To be Argued by:
CAITLIN J. HALLIGAN
(Time Requested: 30 Minutes)

APL-2014-00209
New York County Clerk's Index No. 190196/10

Court of Appeals
of the
State of New York

IN THE MATTER OF NEW YORK CITY ASBESTOS LITIGATION

DORIS KAY DUMMITT, Individually and as Executrix of the Estate of RONALD DUMMITT, deceased,

Respondent,

– against –

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

Defendants,

CRANE CO.,

Appellant.

BRIEF FOR APPELLANT IN RESPONSE TO BRIEF OF *AMICI CURIAE* UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, NATIONAL COUNCIL FOR OCCUPATIONAL SAFETY & HEALTH, NEW YORK COMMITTEE FOR OCCUPATIONAL SAFETY & HEALTH, NORTHEAST NEW YORK COMMITTEE FOR OCCUPATIONAL SAFETY AND HEALTH, MIDSTATE COUNCIL FOR OCCUPATIONAL SAFETY AND HEALTH, WESTERN NEW YORK COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH, BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREATER NEW YORK, ENTERPRISE ASSOCIATION OF STEAMFITTERS LOCAL 638, INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ALLIED WORKERS, LOCAL 12, UNITED ASSOCIATION LOCAL 1 PLUMBERS OF NEW YORK CITY AND TRANSPORTATION WORKERS UNION LOCAL 100 IN SUPPORT OF PLAINTIFF-RESPONDENT

ERIC R.I. COTTLE
ANGELA DIGIGLIO
K&L GATES LLP
599 Lexington Avenue
New York, NY 10022
Tel.: (212) 536-3900
Fax: (212) 536-3901

NICHOLAS P. VARI
MICHAEL J. ROSS
K&L GATES LLP
Of Counsel
K&L Gates Center
210 Sixth Avenue
Pittsburgh, PA 15222
Tel.: (412) 355-6500
Fax: (412) 355-6501

CAITLIN J. HALLIGAN
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
Tel.: (212) 351-3909
Fax: (212) 351-6209

Attorneys for Appellant

Date Completed: October 29, 2015

CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR 500.1(f), Crane Co. states that it is a Delaware Corporation that has no corporate parent or affiliate. The following entities are the direct and indirect subsidiaries of Crane Co.:

ARDAC Inc., Armature d.o.o., Automatic Products (UK) Ltd., B. Rhodes & Son Ltd., Barksdale GmbH, Barksdale, Inc., CA-MC Acquisition UK Ltd., Coin Controls International Ltd., Coin Holdings Ltd., Coin Industries Ltd., Coin Overseas Holdings Ltd., Coin Pension Trustees Ltd., Conlux Matsumoto Co. Ltd., CR Holdings C.V., Crane (Asia Pacific) Pte. Ltd., Crane (Ningbo) Yongxiang Valve Company Ltd., Crane Aerospace, Inc., Crane Australia Pty. Ltd., Crane Canada Co., Crane Composites Ltd., Crane Composites, Inc., Crane Controls, Inc., Crane Electronics Corporation, Crane Electronics, Inc., Crane Environmental Inc., Crane Fengqiu Zhejiang Pump Co. Ltd., Crane Fluid & Gas Systems (Suzhou) Co. Ltd., Crane Global Holdings S.L., Crane GmbH, Crane Holdings (Germany) GmbH, Crane International Capital S.a.r.l., Crane International Holdings, Inc., Crane International Trading (Beijing) Co. Ltd., Crane Ltd., Crane Merchandising Systems Ltd., Crane Merchandising Systems, Inc., Crane Merger Co. LLC, Crane Middle East & Africa FZE, Crane Ningjin Valve Co., Ltd., Crane North America Funding LLC, Crane Nuclear, Inc., Crane Overseas, LLC, Crane Payment Solutions GmbH, Crane Payment Solutions Ltd., Crane Payment Solutions Pty

Ltd., Crane Payment Solutions Srl, Crane Payment Solutions Inc., Crane Pension Trustee Company (UK) Limited, Crane Process Flow Technologies (India) Ltd., Crane Process Flow Technologies GmbH, Crane Process Flow Technologies Ltd., Crane Process Flow Technologies S.P.R.L., Crane Process Flow Technologies S.r.l., Crane Pumps and Systems, Inc., Crane Resistoflex GmbH, Crane SC Holdings Ltd., Crane Stockham Valve. Ltd., Croning Livarna d.o.o., Delta Fluid Products Ltd., Donald Brown (Brownall) Ltd., ELDEC Corporation, ELDEC Electronics Ltd., ELDEC France S.A.R.L, Flow Technology Inc., Friedrich Krombach GmbH Armaturenwerke, Hattersly Newman Hender Ltd., Hydro-Aire, Inc., Inta-Lok Ltd., Interpoint S.A.R.L., Interpoint U.K. Limited, Kessel (Thailand) Pte. Ltd., Krombach International GmbH, MCC Holdings, Inc., MEI Australia LLC, MEI Auto Payment System (Shanghai) Ltd., MEI Conlux Holdings (Japan), Inc., MEI Conlux Holdings (US), Inc., MEI de Mexico LLC, MEI, Inc., MEI International Ltd., MEI Payment Systems Hong Kong Ltd., MEI Queretaro S. de R.L. de CV, MEI Sarl, Merrimac Industries, Inc., Mondais Holdings B.V., Money Controls Argentina SA, Money Controls Holdings Ltd., Multi-Mix Microtechnology SRL, NABIC Valve Safety Products Ltd., Nippon Conlux Co. Ltd., Noble Composites, Inc., Nominal Engineering, LLC, P.T. Crane Indonesia, Pegler Hattersly Ltd., Sperryn & Company Ltd., Terminal Manufacturing Co., Triangle Valve Co. Ltd., Unidynamics / Phoenix, Inc., Viking Johnson Ltd., W.T.

Armatur GmbH, Wade Couplings Ltd., Wask Ltd., Xomox A.G., Xomox Chihuahua S.A. de C.V., Xomox Corporation, Xomox Corporation de Venezuela C.A., Xomox France S.A.S., Xomox Hungary Kft., Xomox International GmbH & Co. OHG, Xomox Japan Ltd., Xomox Korea Ltd., Xomox Sanmar Ltd., and Xomox Southeast Asia Pte. Ltd.

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PRELIMINARY STATEMENT[1]

Amici pejoratively characterize Crane Co.'s assessment of New York law to be a "robotic" no-duty rule (United Steel Brief 11-12, 15), but that is not Crane Co.'s position. Rather, Crane Co. urges the Court to adhere to *its* traditional approach by deciding whether to impose a duty of care "based upon an assessment of its efficacy in promoting a social benefit as against its costs and burdens." *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 236, 727 N.Y.S.2d 7, 15 (2001); *see also Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 297-98, 582 N.Y.S.2d 373, 376-77 (1992). Here, the First Department conducted no such inquiry, and did not enumerate a single policy consideration supporting the novel and vague rule of legal responsibility that it applied—the "significant role" test. That rule is at odds with settled New York precedents, and one of the most basic policies of product liability law expressed in them—that the legal responsibility for injury-causing products is, ordinarily and for good reasons, borne by those who place the harm-causing products into the stream of commerce or control their use.

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[1] Pursuant to 22 NYCRR 500.12(f), Crane Co. writes to respond briefly to the arguments presented by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and the other *amici curiae* that submitted a brief in support of Plaintiff-Respondent (hereinafter the "United Steel Brief"). The Court accepted the brief on October 15, 2015.

RESPONSE TO BRIEF OF *AMICI CURIAE*

I. *Rastelli* Reflects a Sound Policy That Is Undermined By the First Department's Decision Here.

A. *Amici's* "Policy" Arguments Are Based on a Series of Incomplete Hypotheticals That Are Not Analogous to the Situation Presented Here.

In *Rastelli*, the Court's assessment of policy concerns led it to hold that a manufacturer has no duty to warn about potential harm arising from a customer's choice to use its product in conjunction with another product manufactured by a third-party. Other courts in New York have applied the analysis of *Rastelli* to hold that a manufacturer has no duty to warn about dangers arising from products made and sold entirely by others. *See, e.g., Surre v. Foster Wheeler LLC*, 831 F. Supp. 2d 797, 802-03 (S.D.N.Y. 2011); *Tortoriello v. Bally Case, Inc.*, 200 A.D.2d 475, 606 N.Y.S.2d 625 (1st Dep't 1994). So too, here, the Court should conclude that Crane Co. had no duty to warn that the Navy might choose to use asbestos-containing materials with or near its valves in the future, when its valves did not require such materials to function. (R. 984, 986, 1491–92.) Simply put, Crane Co. urges this Court to affix a duty in line with its longstanding precedent that limits duty based on sound policy, rather than imposing a duty that turns on the amorphous case-by-case "balancing test" that *amici* favor. (*See* United Steel Brief 11-12.)

Contrary to *amici's* suggestion, the rule of *Rastelli* is neither "novel" nor "unfair." Rather, that rule recognizes what numerous New York precedents have recognized—that the entities that make and sell harm-causing products generally control the characteristics of those products, and thus they are the ones that bear legal responsibility when those products cause injury. *See, e.g., Sprung v. MTR Ravensburg, Inc.*, 99 N.Y.2d 468, 473, 758 N.Y.S.2d 271, 274 (2003); *Amatulli v. Delhi Constr. Corp.*, 77 N.Y.2d 525, 532, 569 N.Y.S.2d 337, 340 (1991); *Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, Inc.*, 39 N.Y.2d 376, 386-87, 384 N.Y.S.2d 115, 122 (1976); *Codling v. Paglia*, 32 N.Y.2d 330, 340, 345 N.Y.S.2d 461, 468 (1973).

The hypothetical "examples" *amici* offer (United Steel Brief 16-17) show that the historical approach of this Court is the right one. If a nail gun may be used with any type of nail, and an electric sander may be used with any type of sandpaper, a manufacturer would not be obligated (or best positioned) to warn about harms arising from all specific varieties of nails and sandpaper that a user might choose. Rather, the burden to warn about harm arising from a specific type of nail or sandpaper would properly be placed on the maker or seller of that particular product. Those situations, like the situation presented by this case and by *Rastelli* and *Tortoriello*, *supra*, are plainly distinct from the situation presented in *Rogers v. Sears, Roebuck and Co.*, 268 A.D.2d 245, 701 N.Y.S.2d 359 (1st

Dep't 2000), in which plaintiff's evidence established that defendant's product necessarily had to be used (i.e., could *only* be used) with the alleged harm-causing product. Under these precedents, Crane Co. should not bear the burden of warning users about the particular type of sealing or insulating materials, if any, that the Navy chose, among various alternatives, to use with its valves years after Crane Co. sold them.

B. *Amici's* "Rule" Would Not Enhance Consumer Safety and Would Place Manufacturers in an Untenable Position, as Numerous Precedents Have Concluded.

Contrary to *amici's* contention (United Steel Brief 21-23), society benefits from limiting a manufacturer's liability for products made and sold by third parties. *Amici* note that a product manufacturer is often in the best position to warn about dangers associated with its own product. (United Steel Brief 21-22 [citing *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 677 N.Y.S.2d 764 (1998)].) But a manufacturer is *not* best positioned to warn about dangers associated with products manufactured and supplied entirely by third parties. *See Rastelli*, *Rogers*, and *Tortoriello*, *supra*. That distinction is critical here. It is undisputed that Crane Co. did not manufacture, sell, or in any way control the use of the allegedly injurious asbestos-containing materials at issue, and Crane Co. could not have known which materials (if any) the Navy would choose to use with Crane Co.'s valves years, or even decades, after acquiring them.

The implications of imposing a duty in these circumstances would be sweeping: third-party manufacturers would be forced to investigate, test, and understand numerous materials that they do not make, control, or benefit from simply because those materials *could* be used with or near the product that they do make and market. Such freewheeling investigation would not be "inexpensive and uncomplicated" (United Steel Brief 22), and it would not place the legal responsibility for defective products, or the cost of insurance, "on those who produce and market them." *Sprung*, *supra*, 99 N.Y.2d at 473, 758 N.Y.S.2d at 274. And indeed, the resulting exhaustive warning covering all hypothetical combinations of products would detract from worker safety, because "[r]equiring too many warnings trivializes and undermines the entire purpose of the rule." *Liriano*, 92 N.Y.2d at 242, 677 N.Y.S.2d at 769. The warning regime that *amici* ask this Court to impose is boundless. It would greatly diminish the benefits to the public that flow from requiring warnings in carefully delineated circumstances, and serve only to impose liability on defendants who have no meaningful ability to affect the conduct of product users.

For exactly these reasons, numerous courts around the country have refused—contrary to *amici's* contention (United Steel Brief 17-19)—to impose the sort of sweeping duty that would require a manufacturer to warn about potential harm from a customer's choice to use replacement parts made by a third party.

See, e.g., O'Neil v. Crane Co., 53 Cal.4th 335, 363, 266 P.3d 987, 310 (2012) (noting that requiring manufacturers to "investigate the potential risks of all other products and replacement parts that might foreseeably be used with their own product and warn about all of these risks" would "impose an excessive and unrealistic burden on manufacturers"); *Baughman v. General Motors Corp.*, 780 F.2d 1131, 1133 (4th Cir. 1986) ("While a manufacturer can be fairly charged with testing and warning of dangers associated with components it decides to incorporate into its own product, it cannot be charged with testing and warning against any of a myriad of replacement parts supplied by any number of manufacturers."); *May v. Air & Liquid Sys. Corp.*, 219 Md.App. 424, 100 A.3d 1284 (Md. Ct. Spec. App. 2014) (rejecting as a matter of law an "endorsement" theory of legal responsibility—i.e., that a manufacturer of equipment may be held legally responsible for any and all replacement parts later used with that equipment).

The most recent federal decisions in New York are in accord. They faithfully apply this Court's and the Appellate Division's precedents to hold that, at most, a manufacturer *may* have a duty to warn when its product *must*, by necessity, be used in conjunction with a dangerous one. *See Surre*, *supra*, 831 F. Supp. 2d at 802-03 (citing *Rastelli*, 79 N.Y.2d at 297-98, 582 N.Y.S.2d at 376-77 and *Tortoriello*, 200 A.D.2d at 476-77, 606 N.Y.S.2d at 626-27)); *Kiefer v. Crane Co.*,

No. 12 Civ. 7613 (KBF), 2014 WL 6778704 (S.D.N.Y. Feb. 3, 2014). And those decisions did not impose a duty to warn about harm arising from a product manufactured by a third party, because in those cases, as here, defendant's equipment did not require asbestos-containing materials to function (*see*, *e.g.*, R. 984, 986, 1491-92).

This New York case law is entirely consistent with *Macias v. Saberhagen Holdings, Inc.*, 175 Wash.2d 402, 282 P.3d 1069 (2012). Far from "retreat[ing]" from its prior decisions (United Steel Brief 18-19), in *Macias*, the Washington Supreme Court affirmed the rule of *Braaten v. Saberhagen Holdings*, 165 Wash.2d 373, 198 P.3d 493 (2008), and imposed a duty on a manufacturer "to warn of the danger of asbestos exposure inherent in the use and maintenance of the defendant manufacturers' *own* products." *Macias*, 175 Wash.2d at 405, 282 P.3d at 1072 (emphasis in original). The court did not, however, impose a duty to warn of the danger that "the Navy [would] cho[o]se to insulate the equipment on its ships with asbestos products," *id.*, 175 Wash.2d at 414-15 & n.4, 282 P.3d at 1076-77 & n.4.

The Court should affirm the control-based approach of *Rastelli*, which is consistent with the "majority rule nationwide," *see Braaten*, 165 Wash.2d at 385, 198 P.3d at 498, and reject *amici's* vague and undefined alternative approach.

CONCLUSION

For all of the foregoing reasons, Crane Co. respectfully requests that this Court reverse the decision of the Appellate Division, and direct entry of judgment for Crane Co.

October 29, 2015

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP
CAITLIN J. HALLIGAN
200 PARK AVE.
NEW YORK, NY 10166
(212) 351-3909
(212) 351-6209 (FAX)

K&L GATES LLP
ERIC R.I. COTTLE
ANGELA DIGIGLIO
599 LEXINGTON AVE.
NEW YORK, NY 10022
(212) 536-3900
(212) 536-3901 (FAX)

OF COUNSEL
NICHOLAS P. VARI
MICHAEL J. ROSS
K&L GATES CENTER
210 SIXTH AVENUE
PITTSBURGH, PA 15222
(412) 355-6500
(412) 355-6501 (FAX)

Counsel for Defendant-Appellant Crane Co.