Shook, Hardy & Bacon L.L.P.
www.shb.com

May 7, 2008

M. Kevin Underhill

333 Bush Street, Suite 600
San Francisco
California 94104-2828
415.544.1900
415.544.1923 DD
415.391.0281 Fax
kunderhill@shb.com

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

RE: *Norris v. Crane Company*
(Petition for review filed April 22, 2008)
Supreme Court, Case No. S162878
Second Appellate District, Div. 5, Case No. B196031
Los Angeles Superior Court, Case No. BC340413

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 Crane Co.'s petition for review.

QUESTIONS PRESENTED FOR REVIEW

1. Where the plaintiff claims a personal injury caused by exposure to asbestos from a product manufactured by the defendant, can the plaintiff establish causation based solely on expert testimony that *every* exposure to asbestos contributes to asbestos-related diseases?

2. Does the "consumer expectations" test for determining product defect apply to complex toxic torts that are outside the everyday experience of consumers, and the injured party is not a purchaser or user of the product, but a bystander?

INTEREST OF *AMICI CURIAE*

Amici are organizations that represent companies doing business in California and their insurers. Accordingly, *amici* have a substantial interest in ensuring that the legal rules applied to asbestos and other toxic tort cases are consistent with well-established tort law, 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

[1] The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers to address and improve the asbestos litigation environment. The Coalition files *amicus curiae* briefs in important 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.

flimsy causation testimony that is being rejected by an increasing number of courts and through application of a "consumer expectations" product defect test that is a poor fit in asbestos and other toxic tort cases, especially those involving bystander plaintiffs. For these reasons, the subject Petition should be granted and the Court of Appeal's decision should be reversed.

WHY THIS COURT SHOULD GRANT THE SUBJECT PETITION

I. Guidance is Needed As to What Constitutes a "Substantial Factor"

In California, an asbestos plaintiff must "establish some threshold *exposure* to the defendant's defective asbestos-containing products, *and* must 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 v. Owens-Illinois, Inc.* (1997) 16 Cal. 4th 953, 981 (emphasis in original); *see also Mitchell v. Gonzales* (1991) 54 Cal. 3d 1041, 1052-54 (adopting substantial factor test).

Not all exposures are sufficient to meet the "substantial factor" test. For example, the *Rutherford* Court said that the "length, frequency, proximity and intensity of exposure" should be considered along with "the peculiar properties of the individual product" in determining whether a particular exposure contributed "significantly enough." *Id.* at 975, 977.[2] Clearly, the Court appreciated that "each and every exposure" to asbestos is not sufficient to satisfy the substantial factor test, otherwise the care the Court took to consider the "length, frequency, proximity and intensity of exposure" would be superfluous. The Court also said that "a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor." *Id.* at 969; *see also Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal. 4th 71, 79 (a force that is "infinitesimal," "negligible," or "theoretical" cannot satisfy the substantial factor test).

The notion that more than *de minimis* or incidental exposure to asbestos is needed to satisfy the substantial factor test is grounded in 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. Thus, proving an *adequate* dose to cause or increase the risk of asbestos disease is important.

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[2] *See also Lineaweaver v. Plant Insulation Co.* (1st Dist. 1995) 31 Cal. App. 4th 1409, 1416-17 ("Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff's asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant" in addition to "the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff's injury.") (internal citations omitted).

A tension has arisen between *Rutherford*'s "substantial factor" standard and cases such as this one and *Jones v. John Crane, Inc.* (2005) 132 Cal. App. 4th 990, where plaintiffs have been allowed to prove causation merely by showing some exposure to defendant's product and presenting "*any exposure*" expert testimony. The *any exposure* theory, sometimes called the *any fiber* theory, contends that because asbestos is a cumulative, dose-response disease, each and every exposure to asbestos during a person's lifetime, no matter how small or trivial, substantially contributes to the ultimate disease (e.g., asbestosis, lung cancer, or mesothelioma). *See Norris v. Crane Co.* (Cal. Ct. App., 2d Dist., Mar. 11, 2008) No. B196031, 2008 WL 638361, at *14 ("expert testimony established every exposure to asbestos fibers . . . increased the total dose in his lung that led to the development of his disease."). The "*any* exposure" theory allows plaintiffs' counsel to sue thousands of defendants every year whose supposed "contribution" to disease is trivial and far below the type of doses actually known to cause or increase the risk of disease, while at the same time excluding from causation yet accepting the science of non-causation regarding another source of millions of fibers (i.e., background exposures).

This Court should resolve the tension between *Rutherford* and cases such as this one and *Jones*. The Court should clarify that incidental or *de minimis* exposures are insufficient to satisfy the substantial factor test,[3] as other courts have recently done.

For example, the Pennsylvania Supreme Court in *Gregg v. V.J. Auto Parts, Inc.* (Pa. 2007) 943 A.2d 216, 226, stated that "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 (Pa. Super. Ct. 2005), *appeal granted,* (Pa. 2006), directly addressed the illogic of the cumulative dose approach many plaintiffs' experts use to include every exposure in causation:

> 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. If someone walks past a mechanic changing brakes, he or she is exposed to asbestos. If that person worked for thirty years at an asbestos factory making lagging, it can hardly be said that the one whiff of the asbestos from the brakes is a "substantial" factor in causing disease.

[3] "Such modification could be as follows: Plaintiff may prove that exposure to asbestos from defendant's product was a substantial factor in causing his illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure contributed to his risk of developing cancer. Defendant's conduct is not a substantial factor in contributing to plaintiff's risk of developing cancer if the plaintiff was subject to the same or similar risk without that conduct." Steven D. Wasserman *et al.*, *Asbestos Litigation in California: Can it Change for the Better?* (2007) 34 Pepp. L. Rev. 883, 905.

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 5,000+ asbestos case program. 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, 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, over 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* RAND, *supra*, at 62 (Table 3.3). 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 claiming.

Furthermore, the Pennsylvania and Texas Supreme Courts are not alone in their rejection of 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. – (lodged with clerk).[4]

Furthermore, as explained by Petitioner, resolution of this matter is essential to provide needed guidance to 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 of the *Jones* court's approval of the "any exposure" theory. *See* CACI No. 435 (2007). Disagreements arose within the Committee on this issue with one member believing that *Rutherford* requires an instruction that more than a minimum level of exposure is required to establish causation and other Committee members believing that, while *Rutherford* may not require that result, a defendant should be entitled to a *de minimis* instruction upon request. The Committee deferred a decision on that issue "[u]ntil there is additional legal guidance." Judicial Council of California, Advisory

[4] *See also Bartel v. John Crane, Inc.* (N.D. Ohio 2004) 316 F. Supp.2d 603, 604-11, *aff'd sub nom., Lindstrom v. A-C Product Liability Trust* (6th Cir. 2005) 424 F.3d 488, 498; *In* re *W.R. Grace & Co.* (Bankr. D. Del. 2006), 355 B.R. 462, 474, 478, *leave to appeal denied* (D. Del. Mar. 26, 2007) No. 07-MC-0005 RLB, 01-1139, 2007 WL 1074094); *Brooks v. Stone Architecture, P.A.* (Miss. Ct. App. 2006) 934 So. 2d 350; *Georgia-Pacific Corp. v. Stephens* (Tex. App.-Hous. 2007), 239 S.W.3d 304, 320-21, *reh'g overruled* (Oct. 13, 2007), *review denied* (Feb. 22, 2008).

Committee on Civil Jury Instructions, Report (Oct. 12, 1997), p. 6 (Advisory Committee Report), *available at* http://www.courtinfo.ca.gov/jc/documents/reports/120707item4.pdf. The Petition provides this Court with the opportunity to provide the guidance sought by the Committee.

II. Guidance is Needed on the Application of the Consumer Expectations Test for Determining Defectiveness, Particularly in Bystander Plaintiff Cases

In *Barker v. Lull Engineering Co.* (1978) 20 Cal. 3d 413, this Court established a two-prong approach for determining whether a product is defective in design. One prong is the risk-benefit test; the other is the consumer expectations test, which holds that a product is defective if it "failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *Id.* at 432. The consumer expectations test has been criticized as an open-ended and "incoherent basis upon which to measure producer responsibility." James A. Henderson, Jr. & Aaron D. Twerski *Achieving Consensus on Defective Product Design* (1998) 83 Cornell L. Rev. 867, 880; *see also* Restatement Third, Torts: Products Liability § 2(b), Comment d(III) (1998); William C. Powers, Jr., *The Persistence of Fault in Products Liability* (1983), 61 Tex. L. Rev. 777, 796-97 ("The vague expectations of consumers probably oscillate between never expecting a product to injure them (on the theory that 'it will never happen to me') and actually expecting some products to be 'lemons.'"). The jurisdictions that continue to apply the consumer expectations test are "a distinct minority. . . ." Restatement Third, *supra*, § 2(b), Comment d(II)(D).

This Court in *Soule v. General Motors Corp.* (1994) 8 Cal. 4th 548, sought to address some of the criticisms of the consumer expectations test in design defect litigation. The Court recognized a limited role for the test, but found it wholly unsatisfactory for a case involving product design or any complexity. The Court concluded that the consumer expectations test is "reserved for cases in which the *everyday* experience of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and thus is defective *regardless of expert opinion about the merits of the design.*" *Id.* at 567 (emphasis added). Lower courts, however, have continued to struggle with this definition and have reached inconsistent results. Furthermore, the consumer expectation test "tends to be unworkable for third parties and bystanders who do not have any expectations about product performance." Victor E. Schwartz & Mark A. Behrens, *An Unhappy Return to Confusion in the Common Law Of Products Liability — Denny v. Ford Motor Company Should Be Overturned* (1997) 17 Pace L. Rev. 359, 374; *see also* Aaron D. Twerski, *From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation* (1983) 11 Hofstra L. Rev. 861, 907.

The Petition provides this Court with an opportunity to decide the applicability of the "consumer expectations" test to complex toxic torts that are outside the everyday experience of consumers, especially where the injured party is not a purchaser or user of the product, but a bystander.

III. Asbestos Litigation Environment in Which the Petition Must Be Considered

"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.[5] The United States Supreme Court in *Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 597, described the litigation as a "crisis." Through 2002, approximately 730,000 claims had been filed. *See* Stephen J. Carroll *et al., Asbestos Litigation* xxiv (RAND Inst. for Civil Justice 2005), *available at* http://www.rand.org/publications/MG/MG162 [hereinafter RAND Rep.]. 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), *available at* http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf.

So far, the 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, and has had devastating impacts on defendant corporations, employees, retirees, affected communities, and the economy.[6] Over 8,500 defendants have been named, *see* Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, HarrisMartin's Columns: Asbestos, Aug. 2004, at 5, as "the net has spread from the asbestos makers to companies 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. One well-known plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).[7] Nontraditional defendants now account for more than half of asbestos expenditures. *See* RAND, *supra*, at 94.

As long ago as 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. Much of the surge in asbestos case filings nationwide has happened since that time; California courts have not been spared. *See Asbestos Claims Facility v. Berry & Berry* (1st Dist. 1990) 219 Cal. App. 3d 9, 23 (noting "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."), *available at* www.clrc.ca.gov/pub/BKST/BKST-3TrackCivJur.pdf.

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5 *See also* Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis* (1993) 30 Harv. J. on Legis. 383.

6 *See* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation* (2002) 54 Baylor L. Rev. 331.

7 *See also* Steven B. Hantler *et al., Is the Crisis in the Civil Justice System Real or Imagined?* (2005) 38 Loy. L.A. L. Rev. 1121, 1151-52 (discussing spread of asbestos litigation to "peripheral defendants").

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 (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 ("plaintiffs' 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.").

Unsurprisingly, the firms that manage these claims are 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).

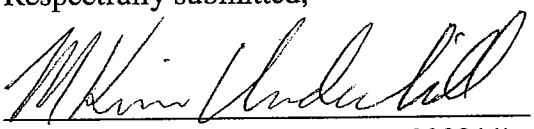
As a result of these developments, "California is positioned to become a front in the ongoing asbestos litigation war." Emily Bryson York, *More Asbestos Cases Heading to Courthouses Across Region*, 28:9 L.A. Bus. J. 8 (Feb. 27, 2006), *available at* 2006 WLNR 4514441.

"Litigation tourists" are drawn to California by the belief that the state's asbestos litigation rules will give them an advantage. Should the Court of Appeal's decision be permitted to stand, it will reinforce this perception and signal to plaintiffs throughout the country that they should file in California because they can obtain judgments based on flimsy expert causation testimony and product defect standards that have been rejected elsewhere. This Court should accept the subject Petition to give meaning to the threshold for "substantial factor" causation, provide needed guidance in the fashioning of proper jury instructions, and apply fair and workable standards for determining defectiveness in complex toxic tort cases, particularly those involving bystander plaintiffs.

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,



Kevin Underhill (Cal. Bar. No. 208211)
SHOOK, HARDY & BACON, L.L.P
33 Bush Street, Suite 600
San Francisco, CA 94104
Tel: (415) 544-1900
Attorney for *Amici Curiae*

Mark A. Behrens
Cary Silverman
SHOOK, HARDY & BACON L.L.P.
600 14th Street, NW, Suite 800
Washington, DC 20005
Tel: (202) 783-8400
Counsel for the Coalition for Litigation, Inc.

William L. Anderson
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 624-2500
Counsel for the Coalition for Litigation Justice, Inc.

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
Tel: (202) 463-5337

Jan Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 637-3000

Lynda S. Mounts
Kenneth A. Stoller
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Avenue, NW, Suite 1000
Washington, DC 20036
Tel: (202) 828-7158

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018
Tel: (847) 553-3826

Gregg Dykstra
NATIONAL ASSOCIATION OF
MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
Tel: (317) 875-5250

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
Tel: (703) 741-5000

H. Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036
Tel: (202) 682-1163

Of Counsel

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF SAN FRANCISCO)

I certify that on May 7, 2008, I sent an original and four copies of the foregoing by courier to:

California Supreme Court, Clerk's Office
350 McAllister Street
San Francisco, CA 94102
Tel: (415) 865-7000

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:

Curt Cutting
HORVITZ & LEVY LLP
15760 Ventura Blvd., 18th Floor
Encino, CA 91436

Robert E. Feyder
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
10100 Santa Monica Blvd., 7th Floor
Los Angeles, CA 90067

Paul R. Kiesel
KIESEL, BOUCHER & LARSON, LLP
8648 Wilshire Boulevard
Beverly Hills, CA 90211

John L. Langdoc
BARON & BUDD, P.C.
3102 Oak Lawn Avenue, Suite 1100
Dallas, TX 75219

Carolin K. Shining
PAUL, HANLEY & HARLEY, LLP
811 W. 7th Street, Suite 206
Los Angeles, CA 90017

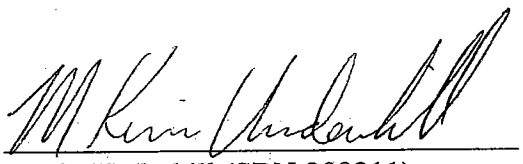
Renee M. Melancon
BARON & BUDD, P.C.
3102 Oak Lawn Avenue, Suite 1100
Dallas, TX 75219

Henry David Rome
HOWARD ROME MARTIN & RIDLEY LLP
1775 Woodside Road #200
Redwood City, CA 94061

Douglas Wah
FOLEY & MANSFIELD
1111 Broadway, 10th Floor
Oakland, CA 94607

Hon. Victor E. Chavez
c/o Clerk
Superior Court, County of Los Angeles
111 North Hill Street
Los Angeles, CA 90012

Clerk's Office
California Court of Appeal,
Second Appellate District, Division 5
Ronald Reagan State Building
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013



Kevin Underhill (SBN 208211)
SHOOK, HARDY & BACON, L.L.P
333 Bush Street, Suite 600
San Francisco, CA 94104

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF SAN FRANCISCO)

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California Supreme Court, Clerk's Office
350 McAllister Street
San Francisco, CA 94102
Tel: (415) 865-7000

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Curt Cutting
HORVITZ & LEVY LLP
15760 Ventura Blvd., 18th Floor
Encino, CA 91436

Robert E. Feyder
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
10100 Santa Monica Blvd., 7th Floor
Los Angeles, CA 90067

Paul R. Kiesel
KIESEL, BOUCHER & LARSON, LLP
8648 Wilshire Boulevard
Beverly Hills, CA 90211

John L. Langdoc
BARON & BUDD, P.C.
3102 Oak Lawn Avenue, Suite 1100
Dallas, TX 75219

Carolin K. Shining
PAUL, HANLEY & HARLEY, LLP
811 W. 7th Street, Suite 206
Los Angeles, CA 90017

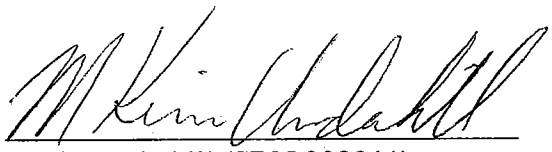
Renee M. Melancon
BARON & BUDD, P.C.
3102 Oak Lawn Avenue, Suite 1100
Dallas, TX 75219

Henry David Rome
HOWARD ROME MARTIN & RIDLEY LLP
1775 Woodside Road #200
Redwood City, CA 94061

Douglas Wah
FOLEY & MANSFIELD
1111 Broadway, 10th Floor
Oakland, CA 94607

Hon. Victor E. Chavez
c/o Clerk
Superior Court, County of Los Angeles
111 North Hill Street
Los Angeles, CA 90012

Clerk's Office
California Court of Appeal,
Second Appellate District, Division 5
Ronald Reagan State Building
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013



Kevin Underhill (SBN 208211)
SHOOK, HARDY & BACON, L.L.P
333 Bush Street, Suite 600
San Francisco, CA 94104