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January 7, 2011

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Via Federal Express

The Honorable Chief Justice Tani Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: **Stewart v. Union Carbide Corporation**
Supreme Court Case No. S189817
Letter in Support of Petition for Review

Dear Honorable Chief Justice Tani Cantil-Sakauye
and Honorable Associate Justices:

Amici curiae the American Chemistry Council (ACC) and the Chamber of Commerce of the United States of America (Chamber) respectfully request that this Court grant the petition for review filed by defendant Union Carbide Corporation (UCC) in the above-referenced case to determine the scope and application of the sophisticated purchaser doctrine in this state. Alternatively, in a separately submitted depublication letter, *amici* request that the Court depublish the Court of Appeal's opinion, which is reported at *Stewart v. Union Carbide* (2010) 190 Cal.App.4th 23 (*Stewart*).

ACC represents leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to provide innovative products and services that make people's lives better, healthier, and safer. The business of chemistry is a $674 billion enterprise and a key element of the nation's economy. The business of chemistry in California alone generates a payroll of over $7.2 billion and directly employs over 81,000 workers, which represents 5.5 percent of the state's manufacturing workforce.

The Chamber is the nation's largest federation of business companies and associations, representing 300,000 direct members and indirectly representing an underlying membership of more than 3,000,000 businesses and professional associations of every size and in every sector and geographic region of the country, including California. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses.

Both ACC and the Chamber have had a longtime interest in the scope and application of their members' duty to warn, which is frequently the subject of litigation. Indeed, the "duty to warn 'is perhaps the most widely-employed claim in modern products liability litigation.'" (Cheney, *Not Just for Doctors: Applying the Learned Intermediary Doctrine to the Relationship Between Chemical Manufacturers, Industrial Employers, and Employees* (1991) 85 Nw.U.L.Rev. 562, fns. omitted.)

In particular, ACC and the Chamber submitted a joint *amici curiae* brief concerning both the sophisticated user doctrine and its natural outgrowth, the sophisticated purchaser doctrine, in *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56 (*Johnson*). ACC and the Chamber now urge this Court to grant review in this case and squarely adopt the sophisticated purchaser doctrine, which this Court in *Johnson* only suggested it would adopt.

I. This Court has already adopted the Sophisticated User Doctrine, which negates a manufacturer's duty to warn about potential product hazards a user either knew or should have known.

Two years ago, in *Johnson*, this Court joined nearly 30 other states in unanimously adopting the "sophisticated user" doctrine in failure to warn cases. The doctrine negates a manufacturer's duty to warn of a potential danger posed by a product where the plaintiff has, or should have had, advance knowledge of the product's inherent hazards.

William Keith Johnson was a trained and certified heating, ventilation, and air conditioning (HVAC) technician. He claimed that various chemical suppliers and manufacturers and HVAC manufacturers should have warned him that servicing an air conditioner evaporator would create harmful phosgene gas, a danger he claimed not to know about. The Court of Appeal affirmed the grant of

summary judgment in favor of defendants, on the ground they had no duty to warn of a danger generally known or reasonably expected to be known by members of Johnson's profession, who were specifically trained about such dangers.

This Court affirmed the judgment in American Standard's favor, and adopted the sophisticated user doctrine as an outgrowth of the "obvious and known danger" rule. Furthermore, this Court held that the sophisticated user doctrine applies equally to negligence and strict liability failure to warn claims, and that the focus should be on "whether the plaintiff knew, or should have known, of the particular risk of harm from the product giving rise to the injury." (*Johnson, supra,* 43 Cal. 4th at p. 71.) The court acknowledged that, under this standard, "there will be some users who were actually unaware of the dangers. However, the same could be said of the currently accepted obvious danger rule; obvious dangers are obvious to most, but are not obvious to absolutely everyone." (*Ibid.*)

This Court reasoned that public policy favored adoption of the defense because it discouraged overwarning and therefore "help[ed] ensure that warnings will be heeded." (*Johnson, supra,* 43 Cal. 4th at p. 70.) By not requiring sellers or manufacturers to warn about obvious dangers, the Court thereby avoided the "social cost of 'overwarning,' . . . in the diversion of limited user attention to warnings that are perceived as verbose, irrelevant false alarms . . . [t]he [resulting] increased competition for user attention would come at the expense of those truly necessary warnings about hidden dangers that, if read and heeded, have the potential to motivate a change in the user's safety-related behavior." (Bowbeer & Killoran, *Liriano v. Hobart Corp.: Obvious Dangers, the Duty to Warn of Safer Alternatives, and the Heeding Presumption* (1999) 65 Brook. L. Rev. 717, 740-741.)

II. This Court should grant review to clarify that California, like a majority of states, also recognizes the Sophisticated Purchaser Doctrine.[1]

A. This Court in *Johnson* suggested that the Sophisticated Purchaser Doctrine should also be part of California law, contrary to what the Court of Appeal in this case concluded.

The contours of the sophisticated user defense adopted in *Johnson* apply to a limited class of cases: where the direct product user belongs to a highly knowledgeable and trained class of professionals. But what about cases where the intermediate purchaser (the user's employer, for example) either has or can be charged with knowledge of the product's hazards and can be expected to pass this knowledge on to the user?

The sophisticated purchaser doctrine— a principle even more widely adopted across the states than the sophisticated user doctrine—provides that, where a product is sold to a sophisticated or knowledgeable purchaser, the manufacturer or distributor has no duty to directly warn the ultimate product users (such as the purchaser's employees) of any hazards posed by the product where it is reasonable to rely upon the purchaser to communicate the necessary warnings (because the purchaser either has or can be expected to have independent knowledge of the hazards, or was informed of them by the manufacturer).

In *Johnson*, this Court indicated that if given the opportunity, it would apply sophisticated user principles to sophisticated purchasers. In analyzing other California and federal court decisions that purportedly signaled the Court's adoption of the sophisticated user doctrine, this Court favorably referred to decisions expressing support for the sophisticated purchaser doctrine. (See *Johnson, supra,* 43 Cal. 4th at pp. 65, 66-69; *Fierro v. International Harvester Co.* (1982) 127 Cal.App.3d 862, 866 [in addition to recognizing the obvious danger rule, the court also notes that "there was nothing about the [manufacturer's] unit which required any warning to [the purchaser]. A sophisticated organization like [the purchaser]

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[1] This Court has been invited to address the viability, scope, and application of the sophisticated purchaser doctrine on at least two prior occasions in the last dozen years. (See *Patterson v. E.I. DuPont de Nemours & Co., et al.,* Case No. S077927 (1999); *Laico v. Amoco Corp.*, Case No. S103525 (2002).)

does not have to be told that gasoline is volatile and that sparks from an electrical connection or friction can cause ignition"]; see also *In re Related Asbestos Cases* (N.D. Cal. 1982) 543 F.Supp. 1142, 1151 [noting as far back as 1982 that the sophisticated purchaser defense was "taking hold in California"].)

Even before *Johnson*, one California Court of Appeal, citing the Restatement of Torts, approved the sophisticated purchaser doctrine, holding that where a product is sold to a sophisticated and knowledgeable purchaser, the manufacturer or distributor has no duty to directly warn the ultimate product users (such as the purchaser's employees) of any hazards posed by the product so long as it is reasonable to rely upon the purchaser to communicate the necessary warnings. In *Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 178, the court held a manufacturer of a ski-binding had no duty to warn the plaintiff skier directly of the danger posed by pairing its bindings with certain types of boots; the manufacturer "had a reasonable basis to believe [its dealers] would pass along [its] product warning and was justified in relying upon [the dealer] to perform its independent duty to warn as required by law." The ski-binding purchaser in *Persons* happened to gain its knowledge of hazards from the manufacturer, but there is no indication that the *Persons* court conditioned its application of the sophisticated purchaser doctrine on that fact, or would reject the doctrine where the purchaser has independent knowledge of a product's hazards. (But see *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 21 [interpreting *Persons* to require an adequate warning by the defendant to the intermediary].)

In the wake of *Johnson*, a number of courts have summarily adjudicated warning claims based on the sophisticated purchaser doctrine because they interpreted this Court in *Johnson* to have impliedly approved the doctrine. (See, e.g., *Duncan v. 3M Company*, Los Angeles Superior Court Case No. BC419624 (April 2, 2010 Notice of Entry of Order Granting Union Carbide's Motion for Summary Adjudication of Failure to Warn Claim); *Webster v. 3M Company*, Los Angeles Superior Court Case No. BC421501 (June 1, 2010 order granting Union Carbide motion for summary judgment based on sophisticated purchaser and bulk supplier doctrines).) In contrast, the Court of Appeal in *Stewart* concluded that "[n]othing in the discussion" in *Johnson* suggests the sophisticated purchaser rule. (Typed opn., p. 5.) Moreover, the Court of Appeal observed that, if the sophisticated purchaser doctrine were adopted, it would apply only in circumstances that did not exist in the *Stewart* case: where the manufacturer supplied an adequate warning to

the intermediary and where the sophisticated purchaser is the user's employer. (Typed opn., pp. 5-7.)

This Court should clarify and provide guidance on the viability, scope, and application of the sophisticated purchaser doctrine.

B. Adoption of the Sophisticated Purchaser Doctrine would bring California into line with the majority of other states.

Nationwide, the sophisticated purchaser doctrine has gained particularly wide acceptance: over 30 states have adopted it. (See *In re Asbestos Litigation (Mergenthaler)* (Del. Super. 1986) 542 A.2d 1205, 1210-1211 [discussing cases and noting that "some version of a 'sophisticated purchaser' defense is the norm in most jurisdictions"]; *Kennedy v. Mobay Corp.* (1990) 84 Md. App. 397, 408 [579 A.2d 1191, 1197] ["The legal premise underlying [the sophisticated purchaser] defense, and indeed the defense itself, seems to have gained fairly wide acceptance"], affd. (1992) 325 Md. 385 [601 A.2d 123].) While the exact formulation of the defense varies from state to state, it does not necessarily depend on an adequate warning being given by the manufacturer, as the Court of Appeal concluded here. Under either the minority or the majority view of the sophisticated purchaser doctrine, there is no duty to warn a purchaser who is already knowledgeable about a product hazard and can be expected to pass on that knowledge to the product user.

The Minority View: The Intermediate Purchaser's Knowledge Categorically Defeats Any Duty to Warn the End User. Approximately one-third of the jurisdictions that have adopted the sophisticated purchaser defense have taken a strict common law duty approach, which focuses exclusively on the intermediate purchaser's knowledge and absolves the seller of any duty to warn the ultimate product user so long as the purchaser is or should be aware of the product's hazards. Under this formulation of the sophisticated purchaser doctrine, an adequate warning by the manufacturer is not necessary for the defense to apply, so long as the intermediary had independent knowledge of the product's hazards. The relevant inquiry under this formulation of the defense is simple: If the purchaser-employer had knowledge or notice of the product's hazards, through either the supplier's warnings or independently-obtained information, the supplier has no duty to warn the purchaser's employees and judgment will be entered as a matter of law in the supplier's favor.

Cases reflecting the minority approach include: *In re Asbestos Litigation (Mergenthaler), supra,* 542 A.2d at pp. 1211-1212 ("[w]hen the employer already knows or should be aware of the dangers which the warning would cover, there [is] no duty to warn on the part of the supplier," unless "the supplier knows or has reason to suspect that the requisite warning will fail to reach the employees, the users of the product" [applying Delaware law]); *Stiltjes v. Ridco Exterminating Co.* (1986) 178 Ga. App. 438, 441-442 [343 S.E.2d 715, 718-720], affd. on other grounds (1986) 256 Ga. 255 [347 S.E.2d 568] (supplier of pesticides to professional pesticide control operator entitled to summary judgment on failure to warn claim brought by tenant whose home the pesticide was applied in; supplier had no duty to warn since the pesticide operator was charged as a matter of law with knowledge of the dangers posed by use of the pesticide); *Davis v. Avondale Industries, Inc.* (5th Cir. 1992) 975 F.2d 169, 172, 174-175 (manufacturer has no duty to warn a sophisticated purchaser; defendant manufacturer was therefore entitled to a specific jury instruction that its duty to warn the plaintiff's employee "may be completely discharged by [the employer's] status as a sophisticated purchaser with a duty to warn its employees of the relevant hazard" [applying Louisiana law]); *Jacobson v. Colorado Fuel & Iron Corp.* (9th Cir. 1969) 409 F.2d 1263, 1271-1272 (manufacturer of steel strand not required to warn that strand might snap during pre-stressing operation when victim's employer was already aware of the risk [applying Montana law]); *Marker v. Universal Oil Products Co.* (10th Cir. 1957) 250 F.2d 603, 606-607 (supplier of catalyst used in construction of petroleum refining vessel not required to warn victim's employer about danger of asphyxiation from carbon monoxide gas generated by the catalyst, since the employer already knew of the risk [applying Oklahoma law]); *Akin v. Ashland Chemical Co.* (10th Cir. 1998) 156 F.3d 1030, 1037 (summary judgment in favor of defendant chemical manufacturers on failure to warn claim brought by Air Force officers: "[w]e read Oklahoma case law to impose no duty to warn a purchaser as knowledgeable as the United States Air Force of the potential dangers of low-level chemical exposure. . . . This is tantamount to the familiar 'sophisticated purchaser defense' . . . [which is the] exception [that] absolves suppliers of the duty to warn purchasers who are already aware or should be aware of the potential dangers").

The Majority View: Multi-factor Approach Defeating a Duty to Warn an End User If the Manufacturer Could Properly Rely on the Knowledgeable Purchaser to Warn. The majority of states adopting the sophisticated purchaser doctrine opt for a multifactor approach embodied in the Restatement, under which a manufacturer has no duty to warn where it is objectively reasonable for the manufacturer to rely

on the intermediary to convey necessary warnings to the product's ultimate users. Indeed, a number of states that pioneered the strict common law duty approach discussed above have since moved towards, and supplanted the common law approach with, the Restatement's multifactor approach described below. (See, e.g., *Frantz v. Brunswick Corp.* (S.D. Ala. 1994) 866 F.Supp. 527, 535 & fn. 55 [analyzing manufacturer's duty to warn end-user under the "reasonableness" factors of the Restatement, instead of the strict duty analysis employed by an earlier Alabama court]; *Carter v. E.I. DuPont de Nemours & Co., Inc.* (1995) 217 Ga. App. 139, 142-143 [456 S.E.2d 661, 663-664] [rejecting strict duty approach previously applied by Georgia courts in favor of Restatement multifactor approach]; *Miller v. G & W Elec. Co.* (D. Kan. 1990) 734 F.Supp. 450, 454 [indicating that, since Kansas courts implicitly adopted the Restatement in applying common law duty approach, the appropriate analysis is now the Restatement multifactor approach].)

The Restatement Third of Torts (Products Liability) sets forth the most up-to-date formulation of the sophisticated purchaser doctrine and identifies three factors to be considered in determining "whether one supplying a product for the use of others through an intermediary has a duty to warn the ultimate product user directly or may rely on the intermediary to relay warnings": "the gravity of the risks posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user." (Rest.3d, Torts, Products Liability, § 2, com. i, pp. 29-30; see also Ausness, *Learned Intermediaries and Sophisticated Users: Encouraging the Use of Intermediaries to Transmit Product Safety Information* (1996) 46 Syracuse L.Rev. 1185, 1205-1207 [describing the Restatement's multifactor approach].)

The required analysis is an objectively reasonable one that is not dependent upon evidence of actual, conscious reliance by the manufacturer on the intermediate purchaser. Nor is the test dependent upon what the intermediate purchaser in fact did with the product hazard information it possessed. (Cf. *Manning v. Ashland Oil Co.* (7th Cir. 1983) 721 F.2d 192, 196 ["We are not concerned with the reasonable inferences that may be drawn from the circumstances of the actual internal operation of [the employer's] business, but rather, whether Ashland acted reasonably in light of what [a supplier like Ashland reasonably could know] about the party to whom it sold the lacquer thinner"].)

Again, contrary to the Court of Appeal's conclusion in this case, an adequate warning from the manufacturer is not a prerequisite for this multifactor version of the sophisticated purchaser defense to apply either, as these cases demonstrate: *Goodbar v. Whitehead Bros.* (W.D. Va. 1984) 591 F.Supp. 552, 561 ("when the supplier has reason to believe that the purchaser of the product will recognize the dangers associated with the product, no warnings are mandated"; it then "becomes the employer's responsibility to guard against the known danger by either warning its employees or otherwise providing the necessary protection"); *Fisher v. Monsanto Co.* (W.D. Va. 1994) 863 F.Supp. 285, 288-289 (following *Goodbar* and granting summary judgment for defendant manufacturer on plaintiff-employee's negligent failure to warn claim; defendant could reasonably rely on employer, a sophisticated purchaser of defendant's products, to warn its employees because (1) the employer had considerable knowledge and expertise regarding the product, (2) defendant provided the product in bulk, so that any warnings placed by the manufacturer could not reach employees, and (3) the defendant was not in a position to constantly monitor the turnover in the employer's workforce); *Aetna Casualty & Sur. Co. v. Ralph Wilson Plastics Co.* (1993) 202 Mich. App. 540, 546-548 [509 N.W.2d 520, 523-524] (affirming grant of summary judgment in favor of defendant manufacturer under sophisticated user doctrine; "[c]ommercial enterprises that use materials in bulk must be regarded as sophisticated users, as a matter of law" because "[t]hose with a legal obligation to be informed concerning the hazards of materials used in manufacturing processes must be relied upon, as sophisticated users, to fulfill their legal obligations"); *Jodway v. Kennametal, Inc.* (1994) 207 Mich. App. 622, 627-628 [525 N.W.2d 883, 889] (following *Aetna*); *Kennedy v. Mobay Corp., supra*, 579 A.2d at pp. 1200-1202 (jury properly allowed to consider sophisticated purchaser doctrine where: (1) defendants had no ability to give direct warnings to purchaser's employees and (2) purchaser was aware of the hazards posed by defendants' products).

III. Conclusion.

By requiring manufacturers to warn only about product hazards that are not obvious or generally known to the anticipated sophisticated users of these products, this Court has placed common-sense limits on manufacturers' duty to warn. This Court should grant review in this case and expressly announce that these principles extend to eliminate the need to warn about hazards that sophisticated purchasers know, or should know of, and about which they can be expected to warn anticipated users. Expressly adopting and defining the contours of the sophisticated purchaser

doctrine would provide needed guidance to courts, product manufacturers, and suppliers, and provide uniformity with warning requirements in other states. Alternatively, if the Court does not grant review in this case, *amici* respectfully request in a separately submitted depublication letter that the Court order this opinion depublished and allow the issue of the scope and application of the sophisticated purchaser doctrine to be ventilated further in the lower courts.

Respectfully submitted,

SNELL & WILMER L.L.P.

By: _____
Mary-Christine Sungaila
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Proof of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-7689.

On January 7, 2011, I served, in the manner indicated below, the foregoing document described as **Depublication Request dated January 7, 2011, to Hon. Chief Justice Tani Cantil-Sakauye, etc.** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Please see attached Service List

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 7, 2011, at Costa Mesa, California.

Sandy Cairelli

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