Civil Number **A116816 and A117648**

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

REGINALD R. TAYLOR and VICKIE TAYLOR,

Plaintiffs and Appellants,

v.

A.W. CHESTERTON, *et al.*,

Defendants and Respondents.

San Francisco Superior Court Case Number CGC-05-438516
The Honorable Peter J. Busch, Judge Presiding

APPLICATION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND AMERICAN CHEMISTRY COUNCIL FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANTS/RESPONDENTS

Pursuant to Rule 8.200 of the 2007 California Rules of Court, the National Association of Manufacturers, Coalition for Litigation Justice, Inc., Chamber of Commerce of the United States of America, American Insurance Association, Property Casualty Insurers Association of America, and American Chemistry Council — collectively "*amici*" — hereby apply for leave to file the attached brief in support of Defendants/Respondents.

Amici are organizations that represent companies doing business in California and their insurers. Accordingly, *amici* have a substantial interest in ensuring that California's

tort system is fair, follows traditional tort law rules, and reflects sound public policy. *Amici* intend to show that the trial court's decision is consistent with these principles and should be affirmed.

Here, the trial court followed well-established California precedent to hold that component part manufacturers cannot be liable in strict liability or negligence for failing to warn about alleged hazards in external or replacement parts made, supplied, or installed by others and affixed post-manufacture. *See Rutherford v. Owens-Illinois* (1997) 16 Cal. 4th 953, 958 (a plaintiff in an asbestos case "must, in accordance with traditional tort principles, demonstrate . . . that a product or products *supplied by the defendant*, to which he became exposed" causes injury) (emphasis added); *see also Cadlo v. Owens-Illinois* (2004) 125 Cal. App. 4th 513. California law is consistent with the "black letter" rule in the Restatement Third, Torts: Products Liability § 5 (1997); *see also id.* at Cmt. *a* ("As a general rule, component sellers should not be liable when the component itself is not defective.").

Numerous decisions from around the country support the trial court's decision. *See, e.g., Rastelli v. Goodyear Tire & Rubber Co.* (N.Y. 1992) 591 N.E.2d 222; *Lindstrom v. A-C Prods. Liab. Trust* (6th Cir. 2005) 424 F.3d 488. In addition, the trial court's holding represents sound public policy. A decision to impose liability on component part manufacturers for harms caused by others' products would invite a flood of new asbestos cases into California and adversely impact defendants in other civil cases. Consumer safety also could be undermined by the potential for over-warning (the

"Boy Who Cried Wolf" problem) and through conflicting information that may be provided by manufacturers of different components and by makers of finished products.

* * *

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

The Coalition for Litigation Justice, Inc. ("Coalition") is a nonprofit association formed by insurers to address and improve the asbestos litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[1] The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in

[1] The Coalition for Litigation Justice 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.

every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

The American Insurance Association ("AIA"), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative developments. Among its other activities, AIA files *amicus* briefs in cases before state and federal courts on issues of importance to the insurance industry.

The Property Casualty Insurers Association of America ("PCI") is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the United States property and casualty insurance industry. In light of its

involvement in California, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

For these reasons, *amici* request that the Court grant their application for leave to file a brief in support of Respondents.

Respectfully submitted,

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AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF DEFENDANTS/RESPONDENTS

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The National Association of Manufacturers, Coalition for Litigation Justice, Inc., Chamber of Commerce of the United States of America, American Insurance Association, Property Casualty Insurers Association of America, and American Chemistry Council — collectively "*amici*" — ask this Court to affirm the trial court's decision granting summary judgment in favor of the Respondents.

QUESTION PRESENTED

Whether, under California law, a component part manufacturer owes a duty to warn end users about alleged hazards in external or replacement parts made, supplied, or installed by others and affixed post-manufacture.

STATEMENT OF INTEREST

As organizations that represent companies doing business in California and their insurers, *amici* have a substantial interest in ensuring that California's tort system is fair, follows traditional tort law rules, and reflects sound public policy. As described below, the trial court's decision is consistent with these core principles and should be affirmed.

STATEMENT OF FACTS

Amici adopt the Statement of Facts of the Defendants/Respondents.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Now in its fourth decade, asbestos litigation has been sustained by the plaintiffs' bar search for new defendants, coupled with new theories of liability. As the litigation continues to evolve, the connection to asbestos-containing products is increasingly remote and the liability connection more stretched. 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); *see also* Steven B. Hantler *et al.*, *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) (discussing spread of asbestos litigation to "peripheral defendants"). This appeal is an example.

Plaintiff claims that he developed mesothelioma from occupational exposure to asbestos while serving in the U.S. Navy aboard the U.S.S. Hornet. The proper defendants apparently cannot be reached, because the Navy enjoys sovereign immunity and virtually

all major manufacturers of asbestos-containing products have been forced into bankruptcy. As a substitute, plaintiff seeks to impose liability on solvent component part makers for asbestos in external or replacement parts they never made, sold, installed, or profited from.

The trial court correctly held that, under California law, manufacturers of component parts should only be liable for defects or hazards in their *own* products – not those of others. The trial court's decision is consistent with the majority rule in other jurisdictions and represents sound public policy. It should be affirmed.

ARGUMENT

I. COMPONENT MANUFACTURERS GENERALLY OWE NO DUTY TO WARN OF HAZARDS IN PRODUCTS MADE BY OTHERS

A. No Duty to Warn of Hazards in External Parts Made by Others

The trial court correctly followed well-established California precedent to hold that component part manufacturers cannot be liable in strict liability or negligence for failing to warn about the hazards of subsequently affixed asbestos-containing external parts (insulation) made, supplied, or installed by others. *See Rutherford v. Owens-Illinois* (1997) 16 Cal. 4th 953, 958 (a plaintiff in an asbestos case "must, in accordance with traditional tort principles, demonstrate . . . that a product or products *supplied by the defendant*, to which he became exposed" causes injury) (emphasis added). In analogous situations, California courts have held that the manufacturer of one product has no duty to warn of alleged hazards in another's product.

For example, in *Zambrana v. Standard Oil Co. of California* (1972) 26 Cal. App. 3d 209, plaintiff was injured when his car was struck by a Ford automobile that went out of control from a sudden loss of tire pressure. The Ford vehicle's tires were originally equipped with rubber valve stems and metal extensions. The Ford vehicle's owner later purchased a new set of Firestone tires with brass stems and directed the Firestone dealer to affix the Ford metal extensions to the brass stems. Plaintiff contended that the combination of a metal valve stem with a metal extension was dangerously defective, even though neither the valve nor the extension itself was defective. The Court of Appeal affirmed judgment in favor of Firestone, concluding: "Firestone was neither a 'designer' nor 'manufacturer' of the combination of parts which is said to be defective." *Id.* at 217; *see also Wiler v. Firestone Tire & Rubber Co.* (1979) 95 Cal. App. 3d 621, 629-30 (tire maker not liable for defective valve stem manufactured and affixed to the tire by automobile company).

Numerous other California decisions are in agreement. *See Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal. App. 4th 513, 524 (no liability where there was no evidence that defendant "played any role in the design, manufacture, distribution, or marketing" of the products that allegedly caused plaintiff's harm); *Lee v. Electric Motor Div.* (1985) 169 Cal. App. 3d 375, 385 ("We have found no case in which a component part manufacturer who had no role in designing the finished product and who supplied a nondefective component part, was held liable for the defective design of the finished product."); *Powell v. Standard Brands Paint Co.* (1985) 166 Cal. App. 3d 357, 362-63

("To our knowledge, no reported decision has held a manufacturer liable for its failure to warn of risks of using its product, where it is shown that the immediate efficient cause of injury is a product manufactured by someone else."); *Blackwell v. Phelps Dodge Co.* (1984) 157 Cal. App. 3d 372, 378 ("The product alleged to have been dangerous and hence defective, for lack of warnings and instructions was not the acid supplied by defendant, but the tank car in which the acid was shipped by defendant to [plaintiff's employer]...under these circumstances, defendant incurred no liability to plaintiffs for its failure to warn them of danger from formation of pressure in the acid allegedly caused by the defective design of the tank car..."); *Garman v. Magic Chef, Inc.* (1981) 117 Cal. App. 3d 634, 638 ("To say that the absence of a warning [about defects] in other products makes the [defendant's product] defective is semantic nonsense."); *McGoldrick v. Porter-Cable Tools* (1973) 34 Cal. App. 3d 885, 888 (power saw stand manufacturer not liable for defective saw housing made by another and affixed to the stand).

Likewise, a California trial court has held that, while a broom is commonly used to sweep up dust that might contain silica, the broom manufacturer is not required to warn of the hazards of silica exposure. *See* Thomas W. Tardy, III & Laura A. Frase, *Liability of Equipment Manufacturers for Products of Another: Is Relief in Sight?*, HarrisMartin Columns: Asbestos, May 2007, at 6 [hereinafter Tardy & Frase].

California law is consistent with the "black letter" rule in the Restatement Third, Torts: Products Liability § 5 (1997) [hereinafter Restatement, Third]; *see also id.* at Cmt. *a* ("As a general rule, component sellers should not be liable when the component itself is

not defective."). The Restatement specifically identifies "*valves*" as a component for which liability should not attach unless the product itself is defective. *Id.*

Numerous decisions from around the country support the position of Defendants/Respondents that no duty is owed here.[1] For instance, in *Rastelli v. Goodyear Tire & Rubber Co.* (N.Y. 1992) 591 N.E.2d 222, a much-cited case,

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[1] *See Shaw v. General Motors Corp.* (Colo. App. 1986) 727 P.2d 387, 390 ("The burden of guarding against the injury suffered here should appropriately be placed upon the entity that designed the final product, arranged for the acquisition of all the component parts, and directed their assembly."); *Timm v. Indian Springs Recreation Assoc.* (Ill. App.) 543 N.E.2d 538, 542 ("Liability will not be imposed upon a defendant who is not a part of the original producing and marketing chain."), *appeal denied*, (Ill. 1989) 548 N.E.2d 1079; *Torres v. Wilden Pump & Eng'g Co.* (N.D. Ill. 1009) 740 F. Supp. 1370, 1371 (Ill. law) (no liability where defendant did not make, design, or distribute machine that allegedly caused plaintiff's harm); *Niemann v McDonnell Douglas Corp.* (S.D. Ill. 1989) 721 F. Supp. 1019, 1030 (Ill. law) (airplane manufacturer had no duty to warn about replacement asbestos chafing strips it did not manufacture); *Fricke v. Owens-Corning Fiberglas Corp.* (La. App. 1993) 618 So. 2d 473, 475 (manufacturer not liable for inadequate warning on product it neither made nor sold); *Newman v. General Motors Corp.*, (La. App. 1988) 524 So. 2d 207, 209 (no liability for defective assembly added to trailer after it left manufacturer's control); *Mitchell v. Sky Climber, Inc.* (Mass. 1986) 487 N.E.2d 1374, 1376 ("we have never held a manufacturer liable. . . for failure to warn of risks created solely in the use or misuse of the product of another manufacturer."); *Sperry v. Bauermeister, Inc.* (E.D. Mo. 1992) 804 F. Supp. 1134, 1140 (Mo. law) (nondefective component seller not liable for incorporation of its parts into system designed by another), *aff'd*, (8th Cir. 1993) 4 F.3d 596; *Long v. Cottrell, Inc.* (8th Cir. 2001) 265 F.3d 663, 669 (Mo. law) ("Missouri courts require that an entity place a product in the stream of commerce before it can be liable under a products liability claim."), *cert. denied*, (2002) 535 U.S. 931; *Drewel v. Post Mach. Co., Inc.* (Mo. App. 1994) 880 S.W.2d 932, 935 ("the defendant must be in the stream of commerce before it can be subject to strict products liability for a defective product.); *Kaloz v. Risco* (N.Y. Sup. Ct. 1983) 466 N.Y.S. 2d 218, 221 (pool manufacturer not liable for fall from defective ladder manufactured by another); *Toth v. Economy Forms Corp.* (Pa. Super. 1990) 571 A.2d 420, 423 (Pennsylvania does not "impose liability on the supplier of metal forming equipment to warn of dangers inherent in wood planking it did not supply."), *appeal denied*, (Pa. 1991) 593 A.2d 422; *Firestone Steel Prods. Co. v. Barajas* (Tex. 1996) 927 S.W.2d 608, 615-616 (manufacturer not liable for tire made by licensee); *Nebgen v. Minnesota Mining & Mfg. Co.* (Tex. App.-San Antonio 1995) 898 S.W.2d 363, 366 (affirming summary judgment in favor of defendant where defendant was not part of chain of distribution); *Walton v. Harnischfeger* (Tex. App.-San Antonio 1990) 796 S.W.2d 225, 226 (crane manufacturer had no duty to warn about rigging it did not manufacture, integrate into its crane, or place in the steam of commerce).

Goodyear's tire was used in conjunction with a defective rim made by another company. The court "decline[d] to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of another manufacturer." *Id.* at 376-77.[2]

Similar decisions have been reached in asbestos cases. For example, in *Lindstrom v. A-C Prods. Liab. Trust* (6th Cir. 2005) 424 F.3d 488, plaintiff – like here – sued makers of pumps and valves that were used in vessels. The components did not contain asbestos at the time of sale. Asbestos insulation made by others was externally affixed to the components post-manufacture. The court held that the component part makers could not be held liable for others' asbestos products. *See id.* at 496 ("The information presented establishes that the only asbestos-containing products . . . to which Lindstrom was exposed in connection with any Coffin Turbo products were not manufactured by Coffin Turbo, but rather products from another company that were attached to a Coffin product. *Coffin Turbo cannot be held responsible for the asbestos contained in another product.*") (emphasis added); *see id.* at 497 ("*Ingersoll Rand cannot be held responsible for asbestos containing material that it [sic] was incorporated into its product post-manufacture.*") (emphasis added); *see also Stark v. Armstrong World Indus., Inc.* (6th Cir. 2001) 21 Fed.

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[2] *See also Reynolds v. Bridgestone/Firestone, Inc.* (11th Cir. 1993) 989 F.2d 465, 472 (Ala. law); *Wiler v. Firestone Tire & Rubber Co.* (1979) 95 Cal. App. 3d 621, 629-30; *Spencer v. Ford Motor Co.* (Mich. App. 1985) 367 N.W.2d 393, 396; *Baughman v. General Motors Corp.* (4th Cir. 1986) 780 F.2d 1131, 1133 (S.C. law); *Acoba v. General Tire, Inc.* (Haw. 1999) 986 P.2d 288, 305 (Haw. law).

Appx. 371, 381 (unpublished) (rejecting claim that turbine and boiler manufacturers should be held liable because their equipment "is integrated into the machinery of the vessel, much of which uses and may release asbestos," because "[t]his form of guilt by association has no support in the law of products liability.").

The rule limiting component supplier liability has been found to apply even where the supplier knew its product may be integrated into a finished product that may cause harm. *See* Restatement Third, § 5 Cmt. *a* Illus. 1. For instance, in *Brown v. Drake-Willock Int'l, Ltd.* (Mich. App. 1995) 530 N.W.2d 510 , *appeal denied*, (Mich. 1997) 562 N.W.2d 198, the court held that dialysis machine manufacturers owed no duty to warn hospital employees of the risk of exposure to formaldehyde supplied by another company - even though the dialysis machine manufacturers had recommended the use of formaldehyde to clean the machines. The court held: "The law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else." *Id.* at 515. Other decisions are in accord.[3]

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[3] *See, e.g., Childress v. Gresen Mfg. Co.* (6th Cir. 1989) 888 F.2d 45, 49 (under Michigan law, a component maker's knowledge of the design of the final product was insufficient to impose liability); *In re Silicone Gel Breast Implants Prods. Liab. Litig.* (N.D. Ala. 1997) 996 F. Supp. 1110, 1117 ("[t]he issue is not whether GE was aware of the use to be put by [breast] implant manufacturers of its [silicone gel] – clearly it knew this - . . . such awareness is irrelevant to the imposition of liability."); *Kealoha v. E.I. Du Pont de Nemours & Co.* (D. Haw. 1994) 844 F. Supp. 590, 595 ("The alleged foreseeability of the risk of the finished product is irrelevant to determining the liability of the component part manufacturer because imposing such a duty would force the supplier to retain an expert in every finished product manufacturer's line of business and second-guess the finished product manufacturer. . . .").

Plaintiffs/Appellants, on the other hand, rely on authorities that are distinguishable for various reasons. For instance, two of the principal California authorities relied upon by Plaintiffs/Appellants, *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal. App. 4th 577; *Wright v. Stang Mfg. Co.* (1997) 54 Cal. App. 4th 1218, involved synergistic hazards -a very different situation than the present case. The *Tellez-Cordova* court held that a manufacturer of power grinding tools had a duty to warn about the release of respirable dust caused by the interaction of the defendant's power grinders with abrasive wheels or discs made by another. The court observed that the defendant's grinding tools created the dust and that the other manufacturer's disks would not have been dangerous without the effect of the defendant's tools. *See Tellez-Cordova,* 129 Cal. App. 4th at 585. *Wright* involved a plaintiff injured when a deck gun on a fire truck broke loose and failed under the intense pressure generated by the deck gun and the inadequate capacity of the riser pipe attached to the deck gun. *See Wright,* 54 Cal. App. 4th at 1224-26. In contrast, here the nondefective components made by Defendants/Respondents did not work with others' products to create a synergistic hazard; the alleged hazard arose solely from the asbestos products made by others.

Plaintiffs/Appellants also rely on two other California cases that have no application here: *Thompson v. Package Mach. Co.* (1972) 22 Cal. App. 3d 188, and *DeLeon v. Commercial Mfg. & Supply Co.* (1983) 148 Cal. App. 3d 336. *Thompson* simply stands for the unremarkable proposition that a manufacturer may be liable for the foreseeable misuse of its product. *See Thompson,* 22 Cal. App. 3d at 196. Here, there

was no misuse of Respondents' products. *DeLeon* held that a manufacturer that designs a product for a specific location must ensure that the placement of the product does not create a hazard. *See DeLeon,* 148 Cal. App. 3d at 342-43. The holding thus has no bearing on this case.

Plaintiffs/Appellants also rely on four out-of-state cases, two of which come from the same court. The twin decisions of the Washington Court of Appeals in *Braaten v. Saberhagen Holdings, Inc.* (Wash. App. 2007) 151 P.3d 1010, *review granted* (Wash. Jan. 8, 2008) No. 80251-3; *Simonetta v. Viad Corp.* (Wash. App. 2007) 151 P.3d 1019, *review granted* (Wash. Jan. 8, 2008) No. 80076-6, are the only out-of-state authorities that actually support the position of Plaintiffs/Appellants. Importantly, both cases have recently been accepted for review by the Washington Supreme Court, which could find that the cases were wrongly decided by the appellate court.

Moreover, the *Braaten* court did not rely on Washington precedent to support its holding that equipment manufacturers had a duty to warn of the dangers of asbestos-containing insulation attached to their products. Instead, the court primarily relied upon *Stapleton v. Kawasaki Heavy Indus., Inc.* (5th Cir. 1979) 608 F.2d 571 (applying Ga. law) - and misstated the holding in that key case. In *Stapleton*, the Fifth Circuit affirmed a jury verdict against a motorcycle manufacturer on the theory that the defendant should have warned that if the motorcycle tipped over when the fuel switch was in the "on" position fuel could leak out and ignite. The issue in *Stapleton*, unlike here, was not a

duty to warn of hazards in another's product, but the scope of the motorcycle manufacturer's duty to warn about the operation of its own product.

Moreover, the duty analysis applied by the court in *Braaten* and *Simonetta* is inconsistent with California law. First, contrary to Washington's focus on loss spreading as the justification for strict liability, "California courts have not deemed themselves invariably bound by Section 402A." *LaRosa v. Superior Court* (1981) 122 Cal. App. 3d 741, 754. Second, California courts have held that "foreseeability is not coterminous with duty." *Sakiyama v. AMF Bowling Centers, Inc.* (2003) 110 Cal. App. 4th 398, 407; *Erlich v. Menezes* (1999) 21 Cal. 4th 543, 552; *see also Rowland v. Christian* (1968) 69 Cal. 2d 108, 113 (multi-factor duty analysis); *Coldwell Banker Residential Brokerage Co. v. Superior Ct.* (2004) 117 Cal. App. 4th 158, 167 ("the mere existence of foreseeability of harm . . . is, for public policy reasons, not sufficient to impose liability."); *Vasquez v. Residential Inv., Inc.* (2004) 118 Cal. App. 4th 269, 282 (duty in negligence action does not focus on foreseeability alone, but must consider the burden on the defendant to prevent the harm).

In fact, California courts "may find that no duty exists, despite foreseeability of harm, because of other [*Rowland v. Christian*] factors." *Sakiyama* 110 Cal. App. 4th at 407; *see also Burgess v. Superior Court* (1992) 2 Cal. 4th 1064, 1072 (duty "depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability."). Because the consequences of a negligent act must be limited to avoid an intolerable burden on society, the determination of duty "recognizes that policy

considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk." *Elden v. Sheldon* (1988) 46 Cal. 3d 267, 274; *see also Adelman v. Associated Intern. Ins. Co.* (2001) 90 Cal. App. 4th 352; *Lubner v. City of Los Angeles* (1996) 45 Cal. App. 4th 525 As the California Supreme Court wrote in *Thing v. La Chusa* (1989) 48 Cal. 3d 644, "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which the foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury." *Id.* at 668.

Plaintiffs/Appellants also cite to *Berkowitz v. A.C. & S., Inc.* (2001) 288 A.D.2d 148 (denying pump manufacturer's motion for summary judgment), which even the Washington appellate court described as "unhelpful," *Simonetta,* 151 P.3d at 1026, because it contains "almost no analysis." *Braaten,* 151 P.3d at 1015. Even more significantly, *Berkowitz* is inconsistent with the controlling decision of the New York Court of Appeals in *Rastelli, supra.*

Finally, Plaintiffs/Appellants rely on *Chicano v. General Elec. Co.* (E.D. Pa. Oct. 5, 2004) 2004 WL 2250990, another decision that the Washington appellate court described as "unhelpful," *Simonetta,* 151 P.3d at 1026, because it was unpublished and based on a federal court's attempt to predict Pennsylvania's component manufacturer liability test. Furthermore, like *Braaten* and *Simonetta, Chicano* is incompatible with California law because the court treated foreseeability of harm as synonymous with creating a triable issue of fact with regard to duty.

In sum, California law, the great weight of authority from other states, and sound public policy all require the trial court's decision here to be affirmed.

B. No Duty to Warn of Hazards in Replacement Parts Made by Others

Courts make no distinction between affixed parts and replacement parts supplied by third parties. For example, in *Baughman v. General Motors Corp.* (4th Cir. 1985) 780 F.2d 1131, another much-cited case, the court refused to hold an automobile manufacturer liable for a mechanic's injuries when a tire mounted on a replacement wheel exploded. Plaintiff contended that even though the vehicle's manufacturer did not place the replacement wheel into the stream of commerce, the vehicle was nevertheless defective because the manufacturer failed to adequately warn of the dangers with similar wheels sold by others. The Fourth Circuit rejected this argument:

> Where, as here, the defendant manufacturer did not incorporate the defective component part into its finished product and *did not place the defective component into the stream of commerce, the rationale for imposing liability is no longer present. The manufacturer has not had the opportunity to test, evaluate, and inspect the component; it has derived no benefit from its sale*; and it has not represented to the public that the component part is its own.

Id. at 1132-33 (emphasis added).

Similar rulings have been reached in asbestos cases. For instance, in *Lindstrom,* 424 F.3d 488, the Sixth Circuit affirmed dismissal of products liability claims against numerous product manufacturers where plaintiff's exposure was to replacement asbestos-containing components sold by others. *See id.* at 495, 497. In *Ford Motor Co. v. Wood* (Md. Ct. Spec. App.) 703 A.2d 1315, *cert. denied,* (Md. 1998) 709 A.2d 139, *abrogated*

on other grounds, John Crane, Inc. v. Scribner (Md. 2002) 800 A.2d 727, plaintiffs alleged asbestos exposure from replacement parts in older Ford vehicles. Unable to identify the maker of the replacement parts, plaintiffs sued Ford claiming that "regardless of who manufactured the replacement parts, there was sufficient evidence from which a jury could infer that Ford had a duty to warn of the dangers involved in replacing the brakes and clutches on its vehicles." *Id.* at 1130. The Maryland appellate court, citing *Baughman* with approval, held that "a vehicle manufacturer [is liable only for defective components] incorporated...into its finished product." *Id.* at 1331. The court was "unwilling to hold that a vehicle manufacturer has a duty to warn of dangers of a product that it did not manufacture, market, or sell, or otherwise place into the stream of commerce." *Id.* at 1332.

Even where replacement parts are identical to original equipment, courts have declined to impose liability. *See Exxon Shipping Co. v. Pacific Res., Inc.* (D. Haw. 1991) 789 F. Supp. 1521, 1526 (chain manufacturer not liable for defectively designed replacement chain made by another even though the replacement part was "identical, in terms of make and manufacture, to the original equipment.").

These cases support the trial court's holding that no duty was owed by Defendants/Respondents here.

II. A DUTY REQUIREMENT HERE WOULD REPRESENT UNSOUND PUBLIC POLICY

Public policy dictates that manufacturers be held liable for defects in their *own* products, or in the use of their *own* products – not those of others. To place a duty to warn on a defendant for harms caused by others' products, or the use of others' products, is contrary to long-standing tort law principles: (1) that economic loss should ultimately be borne by the one who caused it,[4] and (2) that the manufacturer of a particular product is in the best position to warn about risks associated with it. As the Restatement, Third explains: "If the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective." Restatement, Third § 5 Cmt. *a.*

"Furthermore, an expansion of the liability for failure to warn under these circumstances becomes untenable and unmanageable." Tardy & Frase, *supra*, at 6. Such a duty rule would lead to "legal and business chaos – every product supplier would be required to warn of the foreseeable dangers of numerous other manufacturers' products. . . ." John W. Petereit, *The Duty Problem With Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product*, Toxic Torts &

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[4] *See Kasel v. Remington Arms Co., Inc.* (1972) 24 Cal. App. 3d 711, 725 ("It is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product . . . which calls for imposition of strict liability.").

Env'tl L. 7 (Defense Research Inst. Toxic Torts & Env'tl L. Comm. Winter 2005) [hereinafter Petereit].

"For example, a syringe manufacturer would be required to warn of the danger of any and all drugs it may be used to inject, and the manufacturer of bread would be required to warn of peanut allergies, as a peanut butter and jelly sandwich is a foreseeable use of bread." Tardy & Frase, *supra*, at 6. "Can't you just see a smoker with lung cancer suing manufacturers of matches and lighters for failing to warn that smoking cigarettes is dangerous to their health?" Petereit, *supra*, at 7. Packaging companies might be held liable for hazards regarding contents made by others. The Court no doubt appreciates there are many other examples.

Consumer safety also could be undermined by the potential for over-warning (the "Boy Who Cried Wolf" problem) and through conflicting information on different components and finished products. *See* Restatement, Third § 5 Cmt. *a.;* Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. Cin. L. Rev. 38, 43 (1983) ("The extension of workplace warnings liability unguided by practical considerations has the unreasonable potential to impose absolute liability. . . .").

III. A DUTY REQUIREMENT HERE WOULD WORSEN THE ASBESTOS LITIGATION

"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. The United States Supreme Court in *Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 597, described the litigation as a "crisis."[5] 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 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*

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[5] *See also* Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 6:6 Briefly 4 (Nat'l Legal Center for the Pub. Interest June 2002); Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

[6] *See* Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003).

Torch the Economy, Wall St. J., Apr. 6, 2001, at A14, *abstract available at* 2001 WLNR 1993314; *see also* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1, *abstract available at* 2000 WLNR 2042486. Nontraditional defendants now account for more than half of asbestos expenditures. *See* RAND, *supra*, at 94.

California has not escaped these problems. In fact, the litigation in California appears to be worsening. 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 Columns: Asbestos, July 2004, at 3. Another San Francisco Superior Court judge noted that asbestos cases were 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.* One practitioner has even described the Bay Area litigation as "chaos" and "an administrative nightmare." Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis*, 45 Santa Clara L. Rev. 1, 2-3 (2004).

More recently, an influx of filings from 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, over three hundred – or 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). Many of these plaintiffs had almost no connection to California, having lived most of their lives outside of the State and alleging asbestos exposure that ostensibly occurred elsewhere. *See* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 599 (2007) ("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?,* 34 Pepp. L. Rev. 883, 885 (2007) ("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 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.

The broad new duty rule created by the appellate court would worsen the litigation and fuel claims against peripheral defendants, such as Defendants/Respondents.

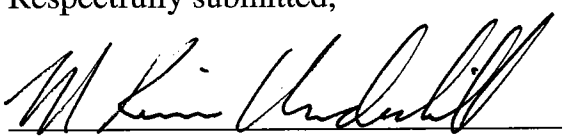
Finally, it is important to note that while plaintiff no doubt seeks to impose liability on solvent component part manufacturers as a substitute for proper entities that

are now bankrupt, trusts have been established to pay claims involving those companies' products. In fact, one recent study concluded: "For the first time ever, trust recoveries 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).

CONCLUSION

For these reasons, *amici curiae* ask this Court to affirm the trial court's decision granting summary judgment in favor of the Respondents.

Respectfully submitted,



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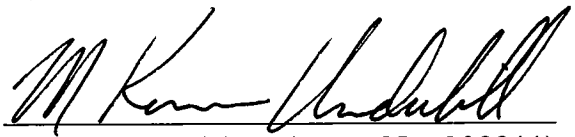

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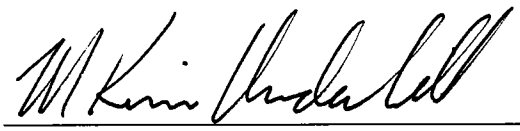

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