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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

In Re: NEW YORK CITY ASBESTOS LITIGATION	New York Asbestos Litigation Index Nos.: 40000/1988 782000/2017
This Document Relates To: ALL NYCAL CASES	***AMICI CURIAE* BRIEF SUPPORTING DEFENDANTS' APPEAL FROM NEW CASE MANAGEMENT ORDER AND ACCOMPANYING DECISION**

***AMICI CURIAE* BRIEF OF BUSINESS COUNCIL OF NEW YORK STATE, LAWSUIT REFORM ALLIANCE OF NEW YORK, NEW YORK INSURANCE ASSOCIATION, INC., NORTHEST RETAIL LUMBER ASSOCIATION, COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN TORT REFORM ASSOCIATION, WASHINGTON LEGAL FOUNDATION, AND AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF DEFENDANTS' APPEAL FROM NEW CASE MANAGEMENT ORDER AND ACCOMPANYING DECISION**

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QUESTIONS PRESENTED

1. Whether this Court should, at a minimum, modify the June 2017 New York City Asbestos Litigation ("NYCAL") case management order ("CMO") to restore the longstanding NYCAL practice of deferring punitive damages claims.

Proposed Answer: Yes

2. Whether this Court should, at a minimum, modify the June 2017 NYCAL CMO to close the asbestos bankruptcy trust disclosure "loophole" that plaintiff lawyers have subjectively read into the CMO and, instead, require plaintiffs to file all eligible asbestos trust claims early in the discovery process and specify that trust claims materials are admissible.

Proposed Answer: Yes

STATEMENT OF INTEREST

Amici are organizations that represent companies doing business in New York, their insurers, policy organizations, and civil justice reform groups. *Amici* have a substantial interest in ensuring that any New York City Asbestos Litigation ("NYCAL") case management order ("CMO") is fair and reflects sound policy. The June 2017 NYCAL CMO deprives defendants of statutory and due process rights without their consent. *Amici* would, therefore, like to see that CMO vacated. If any aspect of that CMO is permitted to stand, the Court should, at a minimum, modify it to (1) defer punitive damages claims; (2) require plaintiffs to file all

eligible asbestos trust claims early in the discovery process; and (3) specify that trust claims materials are admissible. These amendments would help restore needed balance to the CMO if it stands.

STATEMENT OF THE CASE

Amici adopt Appellants' Statement of the Case as relevant to this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Supreme Court issued a CMO in the NYCAL in June of 2017 that deprives defendants of numerous statutory rights under the New York Civil Practice Law and Rules ("CPLR") and due process safeguards without their consent (and over their objection). This brief explains why, if the Court permits any aspect of the June 2017 NYCAL CMO to stand, it should, at a minimum, modify the CMO to (1) defer punitive damages claims; (2) require plaintiffs to file all eligible asbestos trust claims early in the discovery process; and (3) specify that trust claims materials are admissible. These changes are needed to ensure that justice prevails given today's asbestos litigation.

Punitive damages are just as inappropriate in today's asbestos litigation as they were in 1996, when Justice Helen Freedman, then-presiding Administrative Law Judge for all NYCAL cases, deferred such claims while providing other substantial benefits to plaintiffs. In a law review article, she explained:

> First, to charge companies with punitive damages for wrongs committed twenty or thirty years before, served no corrective purpose. In many cases, the wrong was committed by a predecessor company, not even the company now charged. Second, punitive damages, infrequently paid as they are, only deplete resources that are better used to compensate injured parties. Third, since some states do not permit punitive damages, and the federal MDL court precluded them, disparate treatment among plaintiffs would result. Finally, no company should be punished repeatedly for the same wrong.

Helen S. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U.L. Rev. 511, 527-28 (2008). These considerations still exist tand support deferral of punitive damages in asbestos cases.[1]

Asbestos trust claim transparency is also significant to help justice prevail in the NYCAL. Lawyers for some plaintiffs assert that under the CMO they may delay the filing of asbestos trust claims until after trial, thus depriving defendants (and juries) of important evidence related to alternative exposures.[2] This interpretation violates the spirit of the CMO, undermines the truth-seeking role of the courts, and artificially inflates plaintiff recoveries. The new CMO recognizes this problem, but the attempted fix is insufficient. If the Court does not vacate the

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[1] *See* Mark A. Behrens & Cary Silverman, *Punitive Damages in Asbestos Personal Injury Litigation: The Basis For Deferral Remains Sound*, 8 Rutgers J. L. & Pub. Pol'y 50 (2011).

[2] *See* ABA TIPS Section Task Force on Asbestos Litigation and the Bankruptcy Trusts, June 6, 2013, Hrg. Trans. at 114-115 (testimony of Joseph W. Belluck, Esq.) ("[I]n New York, even though claims against bankruptcy trusts may be probable, I can predict that they are going to be filed, I am not under any requirement to file them. I only have to file the claims that my client intends to file before the trial.").

CMO, it should require plaintiffs to file all eligible trust claims early in the discovery process and specify that trust claims materials are admissible.

ARGUMENT

I. IF THE COURT DOES NOT VACATE THE JUNE 2017 NYCAL CMO, IT SHOULD, AT A MINIMUM, MODIFY THE CMO TO CONTINUE THE LONGSTANDING DEFERRAL OF PUNITIVE DAMAGE CLAIMS

A. Punitive Damages Would Threaten the Viability of Some NYCAL Defendants and Jeopardize Compensation for Future Plaintiffs

Over 115 companies have been forced into bankruptcy at least in part from asbestos-related liabilities, including virtually all major asbestos producers. *See* Mark D. Plevin et al., *Where Are they Now, Part Eight: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 16 Mealey's Asbestos Bankr. Rep. 1, Chart 1 (Sept. 2016). The number of bankruptcy filings continues, notwithstanding the increasingly attenuated connection of many of today's defendants to asbestos.[3]

As University at Buffalo School of Law Professor Todd Brown has explained, "Defendants who were once viewed as tertiary have increasingly

[3] Following a wave of bankruptcies involving the historically most culpable asbestos defendants in the early 2000s—the so-called "big dusties"—the asbestos litigation turned into what one plaintiffs' attorney described as an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation' - A Discussion with Richard Scruggs and Victor Schwartz*, 17 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (Mr. Scruggs).

become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years." S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299, 306 (2013). Mass tort expert Deborah Hensler of Stanford Law School has likewise explained that, following the bankruptcies of the traditional thermal insulation defendants, "asbestos plaintiff attorneys turned to 'peripheral' defendants," and the asbestos liability exposure of some of those companies "ballooned." Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 Conn. Ins. L.J. 255, 272 (2006).[4] "The result," she added, "might have been anticipated: the once peripheral defendant corporations followed the target defendants into bankruptcy. *Id*.

With a finite pool of resources available for plaintiffs, punitive damages in asbestos cases represent a "continued hemorrhaging of available funds [that] deprives current and future victims of rightful compensation." *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000). Multiple imposition of punishment against the same defendant can deplete the defendant's resources and endanger the ability of future

[4] *See also* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 556 (2007) (a "surge of bankruptcies in 2000-2002" triggered "a search for new recruits to fill the gap in the ranks of defendants"); Stephen J. Carroll et al., *Asbestos Litigation* xxiii (RAND Corp. 2005) (bankruptcy wave "drove plaintiff attorneys to press peripheral non-bankrupt defendants to shoulder a larger share of the value of asbestos claims and to widen their search for other corporations that might be held liable for the costs of asbestos exposure and

claimants to recover even basic out-of-pocket expenses and damages for their pain and suffering.

Further, the impact of punitive damages on future plaintiff recoveries goes beyond cases that are tried to verdict, extending to cases that settle. The "potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger settlement agreement than would ordinarily be obtained," dissipating "assets that could be available for satisfaction of future compensatory claims…." *Dunn v. Hovic*, 1 F.3d 1371, 1398 (3d Cir.) (Weis, J., dissenting), *modified in part*, 13 F.3d 58 (3d Cir. 1993); *see also* David C. Landin et al., *Lessons Learned From the Frontlines: A Trial Court's Checklist for Promoting Order and Sound Policy in Asbestos Litigation*, 16 Brook. J.L. & Pol'y 589, 654 (2008) (calling for punitive damages claims to be severed early because of the "leveraging effect punitive damages have at the settlement table.")

Multiple punitive damages awards for the same act or course of conduct also raise due process concerns. *See* Victor E. Schwartz et al., *Reining In Punitive Damages "Run Wild": Proposals For Reform By Courts And Legislatures*, 65 Brook. L. Rev. 1003, 1030-32 (2000) ("courts have expressed strong concerns that multiple punitive damages awards may violate constitutionally protected due

disease.").

process rights"); *cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis," because "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct....").

Thus, some other jurisdictions that manage large asbestos dockets have decided that awarding punitive damages in this context "no longer makes sense." Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1, 26 (2001).

For example, the CMO that governs asbestos cases in the Philadelphia Court of Common Pleas states: "All punitive damage claims in asbestos claims shall be deferred." Court of Com. Pl. Phila. County, Pa., *Gen. Court Reg. No. 2013-01*, Order at ¶ 3 (Feb. 7, 2013).

The longstanding practice of the United States District Court for the Eastern District of Pennsylvania, which managed the federal asbestos multi-district litigation (MDL-875), applied a similar rule. *See In re Patenaude*, 210 F.3d 135, 140 n.3 (3d Cir. 2000) (noting the federal asbestos MDL court's practice of severing and retaining jurisdiction over punitive damages claims in cases remanded to transferor courts for trial).

Several states do not permit punitive damages.[5]

The need to preserve resources for future plaintiffs is just as important today as it was when NYCAL and other courts first stripped punitive damages from this litigation. A review of asbestos-related liabilities reported to the U.S. Securities and Exchange Commission by more than 150 publicly traded companies found that "[f]ilings remained flat at the levels observed since 2007…." Mary Elizabeth Stern & Lucy P. Allen, *Resolution Values Dropped 35% While Filings and Indemnity Payments Continued at Historical Levels*, at 1 (NERA Econ. Consulting June 2016); *see also* Jenni Biggs et al., *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* 1 (Towers Watson June 2013) (mesothelioma claim filings have "remained near peak levels since 2000."). "Typical projections based on epidemiology studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next 35 to 50 years." Biggs et al., *supra*, at 5; *see also* Bibeka Shrestha**,** *Expected Asbestos Losses For Insurers Climb By $10B*, Law360, Dec. 17, 2012 ("With no end to these losses in sight…it is clear that the asbestos problem will persist for many years to come.").

[5] Nebraska bars punitive damages on state constitutional grounds. Louisiana, Massachusetts, and Washington, and New Hampshire permit punitive damages when authorized by statute. Michigan recognizes exemplary damages as compensatory, rather than truly punitive. Connecticut has limited what they call punitive recovery to the expenses of bringing the action. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 495 (2008).

The long latency period for mesothelioma and longer life expectancies contribute to keep the continuing number of mesothelioma deaths (i.e., individuals who may have died of unrelated health problems in the past are now living long enough to begin to experience the effects of asbestos exposure).[6]

Further, plaintiff lawyers working on a contingent fee basis advertise extensively on television and the Internet seeking claimants. An October 2015 report by the U.S. Chamber Institute for Legal Reform on plaintiff lawyer marketing found that asbestos-related search terms are "among the most expensive and in-demand search terms on the Internet."[7] In the first half of 2015, for example, "eight of the top ten most expensive keywords on a cost-per-click basis focused on asbestos/mesothelioma." *Id.*[8] Asbestos plaintiff law firms spent almost $46 million nationally on television advertising in 2015 alone. *See* James L. Stengel & C. Anne Malik, *On the Edge: New York County Asbestos Litigation at a Tipping Point* 19 (U.S. Chamber Inst. for Legal Reform Aug. 2017).

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[6] In 2017, the U.S. Centers for Disease Control and Prevention reported that the annual number of mesothelioma deaths in the U.S. from 1999-2015 ranged from a low of 2,479 in 1999 to a high of 2,873 in 2012. Jacek M. Mazurek et al., *Malignant Mesothelioma Mortality – United States, 1999-2015*, 66 Morbidity & Mortality Weekly Rep. 214, 214-15 (Mar. 3, 2017).

[7] *See* Ken Goldstein & Dhavan V. Shah, *Trial Lawyer Marketing: Broadcast, Search and Social Strategies* 2 (U.S. Chamber Inst. for Legal Reform Oct. 2015).

[8] *See also* Barry Schwartz, *Mesothelioma, Asbestos, Annuity: Google's Most Expensive Keywords*, Search Engine Land (Nov. 9, 2012).

Because mesothelioma claims continue to arise at a steady pace, allowing punitive damages claims—which, by definition provide a windfall to the plaintiff—depletes limited funds that otherwise may be needed to compensate future plaintiffs.

Others who could be harmed by the availability of punitive damages in NYCAL cases include defendants' employees and retirees; other businesses that rely on the defendants or their employees for income; and shareholders, such as union pension funds and ordinary citizens' retirement funds. *See Dunn*, 1 F.3d at 1403 (Weis, J., dissenting) ("Payment of [punitive damages] awards not only jeopardizes the ability to provide compensation for future plaintiffs, but also, by forcing companies into bankruptcy, injures employees, customers, and trade creditors who had no part in, and had no knowledge of, the wrongdoing."); *see also* Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003).

B. Allowing Punitive Damages Will Slow Down NYCAL Litigation

Allowing punitive damages awards in NYCAL cases will frustrate settlements, create longer and more complex trials, spawn appeals that will further delay recoveries, and draw more plaintiffs to NYCAL.

Imposition of punitive damages in asbestos cases poses a significant obstacle to settlement negotiations.[9] Plaintiff and defense counsel will likely be oceans apart in terms of estimating the likelihood and potential amount of a defendant's liability for punitive damages, making it harder for parties to come together. In contrast, deferring punitive damages removes the "wild card" element of punitive damages, allowing the parties to more easily value and resolve claims.

Additionally, with the introduction of punitive damages, trials will be longer and more complex. Plaintiffs' counsel will need to put on additional evidence to satisfy the heightened burden of proof for punitive damages. Defendants may request bifurcated trials that would require fact finders to resolve compensatory damages issues prior to considering evidence relevant only to punitive damages. Some plaintiffs' counsel may refuse reasonable settlement offers, choosing instead to try to hit the punitive damages "jackpot."

Also, punitive damages verdicts in NYCAL cases would raise the specter of lengthy appeals that would delay recoveries for *in extremis* plaintiffs. As this Court is likely aware, punitive damages awards have been a fertile field for constitutional challenges. *See* Laura J. Hines & N. William Hines, *Constitutional*

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[9] *See* William M. Schwarzer, *Punishment Ad Absurdum*, 11 Cal. Law. 116 (Oct. 1991) ("Barring successive punitive damages awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs.").

Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma, 66 Hastings L.J. 1257 (2015) (discussing various U.S. Supreme Court punitive damages decisions beginning with *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), and analyzing dataset of 507 state and federal opinions issued in the decade after *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)).

Forum-shopping by asbestos plaintiff firms drawn to NYCAL by the potential for extraordinary awards may add to the backlog, slowing recoveries for New Yorkers and their families. *See* Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 La. L. Rev. 529, 536 (2010) ("If a plaintiff has a large number of states from which to choose, the plaintiff and his counsel would be foolish—indeed, might be committing malpractice in the latter's case—not to base the choice upon obtaining plaintiff-friendly legal rules, including the availability of punitive damages.").

C. Punitive Damages in NYCAL Will Not Serve The Policy Goals of Deterrence and Punishment

The purposes of punitive damages generally are to punish wrongdoers and to deter those actors and others from future misconduct. *See* John M. Leventhal & Thomas A. Dickerson, *Punitive Damages: Public Wrong or Egregious Conduct? A Survey of New York Law*, 76 Albany L. Rev. 961, 964 (2013) ("New York has historically viewed punitive damages as somewhat penal in nature."). The twin

purposes of punitive damages do not justify imposing punitive damages in NYCAL or other asbestos cases.

First, the deterrent function of punitive damages is not served because the asbestos litigation today arises from exposures that took place long ago. In 1972, the federal Occupational Safety and Health Administration (OSHA) issued permanent standards regulating occupational exposure to asbestos. "The OSHA regulations established standards for exposure to asbestos dust and mandated methods of compliance with the exposure requirements, including monitoring work sites, compelling medical examinations, and, for the first time, labeling products with warnings." *Horne v. Owens-Corning Fiberglas Corp*., 4 F.3d 276, 280 (4th Cir. 1993). OSHA's asbestos regulations became increasingly stringent over time. Most uses of asbestos have long been discontinued in this country.

Second, as Vanderbilt University Law School Professor Kip Viscusi has recognized, "[f]or long-term risks, such as asbestos, the economic players today are quite different from those who made the risk decisions decades ago at the time of exposure." Kip Viscusi, *Why There is No Defense of Punitive Damages*, 87 Geo. L.J. 381, 383 (1998). For example, as Justice Freedman appreciated, in many NYCAL cases, "the wrong was committed by a predecessor company, not even the company now charged." Freedman, 37 Sw. U.L. Rev. at 527.

Third, the "message of deterrence, both specific and general, has been heard loud and clear in asbestos cases." Landin et al., 16 Brook. J.L. & Pol'y at 652–53; George L. Priest, *The Cumulative Sources of the Asbestos Litigation Phenomenon*, 31 Pepp. L. Rev. 261, 266 (2003) (the asbestos litigation system has produced punitive damages awards "greater than could possibly be justified by the deterrence rationale. Indeed, punitive damages in asbestos cases have turned the justification for that institution on its head.").[10]

Fourth, as a result of the exit of the primary historical defendants from the tort system through bankruptcy, "[p]arties formerly viewed as peripheral defendants are now bearing the majority of the costs of awards relating to decades of asbestos use." American Academy of Actuaries, *Overview of Asbestos Claims Issues and Trends* 3 (Aug. 2007). As a result, NYCAL defendants today are increasingly more remote and less culpable than the major asbestos producers targeted earlier in the litigation. *See id*. ("[P]eripheral defendants was not as likely to have known of the dangers of asbestos."); Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14 (asbestos litigation has "spread from

[10] *See* also A.M. Best Special Rep., *A.M. Best Increases Estimate for Net Ultimate Asbestos Losses to $100 Billion* (Nov. 28, 2016) (rating agency increasing its estimate for losses that U.S. property/casualty insurers can ultimately expect from third-party liability asbestos claims by approximately 18% to $100 billion, as insurers are incurring approximately $2.1 billion in new losses each year while paying out nearly $2.5 billion on existing claims).

the asbestos makers to companies far removed from the scene of any putative wrongdoing"); Victor Schwartz et al., *A Letter to the Nation's Trial Judges: Serious Asbestos Cases – How to Protect Cancer Claimants and Wisely Manage Assets*, 30 Am. J. Trial Advoc. 295, 327-28 (2006) ("most traditional asbestos companies have already declared for bankruptcy protection, thus, the burden of paying punitive damages falls to the peripheral defendants who have generally not engaged in conscious, flagrant wrongdoing.").

It is partly for these reasons that Cornell Law School Professor (Emeritus) James Henderson, Jr., who was a reporter for the Restatement of Third, Torts: Products Liability, has concluded that punitive damages "have no proper place in mass torts," including asbestos litigation. James A. Henderson, Jr., *The Impropriety of Punitive Damages in Mass Torts*, 52 Ga. L. Rev. --, Cornell Research Paper No. 17-33, at 36 (forthcoming). Asbestos litigation today, he writes, has "very little to do with anyone's moral fault and everything to do with the amoral allocation of losses and costs from mostly innocent victims to mostly innocent enterprises." *Id.*

D. Plaintiff Arguments for Punitive Damages Are Weak

Plaintiffs' counsel often raise two main arguments for the availability of punitive damages in NYCAL. Both lack merit.

The first is that the threat of punitive damages is needed to force so-called "recalcitrant defendants" into settlement. It should not be forgotten, however, that the right to a jury trial applies to defendants too. Any practices that attempt to force defendants into giving up their due process and jury trial rights are wholly inappropriate. Fairness cannot be sacrificed by courts for the sake of efficiency.

Further, very recent verdict data shows that "when an asbestos defendant decides to take a case to trial, its decision is often vindicated." Thomas W. Tardy III & Taylor H. Wilkins, *Asbestos: An Immature Tort (The Contrarian View)*, 32 Mealey's Litig. Rep.: Asbestos 1 (Sept. 13, 2017). The "likelihood of a defense verdict in any given case is significant and rising," in part because of the increasingly remote nature of plaintiffs and defendants in the asbestos litigation. *Id*. In New York, for example, defendants prevailed in only about fifteen percent of asbestos cases tried during the 1990s, but won "almost forty-three percent of the time at the end of 2016." *Id*. Further, when defendants lose at trial, the verdicts are often reduced and sometimes overturned as in the *Matter of Eighth Judicial District Asbestos Litigation (Drabczyk v. Fisher Controls Int'l, LLC)*, 92 A.D.3d 1259 (4th Dep't 2012).

Also, it should be remembered that the number of NYCAL cases tried to verdict is miniscule compared to the total number of filings. Asbestos trials are uncommon in NYCAL, partly because verdicts are among the highest in the

nation, remittiturs notwithstanding. *See* Peggy L. Ableman et al., *The Consolidation Effect: New York City Asbestos Verdicts, Due Process and Judicial Efficiency*, 14 Mealey's Asbestos Bankr. Rep. 1, 5 Fig. 5 (Apr. 2015) (listing NYCAL mesothelioma jury verdicts from 2010-2014); *id*. at 1 (NYCAL has "high-value verdicts that are more than three times the national average."); Stengel & Malik, *supra*, at 6 (NYCAL asbestos verdicts tend to be "substantially higher than comparable tort verdicts in New York City, the rest of New York State, and the rest of the country"). The additional threat of punitive damages is not likely to resolve the remaining cases faster.

Finally, as this Court is aware, asbestos case filings are heavily concentrated in a handful of jurisdictions that are preferred by plaintiffs. Consulting firm KCIC reports that in 2016, almost seventy-two percent of all asbestos lawsuits were filed in just ten jurisdictions, with New York City ranked third. *See* KCIC, *Asbestos Litigation: 2016 Year in Review* 4 (2017). On balance, more new cases are likely to be filed in New York City—fueled by the specter of large punitive damages awards—then will be offset by settlements produced by the threat of punishment.

The second argument frequently heard from plaintiffs with respect to allowing punitive damages in NYCAL is that New York City asbestos plaintiffs should be treated the same as other plaintiffs in New York. Justice Freedman articulated the reasons for the deferral very well. *See* Freedman, 37 Sw. U.L. Rev.

at 527-28. Asbestos is different than other torts in the sense that no other litigation in U.S. history has bankrupted over 115 companies and counting.[11] Further, NYCAL is the dominate asbestos docket in the state. And, while punitive damages technically may be available in asbestos cases outside New York City, they are routinely denied. NYCAL is the "elephant in the room" with respect to any discussion regarding the tort climate of New York.

II. IF THE COURT DOES NOT VACATE THE JUNE 2017 NYCAL CMO, IT SHOULD, AT A MINIMUM, MODIFY THE CMO TO REQUIRE PLAINTIFFS TO FILE ALL ELIGIBLE ASBESTOS TRUST CLAIMS EARLY IN THE DISCOVERY PROCESS AND SPECIFY THAT TRUST CLAIMS MATERIALS ARE ADMISSIBLE

A. Overview of the Asbestos Trust Claim System

Section 524(g) of the Bankruptcy Code provides a path for companies with asbestos-related liabilities to reorganize, channel those liabilities into trusts, and emerge from bankruptcy with immunity from asbestos-related lawsuits. *See* 11 U.S.C. § 524(g); Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* (Rand Corp. 2010). In 2011, the U.S. Government Accountability Office estimated that over sixty trusts (each representing a former defendant company) collectively held

[11] *See* Priest, 31 Pepp. L. Rev. at 266 ("the asbestos law system has . . . provided punitive damages in magnitudes greater than in other accident contexts….").

some $37 billion to pay claimants *completely outside the tort system*. *See* U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 3 (Sept. 2011); *see also* Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* (Rand Corp. 2011). "These trusts answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades." 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*, 23 Widener L.J. 675, 675-76 (2014).

Asbestos trusts are designed to settle claims quickly. *See* Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J., Mar. 11, 2013, at A1. If a claimant meets a trust's criteria for payment—criteria which are less rigorous than the tort system—the claimant will receive a payment. *See* U.S. GAO, *supra*, at 21; Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 The Advoc. (Tex.) 80, 80 (2007) ("it is much easier to collect against a bankruptcy trust than a solvent defendant.").

"Plaintiffs now often receive compensation both from the trusts and through a tort case." Lloyd Dixon & Geoffrey McGovern, *Bankruptcy's Effect on Product*

Identification in Asbestos Personal Injury Cases iii (Rand Corp. 2015). For instance, in a bankruptcy proceeding involving gasket and packing manufacturer Garlock Sealing Technologies, a typical mesothelioma plaintiff's recovery was estimated to be $1-1.5 million, "including an average of $560,000 in tort recoveries and about $600,000 from 22 trusts." *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 96 (W.D.N.C. Bankr. 2014).

B. Asbestos Trust Claim Manipulation and Abuse

By intentionally delaying the filing of asbestos trust claims until after a personal injury case settles or is tried to a verdict, plaintiffs' counsel can suppress evidence of a plaintiff's trust-related exposures and effectively thwart efforts by still-solvent defendants to apportion fault to bankrupt entities under CPLR § 1601. Further, plaintiffs can "double dip"—recover more than once for the same injury—by thwarting defendants from obtaining legally required set-offs under General Obligations Law § 15-108.[12] NYCAL plaintiff lawyers readily admit that they

[12] *See* Editorial, *The Double-Dipping Legal Scam*, Wall St. J., Dec. 25, 2014, at A12 (describing "'double-dipping'—in which lawyers sue a company and claim its products caused their clients' disease, even as they file claims with asbestos trusts blaming other products for the harm. This lets them get double or multiple payouts for a single illness, with a huge cut for the lawyers each time.").

subjectively interpret the CMO to allow the filing of asbestos trust claims to be delayed until after trial, contrary to its spirit.[13]

These tactics artificially inflate plaintiff recoveries at the expense of tort defendants and potentially at the expense of future asbestos claimants too.[14] Also, the tort and trust system disconnect has led to inconsistent claiming activity by plaintiffs. *See* Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071, 1088 (2014) ("In cases where defendants have been able to overcome the attempts to suppress evidence of other exposures, it has become apparent that the product exposures set forth in multiple trust claims differ markedly from, and are inconsistent with, the exposures being asserted by plaintiffs in the tort system."); Shelley et al., 23 Widener L.J. at 679 (claimants "continue to make trust submissions based upon alleged exposure histories that are at stark variance from the tales they tell in the tort system.").[15]

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[13] *See* George Mason Judicial Education Program, 7th Annual Judicial Symposium on Civil Justice Issues, *The Asbestos Litigation Tsunami - Will It Ever End?*, 9 J.L. Econ. & Pol'y 489, 512 (Spring 2013) (quoting a leading New York City asbestos plaintiffs' lawyer as stating, "In my practice, the way we do things, we do not file the bankruptcy claims until after the case is resolved. In New York, we are not obligated to do it before. And unless my client is in a particular situation where he would benefit from the filing of the claims we do not file them during the pendency of the action.").

[14] *See* Phil Goldberg, *Asbestos Litigation Reform That Helps Victims and Businesses*, Forbes, Aug. 10, 2017 ("There is no way that judges and juries can do their jobs if they are blindfolded from the facts.").

[15] *See also* Daniel J. Ryan & John J. Hare, *Uncloaking Bankruptcy Trust Filings in Asbestos Litigation: A Survey of Solutions to the Types of Conduct Exposed in Garlock's Bankruptcy*, 15

These concerns came to the fore in the Garlock Sealing Technologies bankruptcy, where a federal bankruptcy judge documented how plaintiffs' lawyers abuse the opaqueness between the trust and tort systems to gain an unfair litigation advantage. *See In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014).[16] Specifically, the court found that once the major asbestos producers filed bankruptcy and "the focus of plaintiffs' attention turned more to Garlock as a remaining solvent defendant, evidence of plaintiffs' exposure to other asbestos products often *disappeared*." *Id*. at 73 (emphasis added).[17] This "occurrence was a result of the effort by some plaintiffs and their lawyers to withhold evidence of

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Mealey's Asbestos Bankr. Rep. 1, 2 (Aug. 2015) ("[T]here has been a recent focus on ensuring trust transparency in order to avoid the potential for abuse. The abuse occurs most often when claimants allege certain facts to support their trust claims and then allege inconsistent facts to support their tort claims. For instance, claimants have alleged exposure to the products of bankrupt entities in their trust filings, but then ignore or flatly deny those exposures when they target solvent defendants in tort litigation. Claimants also attempt to shield their trust recoveries from disclosure in tort suits by concealing their trust claims or not filing the claims until the tort suit has concluded.").

[16] *See Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp*., 2015 WL 4773425, at *5 (W.D. Pa. Aug. 12, 2015) ("The evidence uncovered in the *Garlock* case arguably demonstrates that asbestos plaintiffs' law firms acted fraudulently or at least unethically in pursuing asbestos claims in the tort system and the asbestos trust system.").

[17] *See also* Lloyd Dixon & Geoffrey McGovern, *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases* (Rand Corp. 2015) (finding that bankruptcy reduces the likelihood that interrogatories and depositions in subsequent tort cases will identify exposure to the asbestos-containing product of the bankrupt entity); Marc C. Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes in Exposure Allegations From 1991-2010*, 27 Mealey's Litig. Rep.: Asbestos 1, 11 (Nov. 7, 2012) ("The results from the study of the Philadelphia asbestos cases indicate that while exposures to thermal insulation products remain prevalent among today's plaintiff population, the identification of

exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants)." *Id*. at 84.

The court described a New York case that Garlock settled during trial for $250,000. "The plaintiff had denied any exposure to insulation products," but after the case settled, the plaintiff's lawyers filed twenty-three trust claims on the plaintiff's behalf, including eight trust claims that were filed within twenty-hours of completing the settlement with Garlock. *Id*. at 85. The court concluded, "The withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating the recoveries against Garlock…." *Id*. at 86.[18]

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exposure to those products is greatly diminished compared to the claims filed prior to the Bankruptcy Wave that had comparable (or even identical) exposure histories.").

[18] The documented abuses in *Garlock* made waves in the legal profession and media. The media understood the issue as not about partisanship, but core to the integrity of the civil justice system:

> As to why anyone should care whether innocent companies have to pay millions to asbestos victims and their lawyers, I would offer three reasons. First, when victims get more than they should under the rules, it means that someone else down the road will wind up with less than he or she should. Second, litigation designed to bring innocent companies to their knees is an impediment to economic growth and job creation. And, finally, there is the rule of law, which the asbestos lawyers suing Garlock clearly flouted.

Joe Nocera, Editorial, *The Asbestos Scam, Part 2*, N.Y. Times, Jan. 14, 2014, at A27; *see also* Michael Tomsic, *Case Sheds Light On The Murky World Of Asbestos Litigation*, Nat'l Pub. Radio, All Things Considered, Feb. 4, 2014 ("No one argues that people suffering from

The trove of discovery data released in the Garlock case became fodder for further study to explore inconsistent claiming activity by plaintiffs. As Delaware Superior Court Judge (Ret.) Peggy Ableman explained, "It would strain one's credulity to believe that these cases are mere anomalies or that Garlock is the sole asbestos defendant who has been prejudiced by this practice." 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*, 88 Tul. L. Rev. 1185, 1201 (2014).

Indeed, a comprehensive analysis of the publicly available discovery data from Garlock's bankruptcy case in relation to asbestos defendant Crane Co. showed "a similar pattern of systemic suppression of trust disclosures that was documented on the Garlock bankruptcy." Peggy Ableman et al., *A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.*, 30 Mealey's Litig. Rep.: Asbestos 1, 1 (Nov. 4, 2015). The study examined 1,844 mesothelioma lawsuits resolved by Crane Co. from 2007 to 2011 that could reliably be matched to the Garlock data. The data revealed the following:

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mesothelioma shouldn't get compensated. Instead, it's a matter of the right companies paying the right amounts.").

- "In cases where Crane was a codefendant with Garlock, plaintiffs eventually filed an average of 18 trust claim forms."
- *"On average, 80% of these claim forms or related exposures were not disclosed by plaintiffs or their law firms to Crane in the underlying tort proceedings."*
- "Overall, nearly half of all trust claims were filed after Crane had already resolved the tort case."

Id. (emphasis added).

As an example, the report discussed a NYCAL case in which the plaintiff "testified at his deposition that he never worked with asbestos containing products from 11 now-bankrupt companies including Combustion Engineering, H.K. Porter, Keene, Unarco (UNR), National Gypsum and Owens Corning." *Id.* At trial, his attorneys successfully moved the court to prevent defense counsel from mentioning Owens Corning's asbestos insulation product, because plaintiff "never affirmatively said he was exposed to the product." *Id.* Yet, the plaintiff's lawyers later filed twenty-six trust claims on his behalf—including Owens Corning and the other "bankrupt companies cited above—despite [plaintiff's] sworn testimony that he did not work with the products from those (now bankrupt) companies." *Id.*

Other inconsistencies regarding exposure history statements made by asbestos plaintiffs in tort cases and in trust claims have been uncovered in individual cases and documented in several recent studies. *See, e.g.*, Peter Kelso & Marc Scarcella, *The Waiting Game: Delay and Non-Disclosure of Asbestos Trust*

Claims 8 (U.S. Chamber Inst. for Legal Reform Dec. 2015). For instance, in May 2012 congressional testimony, one witness described a NYCAL case in which DaimlerChrysler Corp. (Chrysler) sought to overturn a verdict after discovering almost one year later that the plaintiff had made sworn admissions of exposure to several asbestos trusts that were inconsistent with his trial testimony. *See* Leigh Ann Schell, Testimony Before Subcommittee on Courts, Commercial and Administrative Law of the Committee on the Judiciary, U.S. House of Representatives, 112th Cong. (May 10, 2012).

C. Meaningful Trust Transparency is the Solution

The Supreme Court appears to have appreciated these problems but did not address them in a meaningful way. As long as the CMO contains a subjective "intends to file" standard, plaintiffs' counsel will continue their gamesmanship. Further, new language added to the CMO to require plaintiffs to provide notice if they learn of trust claims they are "eligible to file" after certain deadlines have passed is toothless. First, if a plaintiff learns he or she is "eligible to file" trust claims *before* the deadlines have passed, then presumably there is no obligation for the plaintiff to file those trust claims unless plaintiff "intends to file" them—which plaintiffs' counsel admittedly do not intend to do while a tort case is pending. Second, learning on the eve of trial that a plaintiff is eligible to file certain trust claims—after the plaintiff has been deposed and discovery has concluded—is akin

to pouring salt into a wound since the defendant now knows that alternative exposure evidence may exist but can do little to develop admissible evidence to support apportionment at trial.

If the CMO stands, the Court should correct these deficiencies by requiring plaintiffs to file all eligible asbestos trust claims early in the discovery process and specifying that trust claims materials are admissible. *See* Peggy L. Ableman, *The Time Has Come for Courts to Respond to the Manipulation of Exposure Evidence in Asbestos Cases: A Call for the Adoption of Uniform Case Management Orders Across the Country*, 30 Mealey's Litig. Rep.: Asbestos 1 (Apr. 8, 2015) (model CMO). There should also be a policing mechanism to allow defendants to obtain a stay if the plaintiff chooses not to comply with the filing obligation.

Twelve states have laws that are consistent with these recommendations—Texas, Ohio, Wisconsin, Iowa, Tennessee, Utah, West Virginia, Arizona, North Dakota, South Dakota, Oklahoma, and Mississippi—with four enacted in 2017

alone.[19] The National Conference of Insurance Legislators ("NCOIL") adopted bipartisan model asbestos bankruptcy trust transparency legislation in July 2017.[20]

Some courts have adopted similar requirements by CMO. *See, e.g., In re Mass. State Court Asbestos Litig.*, Amended Pre-Trial Order No. 9, ¶ XIII(C)(7)(o)(2)(e) (Mass. Super. Ct. Middlesex Cnty. June 27, 2012) (Case Management Order entered for all asbestos personal injury litigation in Massachusetts) ("Within thirty days of trial, Plaintiff will serve a certification with the [court] that all known bankruptcy claims have been filed.").[21]

Requiring plaintiffs to file all trust claims early in the discovery process would not add new burdens. Trust claims now routinely submitted after trial

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[19] *See* Ariz. Rev. Stat. § 12-782; Ohio Rev. Code §§ 2307.951 to 2307.954; Okla. Stat. tit. 76, §§ 81 to 89; Tenn. Code Ann. §§ 29-34-601 to 609; Tex. Civ. Prac. & Rem. Code Ann. §§ 90.051-.058; Utah Code Ann. §§ 78B-6-2001 to 2010; W. Va. Code §§ 55-7F-1 to 55-7F-11; Wis. Stat. § 802.025; Iowa Code §§ 686A.1 to 9; Miss. Code §§ 11-67-1 to 15; N.D. H.B. 1197 (2017); S.D. Codified Laws §§ 21-66-1 to 11.

[20] *See* Nat'l Conf. of Ins. Legislators, Asbestos Bankruptcy Trust Claims Transparency Model Act, *at* http://ncoil.org/wp-content/uploads/2017/07/FINAL-asbestos.pdf.

[21] *See* also *Hartman v. Carborundum Co.*, No. 2003-CV-4490-AS, ¶ 1 (Pa. Ct. Com. Pl. Dauphin Cnty. May 6, 2015) ("Plaintiff shall file any and all Asbestos Bankruptcy Trust Claims available to him or her no later than [several months before trial]. Contemporaneous with all such filings, Plaintiff shall provide complete and accurate copies of all such filings, including but not limited to all affidavits, medical records and reports, employment documentation, etc. to all Defendants."); *Thibeault v. Allis Chalmers Corp. Prod. Liab. Trust.*, No. 07-27545, ¶ 10 (Pa. Ct. Com. Pl. Montgomery Cnty. Feb. 22, 2010) ("No later than one hundred twenty (120) days prior to trial, each plaintiff shall have filed any and all Asbestos Bankruptcy Trust claims available to him or her. Contemporaneous with all such filings, Plaintiff(s) shall provide complete and accurate copies of all such filings, including but not limited to all affidavits, medical records and reports, employment documentation, etc., to all Defendants.").

would simply have to be filed before trial. By accelerating the filing of trust claims, claimants will receive trust payments more quickly. This is important "in a litigation where plaintiffs often die before they get their day in court." Supreme Court CMO Order, slip op., at 30.

Finally, experience in other states proves that the Supreme Court was uninformed perhaps when it asserted that NYCAL litigation would stop "dead in its tracks" if defendants are able to obtain a stay should plaintiffs fail to comply with an obligation to file all trust claims before trial. A May 2017 report found that Ohio's 2013 trust transparency law has proven to be workable. *See* Maryellen K. Corbett & Matthew M. Mendoza, *Watching It Work: The Impact of Ohio's Asbestos Trust Transparency Law on Tort Litigation in the State* (U.S. Chamber Inst. for Legal Reform May 2017). It is precisely because there is a policing mechanism that delays do not occur. Plaintiffs are providing the materials as required, or at least providing enough information through other means, that defendants have not had to seek stays. *See id*. at 15. The law "likely did not delay the trial process as most filings were made early in the trial calendar." *Id*. at 16.

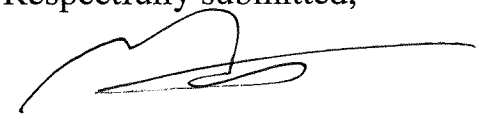
The experience in other states is that streamlining discovery and tackling gamesmanship makes asbestos civil litigation more efficient. It also should be remembered that any delays would not be the fault of defendants, but of plaintiffs themselves from failure to comply with their legal obligation to file.

Lastly, trust claim transparency is needed because trust-related exposure evidence is often not available through other means. For instance, a deceased plaintiff cannot be deposed about exposures. A living deponent may not recall all of that person's exposures, especially if the plaintiffs' counsel selectively refreshes the client's recollection as to just solvent defendant exposures. Also, the trusts themselves have become resistant to discovery and disclosure. Many trusts now have restrictive provisions that preclude or substantially limit the trusts' cooperation with tort defendants. *See* Brickman, 88 Tul. L. Rev. at 1106.

CONCLUSION

For these reasons, if this Court permits any aspect of the June 2017 NYCAL CMO to stand, it should, at a minimum, modify the CMO to (1) defer punitive damages claims; (2) require plaintiffs to file all eligible asbestos trust claims early in the discovery process; and (3) specify that trust claims materials are admissible.

Respectfully submitted,



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Dated: October 13, 2017

PRINTING SPECIFICATIONS STATEMENT

I certify pursuant to 22 N.Y.C.R.R. § 600.10(d)(1)(v) that this brief was prepared with Microsoft Word 2010 using Times New Roman proportionally spaced typeface in 14-point font for the body (12-point font for the footnotes). The portions of the brief that must be included in the word count pursuant to 22 N.Y.C.R.R. § 600.10(d)(1)(i) contain 5,760 words.

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Dated: October 13, 2017