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August 16, 2013

VIA COURIER

Hon. Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: *Strickland v. Union Carbide Corp.*, No. S212424
Amicus Curiae Letter in Support of Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Amicus curiae the Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this letter, pursuant to rule 8.500(g) of the Rules of Court, in support of defendant Union Carbide Corporation's petition for review in this case.

INTEREST OF AMICUS CURIAE

The Chamber is the world's largest federation of business, trade, and professional organizations, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and corporations of every size, from every sector, and in every geographic region of the country. In particular, the Chamber has many members in California and many more who conduct substantial business in this State. For that reason, the Chamber and its members have a significant interest in the sound and equitable resolution of asbestos-related and other claims in California courts.

The Chamber routinely advocates the interests of the business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of vital concern. In fulfilling that role, the Chamber has appeared many times before this Court and the California Court of Appeal.

WHY REVIEW SHOULD BE GRANTED

Union Carbide's petition for review raises important questions of statewide concern warranting this Court's review. Various divisions and districts of the Court of Appeal, and numerous trial courts in this State, have overstepped and failed to faithfully apply this Court's binding precedent by broadening the liability standard for asbestos-related claims to what has effectively become an "any exposure" theory of liability. This change threatens to make the California court system a magnet jurisdiction for asbestos cases, even cases where neither the plaintiff nor the defendant are located in California. This is particularly troubling given the current constraints on California's limited court resources. Left uncorrected, this unduly slanted and fundamentally unjust standard will likely lead to a new wave of bankruptcies of corporations in this State, as the second (and far less culpable) generation of asbestos defendants meets a similar fate as the traditional asbestos defendants did.

THE *RUTHERFORD* LIABILITY STANDARD

This Court's landmark *Rutherford* decision formulated and applied a new product liability standard specific to asbestos-related injuries. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982 [67 Cal.Rptr.2d 16, 35, 941 P.2d 1203, 1223] (*Rutherford*).) This Court squarely rejected the argument that the burden of proof for causation should shift to defendants, explaining that such a "fundamental departure" from "basic tort principles" was not warranted. (*Id.* at pp. 968–969.) But it also noted that holding plaintiffs to a "but for" standard of causation would not be appropriate for asbestos litigation, because it would require plaintiffs to prove that fibers from the defendant's products were the specific fibers that eventually initiated the process of malignant cellular growth. (*Id.* at p. 982.) Due to the scientific uncertainty and difficulty in adducing such proof, *Rutherford* instead held that the appropriate standard of causation was an adapted, asbestos-specific version of the "substantial factor" test. (*Ibid.*)

The two-part asbestos "substantial factor" test requires a plaintiff to (1) establish some threshold exposure to the defendant's defective asbestos product and (2) "further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury." (*Rutherford, supra*, 16 Cal.4th at p. 982, original italics.) This Court further clarified that exposure to a defendant's product was a substantial factor

"if in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer." (*Id.* at p. 977, original italics.)

This Court in *Rutherford* did not intend to relieve plaintiffs of their traditional burden to prove defendants' conduct caused their injuries. Indeed, this Court adapted the substantial factor test in order to *maintain* plaintiff's burden of proving causation, while also acknowledging the scientific difficulties inherent in asbestos litigation. Yet in recent years, numerous divisions and districts of the Court of Appeal and various trial courts have unduly broadened and fundamentally reworked this standard in the mistaken belief that every exposure to asbestos could properly be deemed to have increased the risk of developing cancer. Under this "any exposure" theory, courts have stretched and refashioned the entire notion of "substantial factor" to such an extent that it has essentially been transformed into a very different one-part test. Doing so runs directly counter to this Court's holding in *Rutherford* though: It effectively relieves plaintiffs of any burden of proving causation and instead shifts it entirely onto defendants.

RECENT CASES HAVE IMPROPERLY DEPARTED FROM THIS COURT'S DECISION IN *RUTHERFORD.*

"California continues to produce lower court asbestos causation opinions that distort the standard" in *Rutherford.* (Anderson et al., *The "Any Exposure" Theory Round II – Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008* (2012) 22 Kan. J.L. & Pub.Pol'y 1, 37.) In particular, California courts "have apparently not understood or acknowledged the inherent conflict between *Rutherford* and any exposure testimony. *Rutherford* rejected that plaintiff's attempt to shift the burden of proof of substantial factor causation to defendants. But that is exactly what the any exposure theory does." (*Ibid.*) Several Court of Appeal decisions over the past fifteen years since *Rutherford* have done just this.

For example, in *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990 [35 Cal.Rptr.3d 144], Division Three of the First Appellate District affirmed a jury's substantial factor finding based on expert medical testimony that "every exposure" to asbestos that plaintiff had experienced, "including asbestos releases from defendant's packing and gasket products, contributed to the risk of [plaintiff's] developing lung cancer." (*Id.* at p. 999.) The court found that this testimony was "substantial evidence that Jones's lung cancer was caused by cumulative exposure, with each of

many separate exposures having constituted substantial factors contributing to the risk of his injury." (*Ibid.*) Yet such a conclusion goes directly against the notion of requiring plaintiffs to prove causation in addition to some threshold exposure. To rule that "every" exposure to asbestos is a substantial factor simply because it contributes to the risk of plaintiff's injury is, in essence, to entirely remove the concept of "substantial" from the "substantial factor" test. In reaching this conclusion, the Court of Appeal failed to adhere to *Rutherford*'s central holding, and effectively gutted the second part of this Court's asbestos "substantial factor" test.

The recent decision of Division Two of the Second Appellate District in *Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659 [156 Cal.Rptr.3d 90], similarly contravened *Rutherford* in holding that a medical doctor was not needed to testify that there was a "reasonable medical probability that the exposure . . . was a 'legal cause' of Mr. Hernandez's injury." (*Id.* at p. 673.) The court reversed the trial court's nonsuit, which was based on the rationale that the appellant failed to show, to a reasonable degree of medical probability, that the product caused the complained-of injury. (*Id.* at p. 675.) The Court of Appeal held that the generic testimony of plaintiff's epidemiologist, Richard Lemen, Ph.D., qualified as medical evidence, even though Dr. Lemen was not a medical doctor, did not diagnose Mr. Hernandez, and could not testify as to the cause of Mr. Hernandez's condition. (*Id.* at p. 666.) Dr. Lemen stated that "if a worker were exposed to many different asbestos-containing products, each of those products would contribute to an increased risk of asbestos-related disease, as long as the asbestos was inhaled and retained in the worker's body." (*Ibid.*) The court held that Dr. Lemen's testimony was sufficient for a jury to determine the issue of causation—thereby altering the second part of the *Rutherford* test from a requirement to demonstrate a *substantial* contribution to a requirement to demonstrate *any* contribution.

Several other decisions have similarly watered down the *Rutherford* test to the point of creating virtual automatic liability against defendants who may or may not be responsible for different plaintiffs' injuries.

THE COURT OF APPEAL IN THIS CASE IMPROPERLY ALTERED AND REWORKED THE *RUTHERFORD* STANDARD.

The Court of Appeal's decision in this case is the latest and most blatant example of the regrettable trend of effectively reworking and transforming the *Rutherford* standard into the very burden-shifting this Court rejected in *Rutherford*. The

decedent, Gary Strickland, was repeatedly exposed to amphibole and chrysotile asbestos during his life. (Op. at 3.) After his death, a biopsy showed Strickland had "likely been exposed to a very high concentration of amphibole asbestos." (*Ibid.*) But Union Carbide's product, Calidria, contained no amphibole asbestos, as it was pure chrysotile. (Op. at 2.)

Plaintiff's medical expert testified that "there still probably is relatively little evidence" that chrysotile causes peritoneal mesothelioma. (Op. at 4.) Dr. Hammar even acknowledged that several of his colleagues believed the evidence is "insufficient" to show chrysotile causes peritoneal mesothelioma. (*Ibid.*) Dr. Hammar admitted that he did not have evidence that exposure to Calidria causes mesothelioma, and later clarified that he knew of no cases where Calidria was part of the asbestos individuals were exposed to. (Op. at 5.) Dr. Hammar "did not specifically link Strickland's exposure to Calidria to an increased risk of developing the disease, opining instead as to the cumulative impact of his exposure to asbestos." (Op. at 12.)

Despite all of this, the trial court found (and the Court of Appeal affirmed) that Dr. Hammar's testimony "was sufficient to permit the jury to find substantial factor causation." (Op. at 13.)

Under this reasoning, *any* exposure is essentially equivalent to a *substantial* factor, which all but eliminates the requirement that plaintiffs prove the asbestos "substantial factor" causation. The court held, relying on *Hernandez*, that "[t]here need not be testimony specifically linking the defendant's product in isolation to the plaintiff's increased risk of developing cancer." (Op. at 10.) Combined with *Hernandez*, the Court of Appeal's decision eliminates the need for any medical evidence linking a defendant's product to the risk of developing cancer.

OTHER STATES HAVE REJECTED THE "ANY EXPOSURE" LIABILITY THEORY ADOPTED AND APPLIED BY THE COURT OF APPEAL HERE.

The Court of Appeal's decision places California well outside the mainstream of States with respect to the governing standard for proving exposure to a defendant's asbestos.

Courts across the country have rejected the "any exposure" theory. (See, e.g., *Gregg v. V-J Auto Parts Co.* (Pa. 2007) 943 A.2d 216; *In re W.R. Grace & Co.* (Bankr. D.

Del. 2006) 355 B.R. 462; *Brooks v. Stone Architecture, P.A.* (Miss. Ct. App. 2006) 934 So.2d 350; *Bartel v. John Crane, Inc.* (N.D. Ohio 2004) 316 F.Supp.2d 603, affd sub nom. *Lindstrom v. A-C Prod. Liab. Trust* (6th Cir. 2005) 424 F.3d 488; *Free v. Ametek* (Wash. Super. Ct. Feb. 28, 2008) 2008 WL 728387; *Daly v. Arvinmeritor, Inc.* (Fla. Ct. App. Nov. 30, 2009) 2009 WL 4662280.)

For example, the Pennsylvania Supreme Court in *Betz v. Pneumo Abex LLC* (Pa. 2012) 44 A.3d 27, 39, 58, affirmed a lower court's decision precluding the plaintiffs from using their expert's "any exposure" opinion. (*Ibid.*) The court explained that the "any-exposure opinion . . . obviates the necessity for plaintiffs to purs[u]e the more conventional route of establishing specific causation (for example, by presenting a reasonably complete occupational history and providing some reasonable address of potential sources of exposure other than a particular defendant's product)." (*Id.* at p. 54.) The court found the "any exposure" theory to be in conflict with itself because, "[s]imply put, one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive." (*Id.* at p. 56.)

In a similar vein, the Virginia Supreme Court recently held that the proper causation standard for asbestos cases is the "sufficient-to-have-caused" standard. (*Ford Motor Co. v. Boomer* (Va. 2013) 736 S.E.2d 724, 732.) Under this standard, plaintiffs must show that the exposure likely occurred prior to the development of their cancer, and that the exposure was sufficient in itself to cause it.

As yet another example, the Texas Supreme Court rejected the "any exposure" theory and held that the substantial factor causation test is the proper test to be used in determining liability in asbestos cases. (*Borg-Warner Corp. v. Flores* (Tex. 2007) 232 S.W.3d 765, 770–71.) Under the substantial factor causation test, plaintiffs must provide evidence of an approximate dose and evidence that the dose was substantial enough to cause cancer. (*Id.* at p. 773; see also *Smith v. Kelly-Moore Paint Co.* (Tex. Ct. App. 2010) 307 S.W.3d 829, 835, 839 [asbestos plaintiffs must prove the amount of exposure and the minimum dose of the product above which an increased risk of developing cancer occurs].)

THE IMPACT OF "ANY EXPOSURE" LIABILITY

Since the 1980s, asbestos litigation has proven fatal to manufacturers and distributors of asbestos. Dozens of companies filed for bankruptcy protection. These companies

typically reorganized in a way that channeled all current and future asbestos claims into a personal injury trust funded by the reorganized company. (See Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010* (Oct. 10, 2012) Mealey's Litigation Report: Asbestos at 2.) Accordingly, many claims against the reorganized companies are now handled through an administrative process rather than litigation. (*Ibid.*)

In the wake of the initial wave of bankruptcies of traditional asbestos defendants, the number of new defendants and lawsuits has increased dramatically. (*Id.* at p. 1.) Plaintiffs' attorneys have shifted their focus to peripheral defendants, who manufactured and distributed far less harmful asbestos products such as pumps, valves, and gaskets. (*Id.* at p. 4.)

If the asbestos liability standards continue to move towards absolute liability, more companies in a wide variety of industries will be exposed to crushing liability and potential bankruptcy. The industries facing this potential exposure include construction, automotive trades, residential home repair, and remodeling. Under an "any exposure" standard, plaintiffs' attorneys will enmire and extinguish these peripheral companies, as they did with the traditional defendants of the first wave. Consequently, there may be a new wave of industry-extinguishing bankruptcies across several sectors of the economy that would have disastrous, disproportionate, and unjust consequences for these companies, their employees, and this State more generally.

Just one example should prove illustrative. Yarway Corporation recently declared bankruptcy as a result of asbestos-related claims. (See Cornell, *Yarway Files For Bankruptcy, Citing Asbestos-Related Litigation*, (Apr. 25, 2013), http://www.mondaq.com/unitedstates/x/235980/Insolvency+Bankruptcy/Yarway+Files+For+Bankruptcy+Citing+AsbestosRelated+Litigation.) The asbestos claims arose from gasket and packing products created between the 1920s and the 1970s. (*Ibid.*) In the last five years over 10,000 new asbestos-related claims were filed against Yarway, including over 1,000 claims in 2012. (*Ibid.*) Plaintiffs filed over 30 of these claims in California courts. (See Justia Dockets & Filings (last visited Aug. 13, 2012) http://dockets.justia.com/search?query=Yarway+Corporation%C2%A0&state=california.) At least six companies have already filed for bankruptcy in 2013 as a result of asbestos claims. (Crowell Moring, *CHART 1: COMPANY NAME AND YEAR OF*

BANKRUPTCY FILING (Apr. 23, 2013), http://www.crowell.com/files/List-of-Asbestos-Bankruptcy-Cases-Chronological-Order.pdf.)

Liability standards have real consequences on companies doing business in California, and the Court of Appeal's undue broadening of liability far beyond what this Court contemplated in *Rutherford* may well lead to another wave of bankruptcies of companies unable to weather the unjust and unduly one-sided legal climate many California courts have created for asbestos-related claims.

CONCLUSION

The Chamber respectfully requests that this Court grant review to reaffirm, and disapprove of departures from, the important standard for determining liability in asbestos-related cases this Court set forth in *Rutherford*, and reverse or vacate the judgment of the Court of Appeal in this case.

Sincerely,

Julian W. Poon

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cc: See attached Proof of Service

PROOF OF SERVICE

I, Laura Rocha Maez, declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, California 90071, in said County and State. On August 16, 2013, I served the within:

AUGUST 16, 2013 *AMICUS CURIAE* LETTER TO THE SUPREME COURT OF CALIFORNIA IN SUPPORT OF PETITION OF REVIEW IN *STRICKLAND V. UNION CARBIDE CORP.*, NO. S212424

to each of the persons named below at the address(es) shown, in the manner described below:

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Laura Rocha Maez

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