Eimer Stahl LLP
99 S. Almaden Blvd., Suite 642
San Jose, CA 95113
Tel 408 889 1690 Fax 312 692 1718

March 19, 2022

Presiding Justice J. Dennis M. Perluss and Associate Justices
California Court of Appeal
Second District, Division Seven
350 McAllister Street
San Francisco California 94102-7421

Re: ***JMM Manufacturing Company, Inc. v. Superior Court, County of Los Angeles*, 2nd Civil No. B319046: Request of *Amicus Curiae* Chamber of Commerce of the United States of America for Consideration on the merits**

Honorable Justices:

The Chamber of Commerce of the United States of America (the "Chamber"), as amicus curiae, asks the Court to grant the petition and issue a writ of mandate compelling Scott Peebles to file his unredacted pleadings on the public docket. To the extent necessary, the Chamber asks the Court to treat this letter as a formal application to file the letter as an amicus brief.

This Court should decide the petition on its merits because the underlying complaint involves allegations of egregious misconduct by Simmons Hanly Conroy, LLP ("Simmons"), which the public has a right to see. Although members of the bar are held to the highest ethical standards, plaintiffs' firms have a long history of abusing the court system and engaging in gross misconduct in asbestos-related litigation. In addition to unfairly prejudicing defendants in those cases—many of which are the Chamber's members—this abuse of the judicial process undermines public trust in our judicial system and the rule of law. The firms that engage in these unethical practices have also bankrupted dozens of companies, caused the loss of thousands of jobs, depleted trust funds that should be available to legitimate victims of asbestos-related illnesses, and created a backlog of non-meritorious cases in courts around the country. This Court has a rare opportunity to expose such alleged malfeasance to public scrutiny. To ensure justice to defendants in ongoing cases involving the Simmons firm, and to restore trust in our courts and the profession of law, this Court should grant the petition and order public disclosure of the unredacted pleadings in this case.

AUTHORITY FOR PERMITTING THIS AMICUS LETTER

Rule 8.487 of the California Rules of Court was revised effective January 1, 2017, to expressly permit the filing of amicus briefs after an appellate court issues an alternative

writ or order to show cause.[1] The Judicial Council's Advisory Committee Comment to Rule 8.487 makes clear that amicus letters are also permissible before a court issues an alternative writ or order to show cause:

> "Subdivisions (d) and (e). These provisions do not alter the court's authority to request or permit the filing of amicus briefs or amicus letters in writ proceedings in circumstances not covered by these subdivisions, such as before the court has determined whether to issue an alternative writ or order to show cause or when it notifies the parties that it is considering issuing a peremptory writ in the first instance."

Indeed, one appellate court has stated in a published opinion that the filing of amicus letters in connection with a writ petition was one factor the court considered in deciding whether to issue an order to show cause. (*Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 557 [Second Dist., Div. 7; noting that amicus letters were filed in support of a writ petition and that "based on the amici curiae submissions we have received" the matter "appears to be of widespread interest" such that writ review was appropriate]; see also *County of Los Angeles Board of Supervisors v. Superior Court of Los Angeles County* (2015) 235 Cal.App.4th 1154 [Second Dist., Div. Three; "The Association of Southern California Defense Counsel, as amicus curiae, filed a letter in support of issuance of the writ"], rev'd sub nom. *Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282.)

Therefore, the Chamber asks the Court to consider this amicus letter in deciding the threshold issue of whether to issue a peremptory writ in the first instance or an alternative writ or order to show cause so that the court can address the petition on its merits.

INTEREST OF AMICUS CURIAE

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. Asbestos litigation in particular is rife with examples of plaintiffs' law firms causing waste, abusing courts, and engaging in misconduct, such as by filing

[1] Cal. Rules of Court, Rule 8.487(e)(1).

meritless trust claims. 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 fraudulent practices that appear rampant in asbestos litigation. Many of the Chamber's members have been the target of Simmons and other firms that engage in similar misconduct. 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 motion.

THE ISSUE PRESENTED

Peebles filed heavily redacted copies of his pleadings in the trial court even though the court never granted him permission to file under seal. These pleadings alleged that the Simmons firm engaged in a widespread pattern of misconduct in prosecuting asbestos cases. Although Peebles used those redacted pleadings to leverage a settlement, the trial court refused to compel him to file unredacted copies on the public docket. Did the trial court abuse its discretion?

ARGUMENT

Petitioner's brief ably explains why the trial court erred in concluding that it lacked authority to order Peebles to file the unredacted pleadings on the public docket. Petitioner's brief also demonstrates why parties should not be allowed to litigate in the shadows by heavily redacting publicly filed documents without satisfying the stringent sealing rules provided in the Code of Civil Procedure. The Chamber will not repeat those arguments here. Instead, the Chamber will explain why the extreme misconduct apparently alleged in the redacted pleadings make this the rare case involving "instances of a grave nature or of significant legal impact" where "intervention of an appellate court" is required on a writ petition. (*Anderson v. Superior Court* (1989) 213 Cal.App.3d 1321, 1328.) This Petition warrants special attention from the Court because it shines a light 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] 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 grant the writ and order Peebles to file unredacted pleadings on the public docket.

I. The Allegations in the Underlying Complaint Are Not Appropriate for Sealing or Redaction and Thus Should Be Made Public

The First Amendment grants a presumptive right of access to every member of the public. (*Press-Enterprise Co. v. Superior Court of California, Riverside County* (1984) 464 U.S. 501, 510.) This right can only be overcome by some "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." (*Ibid*.) 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.*)

These protections do not apply, however, to allegations of fraudulent activity. The alleged misconduct in Peebles' complaint likely relates to dozens—perhaps hundreds—of asbestos cases, many of which may still be ongoing. Peebles alleges that "upper management" and senior members of the firm all knew about these "crimes involving moral turpitude" that could "lead to [] disbarment."[3] Had the parties asked the trial court to seal that information, the motion would most certainly have been denied because fraudulent business practices are not trade secrets. Moreover, sealing "based solely on the agreement or stipulation of the parties" is not allowed, (*id.* subd. (a)), and a court should not be an accomplice in a party's efforts to conceal evidence of its misconduct from the public.

Public disclosure is especially important where the alleged misconduct likely involves an *abuse of the judicial system*. As one trial judge aptly stated when confronted with proof that a plaintiffs' lawyer had lied to the court in the context of asbestos litigation, "[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.) But candor is all too often lacking in the world of asbestos

[2] Peggy L. Ableman*, The Garlock Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases*, 37 Am. J. Trial Advoc. 479, 486 (2014).
[3] First Amended Complaint at 5 (PE 289–291).

litigation, and numerous courts and state legislatures have recognized the need to hold plaintiffs' firms accountable for their abuse of the judicial system.[4]

Given the overwhelming evidence that asbestos litigation is rife with abuse and misconduct, and that none of this conduct is properly sealable, this Court should grant this petition 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. Asbestos Litigation: A Tale of Fraud, Deceit, and Dubious Claims

In 1973, the Fifth Circuit first established strict liability against asbestos manufacturers. (See *Borel v. Fibreboard Paper Products Corporation* (5th Cir. 1973) 493 F.2d 1076.) In the aftermath of *Borel*, a wave of asbestos litigation overwhelmed the American judicial system, with tens of thousands of personal injury cases filed nationwide. Enticed by the "low burden of proof" and "deep-pocketed defendants," plaintiffs' firms began "canvassing aggressively" for clients who would assert asbestos-related claims.[5] While there were undoubtedly victims who truly suffered from cancer caused by asbestos exposure, many firms brought dubious claims on behalf of plaintiffs with any type of lung-tissue scarring. One estimate found that up to 90 percent of plaintiffs that brought suits had not experienced *any* symptoms of asbestos-related disease or suffered any illnesses affecting their daily functions.[6] One company, a successor to Georgia-Pacific Corp., "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.[7] It was estimated that if asbestos litigation was allowed to continue uncontrolled, approximately 400,000 jobs would be lost due to corporate bankruptcies.[8]

The curtain hanging over this unethical business was briefly pulled back when one plaintiffs' firm accidently disclosed a memo which proved it was coaching its clients to lie.

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[4] *See* Chamber of Com. Inst. Legal Reform, *Dubious Distribution: Asbestos Bankruptcy Trust Assets and Compensation* (2018) 17 [hereinafter *Dubious Distribution*] (cataloguing recent asbestos bankruptcy trust transparency bills passed in state legislatures). These state bills generally have required plaintiffs' firms to disclose trust-related evidence early in an asbestos personal injury case to prevent firms' common practices of suppressing evidence, as in *Garlock*. (See *Ibid.*)

[5] Texans for Lawsuit Reform Foundation, *The Story of Asbestos Litigation in Texas & Its National Consequences* (2017) 4 [hereinafter *Asbestos Litigation*].

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

[7] See *Dubious Distribution* at 16.

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

In 1997, Baron & Budd, 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 detailed which specific products contained asbestos, what those products looked like, and what the client should avoid saying.[9] In short, the document would "enable someone who never worked with an asbestos product to give convincing testimony that he did, and was harmed by it."[10]

In a reaction to the "avalanche of litigation" set off by *Borel*, 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 liability. Unfortunately, the same plaintiffs' firms that had been shaking down companies for lucrative settlements began targeting these trusts with a similar pattern of misconduct. 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."[11] (See *In re Garlock Sealing Technologies* (Bankr. W.D.N.C. 2014) 504 B.R. 71, 74.) 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 84.) In other words, plaintiffs were telling the court that Garlock's products caused their injuries, while at the same time seeking money from trusts of other bankrupt entities on the theory that *those companies'* products had caused their injuries. The court concluded that this "manipulation of exposure evidence by plaintiffs and their lawyers" had "infected" all of Garlock's asbestos cases. (*Ibid.*)

In one particularly egregious example, a plaintiff obtained a $9 million verdict against Garlock after representing to the jury 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 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

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[9] *Asbestos Litigation* at 5.
[10] *Id.*
[11] Ableman*, supra* note 4, at 483.

bankrupt[] companies' products, but after settling with Garlock made claims against about 19 such companies." (*Ibid.*)

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."[12] But these suits were ultimately dismissed as part of Garlock's bankruptcy settlement, and this outrageous and unethical conduct was left unpunished.

In another 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."[13] Shortly thereafter, "defense counsel learned that a total of twenty bankruptcy claims had been submitted to various trusts and that significant sums of money had already been received" by the plaintiffs.[14] This type of rank dishonesty with the court is all too common in asbestos litigation.

One Ohio court even took the drastic step of barring a plaintiffs' firm from practicing before the court after it discovered 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 "institutionally" failed to discharge the duties of an attorney honestly, faithfully, and competently, and that the plaintiffs' lawyers had "not conducted themselves with dignity." (*Ibid.*)

In recent years, many more "inconsistencies" and discrepancies in bankruptcy trust claims have been exposed.[15] In 2020, the Department of Justice issued a statement 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."[16] 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'

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[12] *Dubious Distribution* at 16.

[13] 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, 1189–90.

[14] *Id.*

[15] Chamber of Com. Inst. Legal Reform, *Insights & Inconsistencies: Lessons from the Garlock Trust Claims* (2016).

[16] Statement of Interest, U.S. Dep't of Justice, DOJ-20-1395, Justice Department Files Statement of Interest Urging Transparency in the Compensation of Asbestos Claims (2020) 1.

products—has "bedeviled the asbestos ecosystem."[17] 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."[18]

This Court should not underestimate the harm that this widespread misconduct causes to all stakeholders involved in asbestos litigation. One tragic and often overlooked consequence of this racket is that bankruptcy trusts "systematically undercompensate legitimate asbestos victims."[19] In other words, misconduct by the plaintiffs' bar, like the behavior alleged in this case, is depriving actual victims and their loved ones of the funds set aside to compensate them for their suffering and loss. And much of the wrongfully diverted money ends up in pockets of the very attorneys who have committed the wrongdoing. 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.

CONCLUSION

This petition presents issues of public importance that warrant considered appellate review, and the Chamber respectfully urges the Court to issue a peremptory writ in the first instance—or an alternative writ or order to show cause—and address the writ petition on its merits.

Respectfully submitted,

EIMER STAHL LLP

/s/ Robert E. Dunn
Robert E. Dunn
Florence W. Liu
99 S. Almaden Blvd. Suite 642
San Jose, CA 95113
(408) 889-1690

[17] *Id.* at 8.
[18] Statement of Interest, U.S. Dep't of Justice, *supra* note 14, DOJ-20-1395 at 5.
[19] *Dubious Distribution* at 18.

Counsel for the Chamber of Commerce of the United States of America