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September 30, 2008

Honorable Chief Justice Ronald M. George,
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4783

RE: *Behshid v. Bondex International, Inc.*
(Petition for review filed September 2, 2008)
Supreme Court, Case No. S166385
Second Appellate District, Div. 3, Case No. B194789
Los Angeles Superior Court, Case No. BC343104

Dear Chief Justice George and Associate Justices:

Amici curiae Coalition for Litigation Justice, Inc.,[1] Chamber of Commerce of the United States of America, National Association of Manufacturers, American Insurance Association, Property Casualty Insurers Association of America, National Association of Mutual Insurance Companies, American Chemistry Council, and American Tort Reform Association write pursuant to Rule 8.500(g)(1) to support Bondex International's Petition for Review.

QUESTION PRESENTED FOR REVIEW

> Where the plaintiff claims injury caused by exposure to multiple asbestos products, only one of which was manufactured by the defendant, can the plaintiff satisfy the Court's requirement that a defendant's product was a "substantial" factor in causing the injury if the plaintiff does not provide any testimony regarding the level of exposure to that product?

INTEREST OF *AMICI CURIAE*

Amici are organizations that represent companies doing business in California and their insurers. *Amici* have a substantial interest in assuring that the legal rules applied to asbestos and other toxic tort cases are consistent with this Court's holdings, as well as sound science and good public policy. *Amici* believe the California Court of Appeal's decision violated these principles by permitting liability to be imposed based on speculative testimony regarding specific causation that failed to meet the basic standards put forth by the Court in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal. 4th 953. The flimsy causation standard sought by plaintiff also has been rejected by courts in other states experienced in asbestos litigation. For these reasons, the subject Petition should be granted and the Court of Appeal's decision should be reversed.

[1] The Coalition is a nonprofit association formed by insurers to address and improve the asbestos litigation environment. The Coalition files *amicus curiae* briefs in cases that may have a significant impact on the asbestos litigation environment. The Coalition includes Century Indemnity Company; Chubb & Son, a division of Federal Insurance Company, CNA service mark companies, Fireman's Fund Insurance Company, Liberty Mutual Insurance Group, and the Great American Insurance Company.

WHY THIS COURT SHOULD GRANT THE SUBJECT PETITION

A central issue in asbestos litigation is specific causation: did the defendant's product cause the plaintiff's alleged disease? There is no defined single incident of exposure for asbestos and the latency period can take decades. Thus, after contracting mesothelioma or other asbestos-related disease, "a plaintiff may not know exactly when or where he was injured and therefore is unable to describe the details of how such injury occurred." *Thacker v. UNR Indus., Inc.* (Ill. 1992) 603 N.E.2d 449. As a result, "most plaintiffs sue every known manufacturer of asbestos products." *Lohrmann v. Pittsburgh Corning Corp.* (4th Cir. 1986) 782 F.2d 1156, 1162. This Court in *Rutherford* set forth the burden of proof for assuring that defendants are not liable to a plaintiff when they did not cause that particular plaintiff's injury. Lower courts are to distinguish between products to which the plaintiff was incidentally exposed and those products to which the plaintiff's exposures were significant enough to be deemed "substantial" factors in causing the plaintiff's condition. 16 Cal. 4th at 981.

As in the instant case, lower courts in California have not been faithfully applying *Rutherford*; they do not require plaintiffs to provide information upon which a court can assess various alleged exposures to determine which defendants' products were substantial factors in causing the plaintiff's injury. *See also Jones v. John Crane, Inc.* (2005) 132 Cal. App. 4th 990 (evidence of exposure to defendant's asbestos products, regardless of level of exposure, was sufficient to establish causation); *accord* Steven D. Wasserman *et al.*, *Asbestos Litigation in California: Can it Change for the Better?* (2007) 34 Pepp. L. Rev. 883, 897-98. Instead, lower courts are allowing liability to be based on expert testimony that "all exposures increase the risk of mesothelioma." Appellate Ct. Typed Opinion Below ("Op.") at 7. This Court should grant the subject Petition to reinforce the holding in *Rutherford*, require courts to distinguish between substantial and insubstantial factors in causing plaintiff's injury, and clarify that a court cannot determine which of the two categories a defendant's product falls without some testimony as to the level of exposure the plaintiff had to a particular defendant's product.

The issue presented in this case also has particular practical import to asbestos litigation, which has been called a "crisis" by the Supreme Court of the United States. *Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 597. Asbestos litigation has forced an estimated eighty-five employers into bankruptcy. *See* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29. In accordance with bankruptcy laws, bankrupt defendants cannot be pursued in asbestos lawsuits; claims against them are paid by settlement trusts. Studies have shown that the recoveries from these settlement trusts may fully compensate asbestos victims. *See* Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 MEALEY'S ASBESTOS BANKR. REP. 1 (Nov. 2006) ("For the first time ever, trust recoveries may fully compensate asbestos victims."). Nevertheless, plaintiffs' lawyers typically name scores of defendants in litigation in an "endless search for a solvent bystander." *Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, MEALEY'S LITIG. REP.: ASBESTOS, vol. 17:3, Mar. 1, 2002, at 5 (quoting Mr. Scruggs). Many of these defendants, however, are "far removed from the scene of any

putative wrongdoing." Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14., *abstract available at* 2001 WLNR 1993314.[2] This Court should ensure that liability in California will be based on the merits of a plaintiff's claim and not the depth of a defendant's pockets.

I. The Lower Courts Are Not Applying *Rutherford*

In *Rutherford*, this Court created upper and lower bounds as to a plaintiff's burden of proof for specific causation when a plaintiff alleging asbestos-related cancer had multiple exposures to asbestos. The Court grounded these bounds in the fact that there is "scientific uncertainty regarding the biological mechanisms by which inhalation of certain microscopic fibers of asbestos leads to lung cancer and mesothelioma." 16 Cal. 4th at 974. Therefore, the Court stated it would not require plaintiffs "to identify the manufacturer of specific fibers that caused the cancer," *id.* at 976 (internal quotation omitted), but it did require plaintiffs to show that a particular defendant's asbestos product "was a substantial factor in contributing to the aggregate *dose* of asbestos the plaintiff or decedent inhaled or ingested." *Id.* (emphasis in original). By not requiring any evidence on the dose of exposure Plaintiff had to Petitioner's product, the lower court has sunk below this lower bound. Without individual dose information, it is impossible for a court to determine whether or not a defendant's product was a substantial factor in contributing to the cumulative dose causing a plaintiff's injury.

The notion that more than *de minimis* or incidental exposure to asbestos is needed to satisfy the substantial factor test is based on the *dose requirement* of toxicology. *See* David L. Eaton, Scientific *Judgment and Toxic Torts—A Primer in Toxicology for Judges and Lawyers* (2003) 12 J.L. & POL'Y 5, 11 ("Dose is the single most important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect."). For instance, it is believed that "background" exposures, such as those received by virtually any urban dweller or those living near natural asbestos outcrops, do not cause or increase the risk of disease. The substantial factor standard, therefore, denotes for juries "that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause." RESTATEMENT (SECOND) OF TORTS § 431 (1965). When a defendant's product could not have been a substantial factor in causing the claimed injury, the defendant must be dismissed—even when the defendant's conduct could have been a "negligible" or "insubstantial" cause of the injury. *See id.*

The dose requirement was essential to this Court's ruling in *Rutherford* because, as the Court explained, eliminating this requirement would improperly shift the burden of proof on the defendant to exonerate itself from liability. 16 Cal. 4th at 975.[3] The

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[2] Now, more than 8,500 defendants are ensnarled in the litigation, *see* Deborah R. Hensler, *California Asbestos Litigation—The Big Picture*, COLUMNS–RAISING THE BAR IN ASBESTOS LITIG., Aug. 2004, at 5, compared with only 300 defendants in 1982. *See* JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 5 (RAND Inst. for Civil Justice 1984).

[3] While the Court cautioned against overemphasizing the word "substantial," it stated that there must be some dividing line, below which exposures would be insufficient to be considered a legal cause of the plaintiff's injury. *Rutherford*, 16 Cal. 4th at 969.

Court expressly prohibited such burden shifting, stating that asbestos plaintiffs must "meet their burden of proving legal causation under traditional tort principles." *Id.* at 968 (also noting that "California has definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact determinations"); *see also Mitchell v. Gonzales* (1991) 54 Cal. 3d 1041, 1052-54 (same). Thus, while the Court permitted arguments based on cumulative exposure, it expressly rejected the notion that each exposure, regardless of dose, creates legal liability.[4] *Id.* at 975. The minimal burden of providing dose evidence, the Court made clear, would not be overly onerous to plaintiffs: "[a] plaintiff who suffers from an asbestos-related cancer and has proven exposure to inhalable fibers from several products will not, generally speaking, face insuperable difficulties in convincing a jury that a particular one of these product exposures, or several of them, were substantial factors" in the injury. *Id.* at 978.

In violation of *Rutherford*, the lower court did not require Plaintiff or Plaintiff's experts to distinguish the dose of the numerous joint compounds to which Plaintiff was allegedly exposed. Rather, Plaintiff simply alleged exposure to the various compounds over nearly fifteen years of home remodeling, without any approximate quantification as to the amount of the Petitioner's product he was exposed—either individually or in relation to the other compounds. *See* Op. at 2-3; Pet. at 3. The only product-specific testimony appears to have been on general causation. *See* Op. at 4-7. In addition, plaintiff's experts testified to versions of the "any exposure" theory. *Id.* ("[E]ach and every exposure to asbestos contributed to the development of the disease" and "all exposures increase the risk of mesothelioma and there is no known safe level of exposure"). Thus, on the issue of specific causation, the jury had no basis for comparing alleged exposures and could not determine whether Petitioner's product was a "substantial" or "insubstantial contribution to the injury." *Rutherford*, 16 Cal. 4th at 969. The jury simply assigned each of five defendants an equal portion of the liability. *See* Op. at 8.

In contrast to its lenient approach for the alleged exposure to Petitioner's asbestos, the Court refused to give a jury instruction regarding other exposures the plaintiff had to asbestos. Op. at 14-17.

- Testimony was provided that plaintiff cut and used felt roofing paper "at least twelve times" and that doing so "could be a 'potential' source of asbestos." Op. at 14.
- Plaintiff's medical records stated that he "reported cutting asbestos-lined shingles," and an expert testified that "cutting asbestos lined shingles would result in asbestos exposure." Op. at 15.
- Plaintiff's medical records indicated that he "was exposed to significant asbestos during his younger days in Iran several decades ago in which he would be sanding . . . asbestos tiles for a number of years with daily exposure." Op. at 15. "All three of [Plaintiff's] experts testified that if

[4] The "any exposure" theory, sometimes called the "single fiber" theory, allows plaintiffs' counsel to sue thousands of defendants every year whose supposed "contribution" to disease is trivial and far below the type of dose actually known to cause or increase the risk of disease, while at the same time excluding from causation other sources of millions of fibers.

> this were true, the exposure would have been a significant contributing factor to [Plaintiff's] development of mesothelioma." Op. at 16.

Yet, the court refused to instruct the jury as to these other exposures. In addition to concern that the court applied a different causation standard for Plaintiff and Petitioner, an instruction on these other exposures could have provided needed context for whether exposure to Petitioner's product was substantial or insubstantial in causing this Plaintiff's injury. In a telling passage trying to explain this seemingly double standard, the appellate court recites specific testimony with regard to Petitioner's product on general causation, but provides no such details on specific causation. *See* Op. at 16. This is because other than simply alleging *some* exposure, Plaintiff did not provide any approximate quantifiable evidence on specific causation against the Petitioner.

The lower court's ruling is not isolated, which gives the Court an additional interest in granting this Petition. As the Petition states, "there has been a disturbing trend of recent appellate cases in which the appellate courts have interpreted *Rutherford* to require nothing more than mere exposure to a defendants' asbestos-containing product, so long as the plaintiff can find an expert to testify that the exposure is a substantial contributing factor." Pet. at 2, 17-21 (citing examples of such cases); *see also California Court: Conflicting Evidence Could Have Resulted in Verdict for Asbestos-Exposed Man*, MEALEY'S LITIG. REP.: ASBESTOS, vol. 22:22, Dec. 12, 2007, at 4 (reporting on a verdict upholding a $4 million judgment against Union Carbide, based on the any exposure theory, when plaintiff could not recall using defendant's product). Some of these courts have read the language in *Rutherford* that the plaintiff has to show that the defendant's product increased the "risk" of the plaintiff getting a disease to support an "any exposure" type of theory, and in doing so have basically ignored the language in the opinion stating that whether an exposure constitutes a "substantial factor" ought to be judged in relation to dose, *i.e.*, "the length, frequency, proximity and intensity of exposure." *Rutherford*, 16 Cal. 4th at 982, 975.

Guidance on this issue is also needed for the Judicial Council's Advisory Committee on Civil Jury Instructions. California's standard jury instruction for non-asbestos cases provides that a substantial factor "must be more than a remote or trivial factor." CACI No. 430 (2007). The Committee removed that language from the "substantial factor" definition used in asbestos cases because the lower court opinions seemingly approved the "any exposure" theory. *See* CACI No. 435 (2007). The Committee has deferred making a final decision on an additional *de minimis* instruction "[u]ntil there is additional legal guidance." Judicial Council of California, Advisory Committee on Civil Jury Instructions, *Report* 6 (Oct. 12, 2007), *at* http://www.courtinfo.ca.gov/jc/documents/reports/120707item4.pdf. The Petition provides this Court with the opportunity to provide such guidance.

II. Expert Testimony Not Based on Dose Evidence Does Not Satisfy the "Substantial" Factor Test

Expert witness testimony baldly asserting that Petitioner's product was a "substantial" factor in causing Plaintiff's injury, when not based on any consideration of dose, can mislead the jury and provide courts with no avenue for evaluating the experts' opinion. *See Daubert v. Merrell Dow Pharms., Inc.* (1993) 509 U.S. 579, 595 ("'Expert

evidence can be both powerful and quite misleading because of the difficulty in evaluating it.'") (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, (1991) 138 F.R.D. 631, 632). Expert witnesses have an important and persuasive role in California courts, as elsewhere, because they can testify as to the "ultimate" legal issue in a case. *See* Evid. Code, § 805; Fed. R. Evid., § 703. Indeed, in *Rutherford*, the Court stated that a plaintiff can show specific causation by establishing exposure to a product along with expert testimony that to "reasonable medical probability" the exposure from that product was "a *substantial factor* in bringing about the injury." 16 Cal. 4th, at 982 (emphasis in original).

The vehicle this Court established for how a plaintiff can meet its "substantial factor" burden, namely through expert testimony, does not relieve the expert from the legal and scientific obligation to account for the dose of exposure to a product in making that determination. *Id.* at 976 (rejecting the any exposure theory); *accord McClain v. Metabolife, Int'l, Inc.* (11th Cir. 2005) 401 F.3d 1233, 1241 ("In toxic tort cases, '[s]cientific knowledge of the harmful level of exposure to a chemical, plus knowledge that plaintiff was exposed to such quantities are minimal facts necessary to sustain the plaintiff's burden.'") (quoting *Allen v. Pa. Eng'g Corp.* (5th Cir. 1999) 102 F.3d 194, 199. As Justice Stephen Breyer of the Supreme Court of the United States has stated, "the law must seek decisions that fall within the boundaries of scientifically sound knowledge." Stephen G. Breyer, *The Interdependence of Science and Law* (1998) 280 SCI. 537, 538. Yet, Plaintiffs' experts did not testify as to dose, *see* Pet. 10-11, and without such knowledge, neither the Petitioner nor the jurors had sufficient information for questioning or verifying those expert opinions.

Other states with courts experienced in asbestos litigation have reinforced that expert testimony must account for dose in testifying as to the ultimate issue of whether a particular product was a "substantial" factor in causing a plaintiff's injury. For example, the Pennsylvania Supreme Court in *Gregg v. V.J. Auto Parts, Inc.* (Pa. 2007) 943 A.2d 216, 226, recently stated: "we do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation in every 'direct-evidence' case." Earlier, another Pennsylvania court in *Summers v. Certainteed Corp.* (Pa. Super. Ct. 2005), 886 A.2d 240, *appeal granted*, (Pa. 2006), directly addressed the need for dose to be considered in informing an expert's testimony:

> Dr. Gelfand used the phrase, "Each and every exposure to asbestos has been a substantial contributing factor to the abnormalities noted." However, suppose an expert said that if one took a bucket of water and dumped it in the ocean, that was a "substantial contributing factor" to the size of the ocean. Dr. Gelfand's statement saying every breath is a "substantial contributing factor" is not accurate.

Id. at 244 (emphasis omitted). The author of the *Summers* opinion, Judge Richard Klein, served for many years as the supervising judge of Philadelphia's asbestos case program, which oversees more than 5,000 cases. Judge Klein's *Summers* opinion

proved influential in convincing the Pennsylvania Supreme Court to reject the *any exposure* approach in the recent *Gregg* ruling. *See Gregg*, 943 A.2d at 226.

Likewise, the Texas Supreme Court in *Borg-Warner Corp. v. Flores* (Tex. 2007) 232 S.W.3d 765, 765-66, recently stated, "While science has confirmed the threat posed by asbestos, we have not had the occasion to decide whether a person's exposure to 'some' respirable fibers is sufficient to show that a product containing asbestos was a substantial factor in causing asbestosis. . . . [W]e conclude that it is not. . . ."

Importantly, the *Gregg* and *Flores* cases were issued by the highest courts in states with two of the most active asbestos personal injury dockets over the past few decades. From 1998 to 2000, more than twenty percent of all state court asbestos claims were filed in Pennsylvania and Texas; from 1993-1997, almost one-half of all state court asbestos claims were filed in these two states. *See* Stephen J. Carroll *et al., Asbestos Litigation* 62 (Table 3.3) (RAND Inst. for Civil Justice 2005), *available at* http://www.rand.org/ publications/MG/MG162 [hereinafter RAND Rep.]. As this Court may be aware, the Pennsylvania and Texas Supreme Courts have extensive asbestos litigation experience throughout the totality of asbestos claims filings and have experienced the various changes over time in science and in liability theories.

Further, the Pennsylvania and Texas Supreme Courts are not alone in rejecting the any exposure causation theory. In the last three years, more than a dozen courts in multiple jurisdictions have excluded or criticized *any exposure* causation testimony as unscientific or insufficient to support causation. *See* Mark A. Behrens & William L. Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony* (forthcoming 2008) 37 SW. U. L. REV. – (available upon request).

III. California's Rulings Weakening the *Rutherford* Causation Standard Have Isolated California as a Magnet for Speculative Asbestos Claims

The lowering of California's specific causation standard is one of the reasons that California has become a magnet for asbestos cases. In 1996, a Court of Appeal stated that California courts were "already overburdened with asbestos litigation . . . ." *Hansen v. Owens-Corning Fiberglas Corp.* (1st Dist. 1996) 51 Cal. App. 4th 753, 760; *see also Asbestos Claims Facility v. Berry & Berry* (1st Dist. 1990) 219 Cal. App. 3d 9, 23 ("the burdens placed on the judicial system by [asbestos] litigation."); Steven Weller *et al., Report on the California Three Track Civil Litigation Study* 28 (Pol'y Stud. Inc. July 31, 2002) ("The San Francisco Superior Court seems to be a magnet court for the filing of asbestos cases."), *at* www.clrc.ca.gov/pub/BKST/BKST-3TrackCivJur.pdf.[5]

In fact, asbestos litigation in California appears to be worsening. *See* Alfred Chiantelli, *Judicial Efficiency in Asbestos Litigation* (2003) 31 Pepp. L. Rev. 171, 171

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5 "For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits." *In re Combustion Eng'g, Inc.* (3d Cir. 2005) 391 F.3d 190, 200. Through 2002, approximately 730,000 claims had been filed. *See* RAND Rep. at xxiv. In August 2006, the Congressional Budget Office estimated that there were about 322,000 asbestos bodily injury cases in state and federal courts. *See* American Academy of Actuaries Mass Torts Subcomm., *Current Issues in Asbestos Litigation* 5 (Aug. 2007), *at* http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf.

(former San Francisco Superior Court Judge stating, "Lately, we have seen a lot more mesothelioma and other cancer cases than in the past."). In 2004, one San Francisco Superior Court judge stated at a University of San Francisco Law School symposium that asbestos cases take up twenty-five percent of the court's docket. *See Judges Roundtable: Where is California Litigation Heading?*, HarrisMartin's Columns: Asbestos, July 2004, at 3. Another San Francisco Superior Court judge noted that asbestos cases are a "growing percentage" of the court's ever increasing caseload and that they take up a large share of the court's scarce resources. *See id.*; *see also* Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis* (2004) 45 Santa Clara L. Rev. 1.

More recently, an influx of filings—many by out-of-state plaintiffs—has significantly increased the burden on California courts. In a 2006 sample of 1,047 asbestos plaintiffs for whom address information was available an astonishing *thirty percent* had addresses outside California. *See* Victor E. Schwartz *et al.*, *Litigation Tourism Hurts Californians*, 21:20 Mealey's Litig. Rep.: Asbestos 41 (Nov. 15, 2006); *see also* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes* (2007) 62 N.Y.U. Ann. Surv. Am. L. 525, 599 ("[P]laintiffs' firms are steering cases to California, partly to the San Francisco-Oakland area, which is traditionally a tough venue for defendants, but also Los Angeles, which was an important asbestos venue in the 1980s but is only recently seeing an upsurge in asbestos cases.").

Not surprisingly, firms that manage these claims are also moving to California. *See* Steven D. Wasserman *et al.*, *Asbestos Litigation in California: Can it Change for the Better?* (2007) 34 Pepp. L. Rev. 883, 885 ("With plaintiff firms from Texas and elsewhere opening offices in California, there is no doubt that even more asbestos cases are on their way to the state."); Ford Gunter, *Houston Law Firm To Open L.A. Office*, Houston Bus. J., Oct. 16, 2007 (detailing move by Lanier Firm of Texas to Los Angeles). As a result, "California is positioned to become a front in the ongoing asbestos litigation war." Emily Bryson York, *More Asbestos Cases Heading to Courthouses Across Region*, 28:9 L.A. Bus. J. 8 (Feb. 27, 2006), *available at* 2006 WLNR 4514441.

"Litigation tourists" are drawn to California by the belief that the state's asbestos litigation rules give them an advantage. The demands of resolving claims that belong in other states impose unfair burdens on California's courts and citizens. It is inconceivable that the people of California would want their hard-earned tax dollars spent to support a court system for out-of-state claimants, or that Californians welcome having to take time off of work or be away from home for lengthy periods to serve on juries deciding asbestos cases that do not legitimately concern Californians.

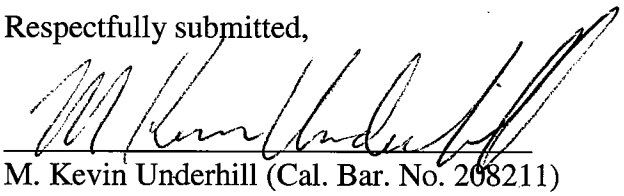
Should the Court of Appeal's decision stand, it will reinforce this perception and signal to plaintiffs that they should file in California because they can obtain judgments on flimsy expert causation testimony rejected elsewhere. This Court should grant the Petition to reinforce *Rutherford*, require courts to distinguish between substantial and insubstantial factors in causing a plaintiff's injury, and clarify that a court cannot make

this determination with respect to any defendant without testimony as to the level of exposure the plaintiff had to defendant's product.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the subject Petition and reverse the decision of the Court of Appeal.

Respectfully submitted,



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I certify that on September 30, 2008, I sent an original and four copies of the foregoing by courier to:

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I also served a copy of the foregoing on each of the interested parties in this action by placing true and correct copy in sealed envelopes sent by U.S. Mail, first-class postage-prepaid, addressed to the following:

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