" to individuals who claimed to suffer injuries from their exposure to asbestos.[25] In recent years, courts have uncovered a "growing

---

[24] *Unlocking the Code: The Value of Bankruptcy to Resolve Mass Torts* at p. 2, U.S. Chamber of Commerce Institute for Legal Reform (Dec. 2022) [hereinafter *Unlocking the Code*], https://tinyurl.com/5dfdn3fe.

[25] Peggy L. Ableman, *A Case Study From a Judicial Perspective: How Fairness and Integrity in Asbestos Tort Litigation Can Be Undermined by Lack of Access to Bankruptcy Trust Claims* (2014) 88 Tul. L. Rev. 1185, 1188 [hereinafter *A Case Study*].

number of plaintiffs' attorneys' schemes to circumvent the disclosure requirements in order to obtain significant recoveries from both tort and trust systems."[26] For example, in 2014, a bankruptcy court in North Carolina presented "'a stunning expose' of the breadth of the practice of withholding exposure evidence concerning the products of bankrupt entities."[27] (See *In re Garlock Sealing Technologies* (Bankr. W.D.N.C. 2014) 504 B.R. 71, 74.) The court revealed that many plaintiffs who represented to the court that Garlock's products caused their injuries often turned around and sought money from trusts of other bankrupt entities on the theory that *those companies'* products had caused their injuries. (*Ibid.*)

In one particularly egregious example, a plaintiff obtained a $9 million verdict against Garlock after testifying that he had not been exposed to asbestos from any other company's products, and that his injuries were caused solely by exposure to asbestos in Garlock's products. But shortly after obtaining the verdict, the plaintiff, represented by the same counsel, filed fourteen trust claims for exposure to other companies' products. (*Ibid.*) One of the trust claims involved a company whose products the plaintiff's lawyers had expressly told the court his client had never been exposed to. "In total, these

---

[26] *A Case Study*, *supra* note 25, at p. 1196.

[27] *Required Reading, supra* note 2, at p. 483.

lawyers failed to disclose exposure to 22 other asbestos products." (*Ibid.*) The *Garlock* court found that, "on average, plaintiffs disclosed only about 2 exposures to bankrupt[] companies' products, but after settling with Garlock made claims against about 19 such companies' Trusts." (*Ibid.*) Based on its review of thousands of case files produced during discovery, the *Garlock* court found that "[i]t was a regular practice by many plaintiffs' firms to delay filing Trust claims for their clients so that remaining tort system defendants would not have that information." (*Id.* at p. 84.) The court concluded that this "manipulation of exposure evidence by plaintiffs and their lawyers" had "infected" all of Garlock's asbestos cases. (*Id.* at p. 82)

As other courts have recognized, the *Garlock* case "demonstrates that asbestos plaintiffs' law firms [have] acted fraudulently or at least unethically in pursuing asbestos claims in the tort system and the asbestos trust system." (*Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp.* (W.D. Pa. Aug. 12, 2015) 2015 WL 4773425, at *5.) After this widespread fraud was revealed, Garlock went on to sue several prominent plaintiffs' firms for civil racketeering, "alleging a scheme to intentionally defraud Garlock by suppressing evidence in hundreds of asbestos cases filed against the company."[28] However, these suits were ultimately dismissed as part of Garlock's bankruptcy settlement,

[28] *Dubious Distribution*, *supra* note 14, at 16.

and this outrageous and unethical conduct was left unpunished. The takeaway from the *Garlock* case is clear: "the practice of deliberately failing to disclose evidence of other exposures is far closer to the norm tha[n] the exception."[29]

Since *Garlock*, plaintiffs' firms have continued the unethical practice of "double-dipping" into trusts and tort judgments.[30] In one case, a Delaware Superior Court judge reported that plaintiffs' counsel had repeatedly "assured the court that no disclosure was required because no [bankruptcy trust] claims had been filed."[31] But the day before trial "defense counsel learned that a total of twenty bankruptcy claims had been submitted to various trusts and that

---

[29] *Fraud and Abuse, supra* note 7, at p. 1125.

[30] See Mark A. Behrens, U.S. Chamber Inst. for Legal Reform, *Disconnects and Double-Dipping: The Case for Asbestos Bankruptcy Trust Transparency in Virginia* (2016) 14–24 (listing examples of plaintiffs' failure to disclose trust claims); see also Peggy Ableman et al., *A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.* (2015) 30 Mealey's Litig. Rep.: Asbestos 19 [hereinafter *A Look Behind the Curtain*] [listing cases "that illustrate the continued suppression of evidence" that plaintiffs' firms perpetuate in asbestos litigation] https://tinyurl.com/5n6jhyvd; Peter Kelso & Marc Scarcella, U.S. Chamber Inst. for Legal Reform, *The Waiting Game: Delay and Non-Disclosure of Asbestos Trust Claims* (2015) 9; Informational Brief of Bestwall LLC, *In re Bestwall LLC* (Bankr. W.D.N.C. Nov. 2, 2017) 2017 WL 4988527; Statement of Interest on Behalf of the United States of America Regarding Estimation of Asbestos Claims (*In re Bestwall LLC*, W.D.N.C. No. 17-31795, Dec. 28, 2020) at 1–2, 10 (hereinafter, U.S. Statement of Interest), *at* https://tinyurl.com/5bwysbyx.

[31] *A Case Study*, *supra* note 25, at pp. 1189–90.

significant sums of money had already been received" by the plaintiffs.[32] The judge later described the details of this case to Congress in a hearing on asbestos regulatory reform.[33] She highlighted the "inherent unfairness" associated with the scheme of asbestos-litigation and bankruptcy trusts. Emphasizing the need for total transparency when it came to asbestos litigation and bankruptcy trust claims, she stated that "the very foundation and integrity of the judicial process is compromised by the withholding of information that is critical to the ultimate goal of all litigation," which is "a search for, and discovery of, the truth."[34]

Addressing another instance of egregious misconduct, an Ohio court took the drastic step of barring a plaintiffs' firm from practicing before the court after discovering that the firm had accepted payments from trusts for companies whose products the plaintiff had never been exposed to. (*Kananian*, *supra*, 2007 WL 4913164.) The court found that the firm's attorneys "institutionally" failed to discharge the duties of an attorney honestly, faithfully, and competently, and had "not conducted themselves with dignity."

---

[32] *Ibid.*

[33] Asbestos Claims Transparency, Hr'g Before Subcomm. on Regul. Reform, Com. and Antitrust L. of the Comm. on the Judiciary, House of Reps., 113th Cong. (Mar. 13, 2013) (statement of Hon. Peggy L. Ableman), 2013 WLNR 7440143.

[34] *Ibid.*

(*Id.* at p.18.) Commenting on the "Pandora's box of deceit" the case had opened, the judge stated, "In my 45 years of practicing law, I never expected to see lawyers lie like this."[35]

In one Maryland case, the plaintiff denied making trust claims related to his mesothelioma. Then, ten days before trial, the plaintiff served amended discovery responses revealing that he had made twenty-two trust claims, thirteen of which were filed before his earlier denial.[36]

Plaintiffs' firms even coordinate with each other to mislead courts by "divid[ing] responsibility for submitting trust claims and conducting civil litigation." [37] Plaintiffs' counsel often "postpone filing trust claims that would undermine a particular theory of liability at trial until after disposition of the suit."[38] In litigation, these firms purposely fail to inform opposing counsel

---

[35] James F. McCarty, *Judge Becomes National Legal Star, Bars Firm from Court Over Deceit*, Cleveland Plain Dealer (Jan. 25, 2007) B1.

[36] William P. Shelley et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update–Judicial and Legislative Developments and Other Changes in the Landscape Since 2008* (2014) 23 Widener L.J. 675, 689 [hereinafter *Need for Further Transparency*].

[37] *Id.* at pp. 681–82 ("First, different plaintiffs' law firms contract with each other to divide responsibility for submitting trust claims and conducting civil litigation. Trial counsel is not informed by trust counsel about claims that have been submitted on the plaintiff's behalf, and trial counsel pleads ignorance when the plaintiff's failure to disclose his trust submissions is unmasked.").

[38] *Ibid.*

about claims that have been previously submitted by the plaintiff, sometimes waiting until the "literal[] eve of trial" to reveal undisclosed trust claims.[39] This suggests "a calculated strategy by the plaintiff's bar to withhold information about a plaintiff's true exposure history during litigation to unfairly shift the blame to less-culpable, solvent tort system defendants."[40] This strategy was "obviously devised to accomplish the receipt of maximum recovery for plaintiffs and their counsel" by over exaggerating a defendant's liability "while at the same time insulating out-of-state counsel from any disciplinary action by the courts for ethical violations."[41]

In 2020, the Department of Justice issued a report explaining its finding that a "significant number of asbestos claimants in the tort system and in Chapter 11 proceedings have provided conflicting and/or inaccurate information regarding the asbestos products to which they were exposed."[42] As the DOJ explained, the practice of so-called "double dipping"—filing a personal injury suit against a solvent company and filing additional bankruptcy trust claims for exposure to different companies' products—has "bedeviled the

---

[39] *A Case Study*, *supra* note 25, at p. 1194.

[40] *Need for Further Transparency, supra* note 36, at p. 682.

[41] *A Case Study*, *supra* note 25, at pp. 1197–98.

[42] U.S. Statement of Interest at 1.

asbestos ecosystem."[43] The DOJ also found that plaintiffs' firms have continued their practice of recruiting clients regardless of whether they are exhibiting any actual asbestos-related injuries, concluding that "persons who did not have malignant conditions accounted for 86 percent of all claims made to the trusts and 27 percent of trust payments."[44]

This Court should not underestimate the harm that this widespread misconduct causes to all stakeholders involved in asbestos litigation.[45] Plaintiffs' firms have filed thousands of dubious claims, bankrupted companies, and stolen millions of dollars from bankruptcy trusts. One tragic and often overlooked consequence of this racket is that bankruptcy trusts "systematically undercompensate legitimate asbestos victims" of funds set aside to compensate them for their suffering and loss.[46] Even worse, much of

---

[43] *Id.* at p. 8.

[44] *Id.* at p. 5.

[45] See S. Todd Brown, *How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts* (2013) 61 Buff. L. Rev. 537, 574 [hereinafter *How Long is Forever*] ["According to some estimates, the historical weaknesses in the asbestos trust system have led to unwarranted payments of hundreds of millions, if not billions, of dollars."].

[46] *Dubious Distribution*, *supra* note 14, at p. 18; see *On the Theory*, *supra* note 6, at p. 103 (finding that "91% of all claims [against the Manville Trust] allege only non-malignant asbestos 'disease' and . . . these cases currently receive 76% of all Trust funds"); see also *How Long is Forever*, *supra* note 45, at p. 538 [finding that "public data shows that few trusts that have processed their initial claims remain in a position to ensure equitable payments to future victims"].

the wrongfully diverted money ends up in pockets of the very attorneys who have committed the wrongdoing.[47] In short, asbestos litigation continues to be a blight on the judicial system, and the unethical behavior of a few bad apples in the plaintiffs' bar threatens to undermine the public's trust in the legal profession.

Given the overwhelming evidence of fraud and gross misconduct in the asbestos litigation ecosystem, the Court should not hesitate to order the disclosure of the redacted allegations filed below so that the public can learn more about the nature and scope of the alleged wrongdoing.

CONCLUSION

For the foregoing reasons, the Chamber urges the Court to reverse and remand with directions to order Peebles to file the unredacted complaint on the public docket.

Dated: June 29, 2022 Respectfully submitted,

/s/ Robert E. Dunn

[47] See *Unlocking the Code*, supra note 24, at p. 21 ["[D]espite the dichotomy of risk between" the tort system and the trust system, "plaintiffs' law firms have transferred the same level of contingency fees and expenses into the trust system."].

Robert E. Dunn
Florence W. Liu
EIMER STAHL LLP
99 S. Almaden Blvd. Suite 600
San Jose, CA 95113
408.889.1690
rdunn@eimerstahl.com
fliu@eimerstahl.com

Attorneys for Amicus Curiae
Chamber of Commerce
of the United States of America

CERTIFICATE OF WORD COUNT

I hereby certify that the attached amici curiae brief of the Chamber of Commerce of the United States of America consists of 4,524 words as counted by the Microsoft Word processing program used to generate the brief.

Dated: June 29, 2023 *<u>/s/Robert E. Dunn</u>*

Robert E. Dunn