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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,

Plaintiffs-Respondents,

– against –

A.W. CHESTERTON, *ET AL.*,

Defendants,

– and –

CRANE CO.,

Defendant-Appellant.

BRIEF FOR *AMICUS CURIAE* GENERAL ELECTRIC COMPANY IN SUPPORT OF APPELLANT CRANE CO.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR 500.1(f), General Electric Company ("GE") states:

1. The following publicly traded companies in which GE and affiliates (including GE Capital and GE Capital Equity) own 10% or more of the outstanding stock:

   APR Energy plc (London Stock Exchange)
   ValueVision Media, Inc.

2. GE's subsidiaries which have outstanding securities in the hands of the public (debt, equity, or other types of securities) are:

   General Electric Capital Corporation

3. There is no parent of GE and no publicly traded company or other entity owns 10% or more of GE.

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INTEREST OF AMICUS CURIAE

General Electric Company is a New York corporation that employs approximately 8,600 individuals, and supports an additional 11,300 supplier employees, in New York. GE manufactured thousands of steam turbines for United States Navy warships during and after World War II. GE's steam turbines did not contain asbestos thermal insulation when they were delivered to the Navy. Rather, the Navy contracted with other manufacturers to add asbestos or other insulation after delivery by GE. The asbestos manufacturers have since filed for bankruptcy, leading plaintiffs' counsel to target increasingly remote potential defendants, including those that did not manufacture or distribute asbestos insulation products.

Given the lifespan of U.S. Navy warships, under the theory of the courts below, GE could face litigation for decades by hundreds of thousands of Navy sailors and personnel who worked on or around GE-made turbines, even though GE never manufactured, specified, or supplied asbestos insulation for these warships. Thus, GE has a substantial interest in the outcome of this case.

QUESTIONS PRESENTED

1. Whether—contrary to the normal rule imposing tort duties only on those in the chain of a good's manufacturing and distribution—this Court should impose a duty to warn about asbestos-related dangers on defendants, including

suppliers of critical Navy warship parts, who themselves did not manufacture, specify, or supply asbestos.

2. Whether—contrary to the normal rule that plaintiffs must prove a causal link between an alleged failure to warn and their injury—this Court should recognize a novel "heeding presumption" that a hypothetical, unidentified asbestos warning would have been followed and prevented injury, particularly in the unique military setting presented here, where the Navy had extensive knowledge of the potential risks and benefits of asbestos, and exercised expansive control over the flow of information to service personnel, and where experience shows that existing asbestos warnings were commonly left unheeded.

3. Whether, even if a "heeding presumption" applies, a defendant, at a minimum, should be permitted to present otherwise admissible evidence to rebut the presumption—including by demonstrating that the proposed warning would not have been permitted or heeded—or whether a heeding presumption should be rendered effectively irrefutable as a matter of law, as it was by the courts below.

STATEMENT OF THE CASE

GE adopts Appellant Crane Co.'s ("Crane") Statement of the Case as relevant to its argument.

PRELIMINARY STATEMENT

Asbestos litigation has been described in recent years by plaintiffs' attorneys

as the "'endless search for a solvent bystander.'" *Medical Monitoring & Asbestos Litigation: A Discussion with Richard Scruggs & Victor Schwartz,* 17:3 MEALEY'S ASBESTOS LITIG. REP. 5 (Mar. 1, 2002) (quoting plaintiffs' counsel Richard "Dickie" Scruggs). After manufacturers of asbestos insulation eventually filed for bankruptcy, recent litigation has focused on increasingly peripheral defendants—even those (such as Crane and GE) that have no relationship with the asbestos at issue. Bedrock tort law does not support imposing liability on such defendants, but plaintiffs in asbestos litigation regularly seek to stretch the law to impose liability on distant defendants. *See, e.g.*, Schwartz, V. E. *et al., Asbestos Litigation: The "Endless Search for A Solvent Bystander,"* 23 WIDENER L.J. 59, 62-94 (2013) (summarizing novel theories).

The extraordinary decision of the courts below would (i) expand the scope of the duty to warn far beyond the confines previously recognized by this Court;[1] (ii) fashion a new heeding presumption that has no place in New York law, particularly in the unique military context presented here; and (iii) exclude fair rebuttal evidence that would have shown the futility of additional warnings. These holdings effectively "stack the deck" against distant defendants such as Crane and GE, improperly converting them into de facto insurers for asbestos products they

[1] The erroneous rules applied by the First Department in the asbestos cases before this Court (*Dummitt*, *Suttner*, and *Konstantin*) constitute improper expansions of the duty. GE focuses on *Dummitt* where that expansion is particularly inappropriate given the military context presented.

never made or distributed. *See generally Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) (reversing test that "stack[ed] the deck" against defendants by relying on a prediction about defendants' hypothetical conduct that is always "presumably" true).

GE will not repeat the well-stated arguments of Crane and its other amici for why reversal is warranted here.[2] Instead, GE writes separately to give essential historical military context for understanding the legal issues before the Court. This context is important for understanding why the duty to warn should not be expanded under New York law. At bottom, this Court should adhere to its longstanding approach that it is the manufacturer and distributer of a good that has a duty to warn—not a third party such as GE or Crane that did not make or distribute the good at issue. Imposing such an expansive duty to warn would be particularly inappropriate here, where the third party had no unique knowledge about the risks at issue, and where the United States military highly valued, and exercised extraordinary control over every aspect of, the good at issue.

This context also is important to understanding why a heeding presumption should not be created here. In adopting a heeding presumption, the decisions below depart from well-established New York law that requires plaintiffs to *prove*

[2] *See, e.g.*, Brief of Appellant Crane; Brief of Business Counsel of New York State, *et al.*, as Amici Curiae in support of Crane Co.; Brief Amicus Curiae of Pacific Legal Foundation in support of Crane Co.

causation as a fundamental element of their case. *See* § III.A, *infra.* Rather than follow the normal rule, and put plaintiff to his proof, the courts below presumed the conclusion that a hypothetical warning by Crane "would have been heeded and injury avoided." COA-60 (Friedman, J., dissenting). Given that presumptions must be grounded in "common principles of induction from usual experience," *i.e.*, common sense, 8 CARMODY-WAIT 2d § 56:17, presuming that the Navy would have permitted and Navy sailors would have heeded yet one more (unidentified) asbestos warning in the military setting presented here is nonsensical. It is implausible that third parties such as Crane or GE could have provided warnings that would have been received and heeded by Mr. Dummitt.

There are at least *five* reasons a heeding presumption is nonsensical here:

First, if Crane provided safety information to the Navy about the risks of asbestos, it is unlikely that such information would have reached Mr. Dummitt. The Navy sat at the cutting edge of evolving medical knowledge about asbestos, and developed extensive protocols for controlling asbestos. *See* § I.B. Therefore, it is doubtful that Crane could have provided any new information to the Navy—much less the kind of game-changing information that would have caused the Navy to alter its safety protocols or provide additional safety information to sailors.

Second, even if Crane—a valve manufacturer with no expertise in asbestos thermal insulation—somehow provided new, material information to the Navy, it

is implausible to presume that the Navy would have altered its existing safety protocols or provided different safety information to sailors. The Navy's strategy for mitigating asbestos risk was already extensive, *see* § I.B, and cost considerations alone may have rendered additional safety measures impractical.

Third, it is irrational to presume that a manufacturer such as Crane was capable of warning sailors such as Mr. Dummitt directly. The Navy provided its own safety warnings, and strictly limited and even prohibited warnings from third parties. *See* § I.B. Indeed, retired Rear Admiral David Sargent would have testified here, had the testimony not been excluded, that the Navy would have *forbidden* Crane from providing different or additional warnings.

Fourth, even if a company such as Crane could somehow warn a sailor directly *and* provide him with non-redundant information, it is illogical to presume that Mr. Dummitt or other sailors would have been able to follow Crane's warning. Individual sailors would have had a difficult time implementing safety procedures that were not specifically sanctioned by the Navy. This is especially true if the warning conflicted with a Navy order—for example, by advising sailors to limit their time working with asbestos, despite orders to perform work for longer periods; or, by advising sailors to wear a respirator, when the Navy did not procure respirators for a particular ship. "The Navy Way" was characterized by consistency and uniformity, rather than individual choice and individualized safety

procedures.[3] Sailors could not deviate from the Navy's safety orders on an individualized basis. Nor did sailors have the option simply to walk off the job if they did not agree with Navy safety orders or protocols.

Fifth, on top of all of this, scientific studies across different industries consistently have demonstrated that asbestos warnings often go unheeded, given, for example, practical challenges to compliance with respirator wear. *See* § I.B.2. Accordingly, historically the Navy focused on limiting exposure, not warnings.

Thus, even in the civilian context, it would be irrational to *presume*—rather than enforce the normal rule to have a plaintiff *prove*—that asbestos-related safety warnings would have made a difference to a particular plaintiff. In this military context, a heeding presumption has even less basis in common sense and experience and should be rejected. Instead, this Court should adhere to its long-held view—one that sister States have followed—that a tort plaintiff must *prove* causation and is not entitled to a presumption that if some additional, unnamed warning were given it would have prevented injury.

Finally, the trial court compounded its error in adopting the heeding

[3] Every sailor learned that there is "the right way, the wrong way, and the Navy way"—and sailors were expected to follow the "Navy way." *See also* Baxter, G., *The Right Way, The Wrong Way And The Navy Way*, FLYING MAGAZINE (June 1983), at 116. Navy life was (and is) characterized by obedience and discipline. U.S. Dep't of Navy, BLUEJACKETS' MANUAL (1960), at 46. Disobedience could be punished severely. *See, e.g.*, 10 U.S.C. §§ 899, 901-02. Navy sailors had little choice but to obey their commanding officers' lawful orders (both as a matter of contract under their Enlistment Agreements and as a practical matter).

presumption when it excluded Crane's primary rebuttable evidence—testimony of Rear Admiral Sargent that the Navy would have forbidden additional warnings from Crane or other parties—rendering the heeding presumption essentially irrefutable. Although the First Department brushed aside these errors as "irrelevant," COA-45, in actuality, they would have "made a difference," *id.* at 48.

For all of these reasons, reversal is warranted.

ARGUMENT

There is no basis for this Court to abandon its well-established principles that (1) a duty to warn rests in the maker and distributor of a good, not in a third party and (2) a plaintiff must *prove* that a failure to warn caused her injury and is not entitled to a presumption that some additional, unidentified warning, would have been heeded and prevented injury.

These principles have particular force in the military setting presented here, where the United States Navy exercised plenary authority over the use of asbestos on its warships. As Respondent acknowledges, under this Court's jurisprudence, the duty and causation issues here implicate "'intensely fact-specific'" inquiries. Resp. Br. at 2, 28 (quoting *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 240, 243 (1998)). Under New York law, these questions cannot be determined in a vacuum, and must be rooted in sound policy, common sense, and experience. Thus, GE focuses on providing historical and military context that is missing from the lower

courts' analyses.

I. HISTORICAL BACKGROUND.

GE first provides background about the Navy ships that plaintiffs such as Mr. Dummitt worked on, that were constructed during and after World War II ("WWII") and utilized asbestos insulation to prevent fires and explosions. Second, GE explains the Navy's sophisticated knowledge about asbestos, its own safety orders and warnings about asbestos, and other measures it took to reduce asbestos exposure while balancing other military priorities. Against this backdrop, it is particularly evident why the new duty (*see* § II, *infra*) and heeding presumption (*see* § III, *infra*) urged by Respondent should be rejected.

A. Understanding The Historical Military Context For The Navy's Use Of Asbestos Is Helpful To Resolving The Issues Here.

Plaintiffs such as Mr. Dummitt often bring tort claims many decades after their military service and more than half a century after defendants such as GE supplied non-asbestos-related goods to the Navy—often in the extraordinary context of World War II. Especially in this context, Plaintiffs' efforts to abandon traditional duty to warn and causation standards, and instead to impose nearly unlimited liability on defendants such as these, makes particularly bad sense.

1. Navy Ship Construction Surged During World War II.

Before the United States entered WWII, President Franklin D. Roosevelt called upon American manufacturers to become "the great arsenal of democracy"

to thwart Nazi efforts to "use the resources of Europe to dominate the rest of the world." Roosevelt, President Franklin D., The Great Arsenal of Democracy (Dec. 29, 1940). President Roosevelt recognized:

> This nation is making a great effort to produce everything that is necessary in this emergency, and with all possible speed. . . . Guns, planes, ships and many other things have to be built in the factories and the arsenals of America. . . . So I appeal to the owners of plants, to the managers, to the workers, to our own government employees to put every ounce of effort into producing these munitions swiftly and without stint. [*Id.*]

In response, American industry mobilized and surged production to build "the most awesome military machine in history." Herman, A., FREEDOM'S FORGE: HOW AMERICAN BUSINESS PRODUCED VICTORY IN WORLD WAR II (Random House 2012), at ix. In the words of then-General Dwight D. Eisenhower: "Our enormous material superiority gave us an unchallengeable advantage over our foes. No army or navy was ever supported so generously or so well." Miller, J.A., MEN AND VOLTS AT WAR: THE STORY OF GENERAL ELECTRIC IN WORLD WAR II (McGraw-Hill Book Company, Inc. 1947), at v.

GE contributed to the war effort by manufacturing some 27 million horsepower of steam turbine equipment to propel Navy ships. *Id.* at 17. GE's efforts garnered significant praise, including from Secretaries of the Navy during WWII. Secretary of the Navy Frank Knox, for example, stated:

> No single industry in America has made a better response, a quicker response, to our appeal for help than General Electric. I don't think

> what you've done here can be duplicated anywhere in the world. And it's that quality of America that makes it possible to get into this war late and unprepared, and within a year, so affect its complexion as to change the whole posture of the Allies from one of defense to one of growing offense. You are making the things which are absolutely essential to victory in this war, so lift up your heads with pride—the same kind of pride that men who wear the uniforms of this country have when they go forth to do battle for us—because in the truest possible sense, you are battling for everything for which America stands.

Id. at vi. His successor, Secretary James Forrestal, similarly wrote to GE's president:

> Among the companies which gave our fleet the power to attack, yours has been preeminent. You and all the men and women who have worked with you deserve, therefore, to carry into peace a special pride in a great national achievement.

Id. at 22-23. In total, GE received 76 governmental awards in recognition of its production efforts during the war. *Id.* at 252-55.

2. The Navy Viewed Asbestos As A Critical Commodity To Prevent Serious Fires And Explosions On Navy Ships.

Historically, the Navy viewed asbestos as an essential material to help contain the omnipresent danger of shipboard fire. Navy ships sail with tons of munitions, fuels, and other explosives. Navy warnings give a flavor of the numerous fire hazards on Navy ships:

- "Black powder is one of the most dangerous of explosives."
- "Intense heat will detonate cast TNT charges."
- "[T]he flame from leaky or punctured torpedo torch pots may ignite combustible gases."

- "In handling projectiles fitted with tracers, care must be taken not to strike the tracer, as such a blow involves danger of igniting it."
- Ammunition "[m]agazines should be kept scrupulously clean and dry. Particular attention should be exercised to see that no oily rags, waste or other materials susceptible to spontaneous combustion are left in a magazine."
- "Explosions have occurred apparently due to hydrogen gas formed while charging boat batteries."

U.S. Dep't of Navy, BLUEJACKETS' MANUAL (1960), at 396-402 (Chapter 23: Safety First). Despite the Navy's efforts to limit fire risks, as illustrated by the following photograph, such risks are not completely avoidable:

In 1944, an explosion aboard the U.S.S. Mount Hood caused severe damage to the ship and resulted in death or injury to 180 crewmen. *Photo #NH 96173, courtesy of U.S. Naval Historical Center.*

Compounding the danger, it is extremely difficult to escape a fire on the

open sea. Sailors face exposure, dehydration, and shark attacks while trying to escape. *See id.* at 501-08. Thus, fire control is a critical priority on Navy ships.

3. Asbestos Insulation Was The Navy's Preferred Insulating Material On Its Ships Constructed During And After World War II.

Asbestos was vitally important to the Navy's efforts to limit fire risks. Asbestos is an extremely effective insulator, with "well known fire and heat resistance characteristics" and "superior heat and chemical resistance." *See, e.g.*, McArthur, Captain J.C., U.S. Navy Commander, Pearl Harbor Naval Shipyard, Statement before the Subcomm. on Compensation, Health and Safety of the House Comm. on Education and Labor (Nov. 13, 1978), at 1-2. The Navy's industrial hygienist during WWII explained that asbestos "became the preferred insulating material in Navy ships" because "it afforded heat protection to critical parts of the ship." *Hearings on Compensation for Occupational Diseases: Hearing on H.R. 1626 and H.R. 3090 before the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 99th Congress 353 (1985) ("*Hearings on Compensation*").

Thus, as the federal judge presiding over the asbestos multi-district litigation ("MDL") has summarized, during WWII, "[t]he Navy became the country's largest consumer of asbestos, stockpiling and using it to prevent fires on the newly constructed combat vessels." Robreno, Hon. Eduardo C., *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New*

Paradigm?, 23 WIDENER L.J. 97 (2013), at 102. For example, in 1969, a fire ignited on the *USS Enterprise* after ordnance were overheated by aircraft exhaust and exploded. Asbestos was credited with helping to prevent an even more catastrophic fire and saving the lives of some 3,000 Navy personnel:

Photo courtesy of the Tailhook Association, Baumer Collection, in TRIAL ORDEAL OF THE USS ENTERPRISE (Tuscarora Press 1993).

In addition to its effectiveness, the Navy used asbestos insulation because it "was also lighter" than other available insulation. *See Hearings on Compensation*, *supra*, at 353. This is significant because Navy ships were bound by weight restrictions imposed by the Washington Naval Treaty of 1922. *See* Treaty Between the United States, the British Empire, France, Italy & Japan Agreeing to A Limitation of Naval Armament art. V, 43 Stat. 1655 (Feb. 6, 1922).

Because of these beneficial characteristics, asbestos insulation was used on almost every type of equipment, including thousands of feet of pipes, and a typical

Navy ship was covered with many tons of asbestos insulation. *See, e.g.*, Hollins, D. M. *et al.*, *A Visual Historical Review of Exposure to Asbestos at Puget Sound Naval Shipyard (1962-1972)*, 12 J. OF TOXICOLOGY & ENVTL. HEALTH, Part B 124 (Feb. 1, 2009) at 125.

Asbestos was considered so valuable that it was one of fifteen commodities deemed "critical" to the war effort. *See U.S. War Production Board, Strategic and Critical Materials List (Jan. 30, 1940)*, in Maines, R., ASBESTOS AND FIRE: TECHNOLOGICAL TRADEOFFS AND THE BODY AT RISK (Rutgers University Press 2005) at 89. To ensure asbestos was available for military use, President Roosevelt ordered that its civilian use be curtailed "to promote the defense of the United States." Conservation Order M-79, Curtailing the Use of Certain Types of Asbestos (Jan. 1942).[4]

B. The Navy Took Primary Responsibility For Controlling Asbestos Health Hazards.

Given the importance of asbestos to its mission, the Navy developed its own measured approach to mitigating asbestos-related risks in the face of emerging science about those risks. An understanding of this setting provides important context for why traditional notions of failure to warn (*see* § II, *infra*) and causation

[4] Indeed, under the War Production Board mandates, companies that supplied asbestos were required to do so by the federal government. *See* Burke-Wadsworth Act, Pub. L. No. 76-783, 54 Stat. 885 (Sept. 16, 1940). Noncompliance in a wartime setting would have risked high penalties, such as federal felony prosecution or possible nationalization of the industry. *Id.*

(*see* § III, *infra*) should not be abandoned in cases like this.

1. The Navy Had State-Of-The-Art Knowledge About Asbestos, Provided Its Own Warnings To Sailors, And Limited Warnings From Third Parties.

By 1940, the Navy "was a leader in the field of occupational medicine relating to, among other things, asbestos exposure." *Harris v. Rapid Am. Corp.*, 532 F. Supp. 2d 1001, 1006 (N.D. Ill. 2007); *see also, e.g., Machnik v. Buffalo Pumps Inc.*, 506 F. Supp. 2d 99, 104 (D. Conn. 2007) (discussing Navy's study of potential asbestos-related risks from the early 1920s); *MacQueen v. Union Carbide Corp.*, No. CV 13-831-SLR-CJB, 2013 WL 6571808, at *11 (D. Del. Dec. 13, 2013), *report and recommendation adopted*, No. CV 13-831-SLR/CJB, 2014 WL 108535 (D. Del. Jan. 9, 2014).[5]

The Navy utilized its knowledge to provide extensive warnings to personnel as it determined appropriate based on the then-current science. For example, in his 1939 annual report, the Surgeon General of the Navy recognized that insulators and those involved in "asbestos pipe-covering" are engaged in "hazardous occupations." U.S. Dep't of Navy, Bureau of Med. & Surgery, ANNUAL REPORT OF THE SURGEON GENERAL (1939), at 24. The Surgeon General took a measured approach to the perceived hazard, recommending the use of local exhaust

[5] This is not to say that the Navy's knowledge of the full dangers posed by asbestos was the same in the 1920s as it is today. Rather, the knowledge of the risks evolved over time, and the Navy was at the forefront of that developing knowledge.

ventilation to control asbestos dust exposure. *Id.*[6] Similarly, the same year, the Navy Hospital Corps' Handbook set out to determine what "asbestos hazards exist[ed]" at Navy shipyards, and instructed that "masks for asbestos workers . . . must be available and used." U.S. Dep't of Navy, Bureau of Med. and Surgery, HANDBOOK OF THE HOSPITAL CORPS (1939) at 518-19.

The Navy continued to study these dangers linked to asbestos and to advocate a measured approach to the use of asbestos throughout the 1940s. *See, e.g.*, Brown, E.W., *Industrial Hygiene and the Navy in National Defense*, WAR MEDICINE (Jan. 1941), at 3, 11-12 (noting asbestosis among "potential occupational health hazards in Navy Yards"); U.S. Dep't of Navy, MANUAL OF INSTRUCTIONS FOR PURCHASE AND ADMINISTRATION OF INSURANCE ON NAVY DEPARTMENT CONTRACTS (1943), at 39-40 (similar, and stating "[o]perations with asbestos can be safely performed if the dusty work is segregated and if ventilation hoods enclosing the working process . . . are furnished or special respirators are worn") ("*Navy Insurance Manual*").

In 1946, the Harvard School of Public Health published a Navy-commissioned epidemiological study, which discussed the risks of "prolonged breathing of asbestos dust" and concluded that asbestos disease could be avoided

[6] *See also Albrecht v. A.O. Smith Water Prods.*, No. 11 CIV. 5990 BSJ, 2011 WL 5109532, at *2 (S.D.N.Y. Oct. 21, 2011) (discussing 1939 Annual Report).

by limiting levels of exposure to below 5 million particles per cubic foot ("mppcf"). Fleischer, *et al.*, *A Health Survey of Pipe Covering Operations in Construction of Navy Vessels*, J. OF INDUS. HYGIENE AND TOXICOLOGY (Jan. 1946), at 9-16. Based on its study of emerging asbestos-related science, in 1955, the Navy adopted permissible exposure levels for asbestos and other "toxic materials." *See* U.S. Dep't of Navy, Bureau of Med. and Surgery, BUMED INSTRUCTION REGARDING THRESHOLD LIMIT VALUES FOR TOXIC MATERIALS (Nov. 7, 1955). It did so more than 16 years before the federal government adopted such a standard more generally under the Occupational Safety and Health Administration ("OSHA"), and the government continued to revisit these limits over time.

The Navy did not, however, ban the use of asbestos aboard its ships, take steps to remediate asbestos on its ships, or otherwise suggest that the risks associated with the use of asbestos outweighed the many benefits it believed that asbestos provided by minimizing the risk of fire while keeping ships light. The Navy continued to warn about the hazards of asbestos insulation throughout the 1950s, 1960s, and 1970s.[7]

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[7] *See, e.g.*, U.S. Dep't of Navy, SAFETY PRECAUTIONS MANUAL FOR FORCES AFLOAT, OPNAVINSP 5100.19 (Feb. 23, 1973) (warning about asbestosis and mandating the use of, *inter alia*, partitions, respirators, coveralls, vacuums, and wet methods for asbestos removal); Robbins, H.M., *et al.*, *Asbestosis*, SAFETY REVIEW, Vol. 19, No. 10 (Oct. 1962) (warning pipe coverers that "[t]here is, at present, no known cure for asbestosis. Once a person has contracted the disease he has suffered a loss of health which cannot be redeemed."); U.S. Dep't of Navy, Bureau of Ordnance, SAFETY HANDBOOK FOR PIPEFITTERS, NAVORDINST 5100.21 (Jan. 7,

Significantly, the Navy also limited warnings from private manufacturers. For example, in 1945, the Navy considered—and *rejected*—offers by the manufacturers of asbestos insulation to provide precautions with regard to the use of their insulation. *See* Letter from Philip Drinker, Chief Health Consultant to the U.S. Maritime Commission, to Captain Thomas Carter of the U.S. Navy Department's Bureau of Medicine and Surgery (Jan. 31, 1945). Although the Chief Health Consultant to the U.S. Maritime Commission recognized that manufacturers of asbestos-containing insulation materials "stated they would be glad to get out a brief statement of precautions which should be taken in light of their own experience," he concluded "I understand that neither Navy nor Maritime wants any change in the specifications as the performance with the present materials is entirely satisfactory. From a health standpoint we do not believe any specification changes are needed." *Id.*

The Navy also limited warnings by manufacturers of equipment that did not contain asbestos insulation, such as Crane and GE. Manufacturers typically conveyed information in three ways, by identification plates, information plates, and technical manuals—all of which were strictly controlled by the Navy. With respect to identification plates and information plates, Navy specifications

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(continued...)

1958).

provided specific diagrams identifying exactly how these plates should look, and what information should be included. *See* MIL-I-15024 (SHIPS), *Military Specification—Identification Plates, Information Plates and Marking Information for Identification of Electrical, Electronic, and Mechanical Equipment* (June 11, 1971). A sample plate is depicted below. The plate, which is 6-x-7 inches, complies with Navy size restrictions and illustrates the limited space available for warnings:

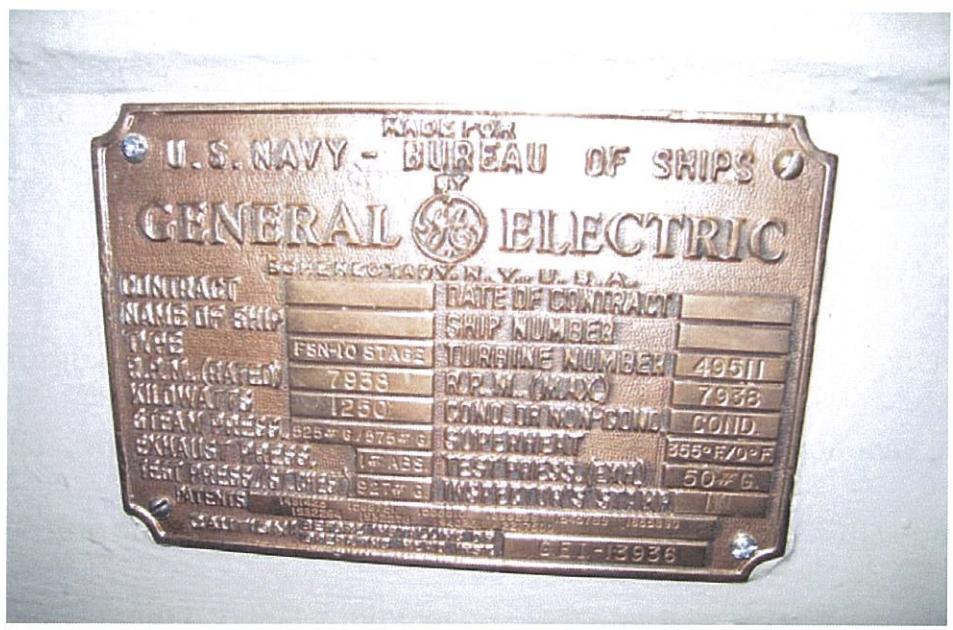

Photo taken at the USS Hornet Museum (2007).

With respect to technical manuals for equipment such as turbines and valves, Navy specifications only allowed manufacturers to provide safety information about "special hazards" unique to their equipment. *See* MIL-T-15071 (SHIPS) *Military Specification—Technical Manuals for Mechanical and Electrical Equipment* (Aug. 15, 1954) at § 3.5.1 ("Contents"), § 3.4.7.1 ("Method of

Approval"). Asbestos insulation was not unique to valves and turbines because it was used on almost every type of equipment, and therefore subject to background Navy specifications. *See, e.g.*, U.S. Dep't of Navy, Bureau of Med. and Surgery, BUMED INSTRUCTION REGARDING THRESHOLD LIMIT VALUES FOR TOXIC MATERIALS (Nov. 7, 1955). Moreover, the Navy generally prohibited manufacturers of turbines and other goods such as those supplied by GE and Crane from providing any insulation with their equipment. *See* MIL-T-17600C (SHIPS) *Military Specification—Turbines, Steam, Propulsion Naval Shipboard* (Sept. 21, 1966), at § 3.6 ("The shipbuilder will be responsible for furnishing and installing thermal insulation and lagging"); MIL-T-17600 (SHIPS), *Military Specification—Turbine, Steam, Propulsion (For Naval Shipboard Use)* (June 26, 1953), at § 3.4.8.2 ("Turbine casings and steam chest will be completely and efficiently insulated and covered by the shipbuilder..."). Asbestos insulation that a company neither made nor supplied, which was used throughout the ship, is the opposite of a "special hazard" unique to that equipment.

The Navy also required detailed review and approval of all content in third-party technical manuals for turbines and valves. *See* MIL-T-15071 (SHIPS) *Military Specification—Technical Manuals for Mechanical and Electrical Equipment* (Aug. 15, 1954), at § 3.4.7.1 ("Method of Approval"). Navy control was so integrated throughout the technical manual preparation process that, upon

approving a manual, the Navy adopted the manual as an official Navy publication, and designated it with a unique NAVSHIPS publication designator number. *Id.* at §§ 3.4.1, 3.4.3.

Through these procedures, the Navy strictly curtailed the safety information provided by third parties directly to sailors, and remained the leading authority on asbestos information and warnings. *See also Leite v. Crane Co.*, 749 F.3d 1117, 1123 (9th Cir. 2014) (discussing evidence regarding Navy's control over warnings); *Harris*, 532 F. Supp. 2d at 1005 (discussing evidence that the Navy "the Navy dictated every aspect of . . . written documentation and warnings"); COA-62 (Friedman, J., dissenting) (Crane's expert, Rear Admiral Sargent, was prepared to testify that the Navy would have been *forbidden* additional warnings from Crane).

Once Navy leadership determined which warnings were warranted, the Navy issued mandatory safety instructions, which were communicated to sailors through the Navy's publications system and command. Sailors were advised to follow safety orders only from their immediate supervisor. *See* Safety Office, San Francisco Naval Shipyard, *Who Is Responsible For Safety?*, SAFETY REVIEW, Vol. 19, No. 10 (Oct. 1962), at 6 ("The individual employee should take orders only through his immediate supervisor."). The Navy further advised that "sensible, clear instructions exist for the protection of men and equipment on any ship or group of ships, and must be obeyed by every man on board." U.S. Dep't of Navy,

BLUEJACKETS' MANUAL, at 394; *id.* at 395 (noting that injuries "above all [are caused] by failure to carry out the proper safety precautions"). Therefore, "[e]ach commanding officer, each executive officer, and each department head is required to see to it that the men are instructed in these precautions, that they are drilled in them, and that they follow them." *Id.* at 394.

2. Although The Navy Provided Asbestos Warnings, It Focused On Limiting Asbestos Exposure Given The Limited Effectiveness Of Asbestos Warnings.

Although, as shown above, the Navy provided certain asbestos warnings in the manner it deemed appropriate, it did not place them on every individual piece of insulation (which covered much of the ship). Rather, the Navy primarily focused on reducing asbestos *exposure* through engineering controls—which were considered far more effective than providing warnings.

Beginning in the 1940s, the Navy started implementing control measures to limit exposure. *See* Fleischer, *supra*, at 10-11, 44. The Navy's control measures included: (a) Military Construction (MILCON) Project standards to modernize naval shipyards to ensure proper layout, ventilation, and air filtration systems; (b) wet processes; (c) exhaust ventilation; (d) protective clothing; (e) vacuuming; (f) development of proper procedures; and (g) respiratory protection. *Id.* at 44.[8]

[8] *See also Hearings on Compensation*, 99th Congress 346, 349 (discussing control measures); U.S. Dep't of Navy, Bureau of Ordnance, SAFETY HANDBOOK FOR PIPEFITTERS, NAVORDINST

"As more information unfolded regarding the hazards of exposure to asbestos dust, even more emphasis was given to *controlling* the exposure." Winer & Holtgren, *Asbestos—A Case Study of the U.S. Navy's Response to Upgraded Safety and Health Requirements*, NAVAL ENG'RS J. (Dec. 1976), at 41, 44 (emphasis added). After the Navy adopted a permissible exposure level in 1955, *see supra*, it adjusted its specifications to further reduce asbestos exposure by 1973. *See* Winer & Holtgren, at 45; *see also* Fleischer, *supra*, at 10-11 (noting that the Dreessen study suggested 5 mppcf as a threshold limit, and concluding that dust counts below this level "indicate good dust control").[9]

The Navy focused on reducing exposure because experts advised—and continue to advise—that asbestos warnings are ineffective. Between 1963 and 1988, in both the civilian and military context, industrial workers already were being inundated with warnings, which typically advised workers to wear respirators. Outside of the Navy, warnings about asbestos hazards were provided

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5100.21 (Jan. 7, 1958); Pipe and Copper Shop Master Mechanics Conference Minutes, Boston Naval Shipyard (May 8-10, 1957); Robbins, H.M., *et al., Asbestosis*, SAFETY REVIEW, Vol. 19, No. 10 (1962); Marr, W. T., *Asbestos Exposure During Naval Vessel Overhaul*, 25 AM. IND. HYG. ASSOC. J. (May-June 1964), at 264-268; Hogan, B. W., Chief, Bureau of Medicine and Surgery, OCCUPATIONAL HEALTH HAZARDS DERIVED FROM INDUSTRIAL HEALTH REPORTS JULY 1960 THROUGH SEPTEMBER 1960, Release No. 26 (Feb. 1, 1961), at 59.

[9] The implementation of these control measures varied within the Navy. *See generally* Barna, S. L., *Notes: Abandoning Ship: Government Liability for Shipyard Asbestos Exposures*, 67 N.Y.U. L. REV. 1034 (1992), at 1058-59; *Hearings on Compensation*, 99th Congress 347 (discussing surveys showing that "some shipyards made [recommended asbestos-control] improvements and others did not").

by medical professionals,[10] unions,[11] asbestos manufacturers,[12] and periodicals.[13] Safety measures were also enacted into law. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590; OHSA Standard for Exposure to Asbestos Dust, 37 Fed. Reg. 11, 318 (June 7, 1972).

Despite these warnings, medical studies have shown that industrial workers often refuse to wear respirators consistently. *See, e.g., Dr. Irving J. Selikoff's Address to the Delegates of the Twenty-Second Convention of the International*

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[10] *See, e.g.*, Selikoff, *et al.*, *Relation between Exposure to Asbestos and Mesothelioma*, NEW ENGLAND J. MED., VOL. 272 (Mar. 18, 1965), at 565 ("It appears that mesothelioma must be added to the neoplastic risks of asbestos inhalation . . ."); Selikoff, *et al.*, *Partnership for Prevention—The Insulation Industry Hygiene Research Program, Indus. Medicine*, INDUS. MED. Vol. 39 (April 1970), at 24-25 (explaining current shortcomings with asbestos dust masks and plan for developing more effective dust masks); Selikoff, *et al.*, *Cancer risk of insulation workers in the United States*, BIOLOGICAL EFFECTS OF ASBESTOS (P. Bogovski, *et al.*, eds. 1973), at 209-216 ("A serious cancer risk has been demonstrated among asbestos insulation workers in the United States.").

[11] *See, e.g.*, Sickles, C.W., ed., *Minutes of Conference Meetings, Western States*, THE ASBESTOS WORKER (May 1959) at 22 ("Health Hazards relating to our trade were discussed and various types of respirators were presented and the good points of each were brought out."); Selikoff, *et al.*, *Asbestos Exposure and Neoplasia*, THE ASBESTOS WORKER (Nov. 1964), at 5-9 ("[i]ndustrial exposure to asbestos by insulation workers . . . results in a marked increase in the incidence of cancer of the lung"); Todd, William T., ed., *Our Troubled Environment*, UA J. (Nov. 1971), at 14 (referring to "Asbestos as a Killer"); Laborers' Int'l Union of N.A., *Labor Urges Stronger Safety Standards for Exposure to Asbestos*, THE LABORER (July 1972), at 8-9 ("Medical science has turned up some frightening statistics indicating an extremely close relationship between the handling of asbestos and cancer-related diseases.").

[12] Beginning in 1964, manufacturers of asbestos insulation provided warnings on their products in the civilian context. *See, e.g.*, The Celotex Corporation Warning ("These products contain asbestos fiber. . . . regulations may require special ventilation equipment, or the wearing of approved protective masks. OHSA has found asbestos fibers to be a health hazard, if repeatedly inhaled, which may causes diseases including cancer and asbestos of the lungs.").

[13] Sherrill, R., *Asbestos, The Saver Of Lives, Has A Deadly Side*, NEW YORK TIMES MAGAZINE (Jan. 21, 1973); Cohn, V., *AFL-CIO Warns on Asbestos Cancers*, THE WASHINGTON POST (Mar. 16, 1972).

Assoc. of Heat and Frost Insulators and Asbestos Workers (Miami, Fla.) (Sept. 1972), at 106 ("[W]e found most asbestos workers did not wear respirators."); Winer & Holtgren, *supra*, at 47 ("In spite of a mandatory requirement to wear dust respirators, many workers chose to ignore this regulation.").

Workers repeatedly reported that they did not wear respirators for the reasons one would expect—because respirators caused "discomfort and interference with breathing"—notwithstanding that they were warned of risks of lung cancer and mesothelioma associated with asbestos exposure. Selikoff, *et al., Union Survey Shows Current Masks Have Drawbacks*, THE ASBESTOS WORKER (May 1969), at 19-22; *see also, e.g.*, Selikoff, *et al,*. ASBESTOS AND DISEASE (Academic Press 1978), at 477-78 ("The use of respirators has long posed problems to those responsible for industrial hygiene in dusty environments."). "In practice, the discomfort of constant wear, and difficulty in speech, etc., render workers very unwilling to use this form of protection for any length of time." Merewether, E.R., *et al.*, Home Office, REPORT ON EFFECTS OF ASBESTOS DUST ON THE LUNGS AND DUST SUPPRESSION IN THE ASBESTOS INDUSTRY (1930), at 17.

Wearing a respirator was considered something that "should only be used as a last resort," not a panacea for asbestos-related risks. Winer & Holtgren, *supra*, at 47; *see* OHSA Standard for Exposure to Asbestos Dust, 37 Fed. Reg. 11, 318 (June 7, 1972) ("Compliance with the exposure limits . . . may not be achieved by the use

of respirators . . . except" in emergencies or when other practices to limit exposure were not feasible or available). To this day, OHSA regulations continue to advise that respirators should be used as a last resort, such as when other measures, including ventilation, wetting, and segregation, cannot keep asbestos dust below permissible levels. 29 C.F.R. § 1910.1001(g).

* * *

In sum, the historical record shows that: (a) because asbestos insulation was so effective at controlling fire dangers, the Navy utilized it on almost every type of equipment; (b) the Navy, as the largest consumer of asbestos insulation in the world, had state-of-the-art knowledge about the emerging risks of asbestos; (c) the Navy set forth its own safety orders regarding asbestos; (d) the Navy tightly controlled safety warnings from suppliers; and (e) the Navy did not prioritize asbestos warnings because it was focused on reducing asbestos exposure and because such warnings were considered ineffective.

Against this backdrop, it is difficult to imagine that Navy contractors such as GE and Crane could have told the Navy or Navy sailors anything new about asbestos that would have materially altered their behavior and prevented injury or that supplying non-asbestos products to the Navy played any role in causing injury here. Yet the theory of the courts below would effectively impose such a duty to warn and a presumption of causation on a third party such as GE or Crane, where

the third party not only has no unique knowledge about the danger, but also did not even manufacture or supply the asbestos at issue.

II. THE COURT SHOULD ADHERE TO THE FUNDAMENTAL TORT PRINCIPLE THAT ONLY DEFENDANTS WHO MAKE OR DISTRIBUTE A GOOD HAVE A DUTY TO WARN ABOUT THAT GOOD—PARTICULARLY IN THE HISTORICAL MILITARY CONTEXT PRESENTED HERE.

The law does not impose a duty on a defendant to provide a warning with respect to a product it neither made nor distributed. Indeed, in *Rastelli v Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 298 (1992), this Court concluded that a defendant "had no duty to warn about the use of its [good] with potentially dangerous [goods] produced by another where [defendant] did not contribute to the alleged defect in a product, had no control over it, and did not produce it." *Id.*

Second Circuit Judge Chin, while sitting by designation in the Southern District of New York, applied *Rastelli* in similar circumstances to those presented here, and concluded that a manufacturer-defendant has no duty to warn against defects in third-party products so long as the manufacturer had no control over the production of the defective product and did not place it into the stream of commerce. *See Surre v. Foster Wheeler*, 831 F. Supp. 2d 797, 802-03 (S.D.N.Y. 2011) (Chin, J.) (*citing Rastelli v. Goodyear*, 79 N.Y.2d 289, 297-98 (1992)). Yet that is precisely what the decisions below would do.

The duty to warn is, above all, grounded in reasonableness. *See, e.g.*,

RESTATEMENT (SECOND) OF TORTS § 388 (AM. LAW INST. 1965) (liability attaches if supplier "fails to exercise reasonable care" in providing warnings). Imposing a duty is particularly unreasonable here. Such would insert a non-asbestos manufacturer such as Crane or GE into the complex command and control relationship on a dangerous warship with respect to a product *they neither made nor supplied.* Such a duty would be premised on the faulty assumption that a non-asbestos supplier, such as Crane or GE is in an equal or better position than the United States Navy to understand the emerging risks of asbestos, and to train Navy sailors how to safely handle a product Crane or GE neither made nor sold but which the Navy had extensively studied for many years. There is no basis in New York law to extend a duty in these circumstances.

III. THE COURT SHOULD NOT ADOPT A NOVEL HEEDING PRESUMPTION HERE—LET ALONE A PRESUMPTION THAT IS EFFECTIVELY IRREBUTTABLE.

Nor is there a basis to abandon well-established causation principles here. In adopting a heeding presumption, the decisions below depart from well-established New York law that requires plaintiffs to *prove* causation as a fundamental element of their case. *See* § III.A, *infra.* The courts below instead *presumed* causation by concluding that a hypothetical asbestos-related warning by Crane would have been heeded by Mr. Dummitt and prevented injury. Presuming that the Navy would have permitted, and Navy sailors would have heeded, yet one more (unidentified)

asbestos warning in the military setting presented here is irrational. Given that asbestos warnings were widely viewed as ineffective and the Navy already had determined ways in which to mitigate asbestos risks, it is highly doubtful that the Navy or its personnel would have been receptive to yet *more* asbestos warnings from third parties, particularly when those parties did not even make the asbestos insulation. At a minimum, the conclusion that an additional warning could have been given and would have been effective should not be presumed, but should be subject to a normal showing of proof by the plaintiff.

A. New York Follows The Bedrock Tort Principle That A Plaintiff Must Prove Causation And Is Not Entitled To Presume That Conclusion.

This Court has long recognized in tort cases that "a plaintiff must establish by a preponderance of the evidence that the defendant's negligence was a proximate cause of plaintiff's injuries." *Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544, 550 (1998); *accord Cornell v. 360 West 51st Street Realty, LLC*, 22 N.Y.3d 762, 783-84, 786 (2014) (reinstating summary judgment to defendants because plaintiff "did not show the necessary specific causation" to prove that defendant caused her injury).

Following this principle—aside from the results below in the cases presently before the Court—the First Department repeatedly has held that plaintiffs in failure to warn cases must affirmatively prove causation by "adducing proof that the user of a product would have read and heeded a warning had one been given." *Sosna v.*

Am. Home Prods., 298 A.D.2d 158, 158 (1st Dep't 2002). Similarly, the First Department has held that "well settled law" establishes that "a plaintiff has the obligation to adduce proof that had a warning been provided, she would have read the warning and heeded it." *Mulhall v. Hannafin*, 45 A.D.3d 55, 61 (1st Dep't 2007). Numerous First Department cases are to this effect.[14]

Likewise, the Second Department has recognized that "a plaintiff whose claim is based on inadequate warnings must prove causation, *i.e.*, that if adequate warnings had been provided, the product would not have been misused." *Banks v. Makita, U.S.A., Inc.*, 226 A.D.2d 659, 660 (2d Dep't 1996)) (citing *Johnson v. Johnson Chem. Co.*, 183 A.D.2d 64, 70 (2d Dep't 1992)); *see also Estrada v. Berkel Inc.*, 14 A.D.3d 529, 530 (2d Dep't 2005) ("[A]s in any products liability case, the plaintiff in an action premised on inadequate warnings must prove causation.") (internal quotation omitted).[15] Similarly, it has long been the rule in

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[14] *See, e.g., Reis v. Volvo Cars of N. Am., Inc.*, 73 A.D.3d 420, 423 (1st Dep't 2010) (dismissing failure to warn claims because "there is no proof in the record that [the product user] would have read and heeded a warning"); *Glucksman v. Halsey Drug Co.*, 160 A.D.2d 305, 307 (1st Dep't 1990) ("A plaintiff must demonstrate that the warning was inadequate and that the failure to adequately warn of the dangers of the drug was a proximate cause of his or her injuries."); *Guadalupe v. Drackett Prods. Co.*, 253 A.D.2d 378, 378 (1st Dep't 1998) (affirming summary judgment for defendant where "any purported inadequacies in the product's labeling were not a substantial factor in bringing about [plaintiff's] injury").

[15] Numerous trial courts in the Second Department have followed this principle and held that a plaintiff must "must adduce proof that he or she 'would have read and heeded a warning had one been given.'" *Menna ex rel. Menna v. Walmart*, 40 Misc. 3d 1221(A), at *2 (Sup. Ct. 2013) (unreported); *Zapata v. Ingersoll Rand Co.*, 36 Misc. 3d 1230(A), at *11 (Sup. Ct. 2012) (unreported) ("[U]nder well settled law, to prove proximate cause, a plaintiff has the obligation

the Fourth Department that a "[p]laintiff must establish, of course, that the failure to warn was a proximate cause of the injury." *Belling v. Haugh's Pools, Ltd.*, 126 A.D.2d 958, 959 (4th Dep't 1987).

Respondent erroneously contends that certain Appellate Division cases support a heeding presumption because, in those cases, "the product manufacturer actually provided an *adequate* warning and the plaintiff completely ignored it." Resp. Br. at 71 (emphasis added). It is far from clear that the warnings at issue in these cases were "adequate."[16] But even if they were, the key point is that the product users in those cases failed to follow existing warnings and, therefore, were unable to prove that they would have followed yet another warning they claimed the defendant should have given. Thus, far from *presuming* that a hypothetical warning would be followed, these courts followed the normal rule and required the

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to adduce proof that had a warning been provided, he or she would have read the warning and heeded."); *Granata v. Sub-Zero Freezer Co.*, 12 Misc. 3d 1155(A) (Sup. Ct. 2006) (unreported) (similar), *aff'd*, 43 A.D.3d 996 (2d Dep't 2007); *Langer v. Well Done, Ltd.*, 11 Misc. 3d 1056(A), at *3 (Sup. Ct. 2006) (unreported) ("In order to satisfy the causation element of a failure to warn claim, however, plaintiff must show that if adequate warnings had been provided, the product would not have been misused. Accordingly, a failure to warn claim must properly be dismissed where, as here, the plaintiff fails to make a showing of causation.").

[16] Only two of these cases arguably involved "adequate" warnings. *See Mulhall*, 45 A.D.3d at 61 (defendant's warnings were "not deficient in any way"); *Rochester Refrigerating Corp. v. Easy Heat, Inc.*, 222 A.D.2d 1013, 1014 (4th Dep't 1995) ("Those notices and instructions, if read, would have warned the employee to install the de-icer only on roofs, gutters and downspouts."). *Cf. Guadalupe*, 253 A.D.2d at 378 (granting summary judgment because "any purported labeling or design defects were not the proximate cause of the plaintiff's accident"); *Sosna*, 298 A.D.2d at 158 (granting summary judgment to defendant on proximate cause grounds without addressing adequacy of the warning); *Upfold v. Generac Corp.*, 224 A.D.2d 1021 (4th Dep't 1996) (same).

plaintiffs to *prove* the causal link between a lack of warning and their injury. *See, e.g.*, *Reis*, 73 A.D.3d at 423 (dismissing plaintiff's failure to warn claims because "there is no proof in the record that [the product user] would have read and heeded a warning"); *Mulhall*, 45 A.D.3d at 58 (holding that "plaintiffs were required to prove that the product did not contain adequate warnings and that the inadequacy of those warnings was the proximate cause of the injuries"); *Glucksman*, 160 A.D.2d at 307 (granting summary judgment because plaintiff "failed to make the necessary showing" regarding causation). Rather than endorsing a heeding presumption, these courts concluded that product users would *not* follow additional warnings given the circumstances presented, including the plaintiffs' failure to follow other warnings in the past.[17]

The Second Circuit also has recognized that "New York, in company with most jurisdictions, imposes on a plaintiff the burden to prove that a defendant's negligence was a proximate cause of his injury"; even if "causation may sometimes be inferred from the facts and circumstances" of a case, "a plaintiff is not entitled to a presumption" of causation. *Raney v. Owens-Illinois, Inc.*, 897

[17] Respondent contends that these cases "implicitly adopt the proposition in [Restatement] Section 402A that when a warning is *actually given*, the manufacturer can presume it will be heeded." Resp. Br. at 70-71 (emphasis in original). Even assuming for the sake of argument that this were correct, it remains a further logical leap to presume that a warning that is *not* given would have been followed. If anything, the Appellate Division inferred from the circumstances in these cases that warnings were not followed.

F.2d 94, 95-96 (2d Cir. 1990). Similarly, federal trial courts have summarized that, under New York law, "a plaintiff bears the burden to prove that defendant's failure to warn was a proximate cause of his injury and this burden includes adducing proof that the user of a product would have read and heeded a warning had one been given." *Alston v. Caraco Pharm., Inc.*, 670 F. Supp. 2d 279, 285 (S.D.N.Y. 2009); *Smallwood v. Clairol, Inc.*, No. 03 CV 8394SWK, 2005 WL 425491, at *2 n.5 (S.D.N.Y. Feb. 18, 2005).[18]

Like New York, numerous well-reasoned holdings from sister States have rejected a heeding presumption. Although there is, as to be expected, some variance among the laws of the 50 States, New York is in good company in rejecting a heeding presumption. *See, e.g.*, *Ford Motor Co. v. Boomer*, 736 S.E.2d 724, 733 (Va. 2013) ("Virginia does not observe a heeding presumption."); *Huitt v. S. Ca. Gas Co.*, 116 Cal. Rptr.3d 453, 467-68 & n.9 (Cal. App. 2010) (heeding presumption "is not recognized in California"); *DeJesus v. Craftsman Machine Co.*, 548 A.2d 736, 744 (Conn. App. 1988) (no "presumption of proximate cause" in Connecticut law).[19]

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[18] Some federal trial courts have erroneously held that New York recognizes a heeding presumption. *See, e.g.*, *Bee v. Novartis Pharm. Corp.*, 18 F. Supp. 3d 268, 284 (E.D.N.Y. 2014); *In re Fosamax Prods. Liab. Litig.*, 924 F. Supp. 2d 477, 486 (S.D.N.Y. 2013); *Anderson v. Hedstrom Corp.*, 76 F. Supp. 2d 422, 441 (S.D.N.Y. 1999). None of those decisions cites *Raney*, let alone the relevant Appellate Division cases noted above.

[19] *See, e.g.*, *Rivera v. Philip Morris*, 209 P.3d 271, 277 (Nev. 2009) ("Nevada law does not

Even in the States that have adopted a heeding presumption in some cases, the presumption is rebuttable—for example, where the warning would be futile.[20] For instance, as a Louisiana appellate court observed, although "[i]n owners' manual cases, where the manufacturer" (not a third party) "fails to give an adequate warning, a presumption arises that the user would have read and heeded such warnings"; the "presumption is rebutted, however, if the manufacturer produces evidence to show that the warning or instruction would have been futile." *Isgitt v. State Farm Ins. Co.*, 156 So. 3d 669, 673 (La. App. Ct. 2003). The

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support recognizing a heeding presumption."); *Riley v. Am. Honda Co.*, 856 P.2d 196, 199-200 (Mont. 1993) (rejecting heeding presumption and explaining: "A defendant certainly is in no better position to rebut a presumption which totally excuses a plaintiff from meeting the causation element than a plaintiff is in establishing the causation element as part of the prima facie case."); *Harris v. Int'l Truck & Engine Corp.*, 912 So. 2d 1101, 1109 (Miss. App. 2005) (concluding that "the Mississippi Supreme Court has no intention or desire to adopt or create a heeding presumption"); *Tuttle v. Lorillard Tobacco Co.*, 377 F.3d 917, 925 (8th Cir. 2004) ("the Minnesota state courts have not adopted the so-called 'heeding presumption'"); *Odom v. G.D. Searle & Co.*, 979 F.2d 1001, 1003 (4th Cir. 1992) (declining to "simply presume causation in the event she is able to prove that [defendant]'s warning was inadequate" because "[t]here is no such presumption under South Carolina law, and we are unwilling to create one here"); *Parkinson v. Novartis Pharm. Corp.*, 5 F. Supp. 3d 1265, 1272 (D. Or. 2014) ("there is not a presumption under Oregon law that an adequate warning would have been read and prevented the harm"); *Luttrell v. Novartis Pharm. Corp.*, 894 F. Supp.2d 1324, 1345 n.16 (E.D. Wash. 2012) (the heeding presumption "is not currently recognized in Washington law"); *Motus v. Pfizer Inc.*, 196 F. Supp. 2d 984, 993 (C.D. Cal. 2001) ("But in fact, no California court has adopted or applied that presumption, and several California courts have decided whether proximate cause has been or can be established in prescription drug and medical device failure-to-warn cases without mentioning the rebuttable presumption."), *aff'd*, 358 F.3d 659 (9th Cir. 2004); *see also Deere & Co. v. Grose*, 586 So. 2d 196, 198 (Ala. 1991).

[20] *See, e.g., Moore v. Ford Motor Co.*, 332 S.W.3d 749, 763 (Mo. 2011); *Sharpe v. Bestop, Inc.*, 713 A.2d 1079, 1086 (N.J. Super. App. Div. 1998), *aff'd*, 730 A.2d 285 (N.J. 1999); *Knowlton v. Desert Med., Inc.*, 930 F.2d 116, 123 (1st Cir. 1991) (Massachusetts).

decision below improperly excluded just this type of futility evidence: fair rebuttal from Rear Admiral Sargent that additional warnings would not have been allowed.

This Court should adhere to the bedrock tort principle that a plaintiff must prove that a warning would have made a difference and prevented her injury—rather than permitting a plaintiff to assume the conclusion. Presuming causation—rather than putting plaintiffs to their proof—is all the more unwarranted in a case like this one, where it is unclear what additional warning could have been given and where experience and common sense cast profound doubt on whether additional warnings would have been followed and prevented injury.

B. Respondent's Arguments In Favor Of A Heeding Presumption Are Misguided.

1. This Court Should Not Extend The Reach Of Now-Repudiated Comment j Of The Restatement (Second) Of Torts § 402A.

Respondent urges this Court to adopt a heeding presumption based on an extension of an out-dated Restatement comment that has been disavowed by its drafters. Resp. Br. 70-71. Specifically, Respondent invokes comment j of the RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965), which states:

> *Where warning is given, the seller may reasonably assume that it will be read and heeded*; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous. Restatement (Second) of Torts § 402A, *cmt. j*. (emphasis added).

Comment j has drawn considerable criticism and the Restatement drafters removed that presumption from the Restatement (Third) of Torts. *See*

RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2, *cmt. l* (AM. LAW INST. 1998).[21] In so doing, the drafters have referred to the comment j presumption as "unfortunate language," and recognized that "[t]he Comment j presumption has elicited heavy criticism from a host of commentators." *Id.*

The "sharpest and most cogent attack" challenged the assumption that product users "can be expected to receive, correctly interpret, and obey every comprehensible warning accompanying every product they use or encounter." Indeed, many courts have recognized that "it is foreseeable that warnings or obvious dangers will either not be seen or will be disregarded." *Id.*

These same criticisms apply with equal or more force here. It is unduly speculative, if not illogical, to presume that a hypothetical, undefined warning that was *not* given would have been heeded and prevented injury. Especially here where the Navy, as described above, already had considered and balanced the appropriate level of asbestos warnings, the opposite appears more likely: another warning, if given, would not have been permitted, followed, or averted injury.

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[21] This Court has not adopted comment j of the Restatement (Second). It has, however, already embraced significant principles of law adopted in the Restatement (Third). For example, this Court referenced the Appellate Division's invocation of the Restatement (Third) approvingly when it declined to adopt a "product line" exception to successor liability, which would have "[placed] responsibility for a defective product on a party that did not put the product into the stream of commerce." *Semenetz v. Sherling & Walden, Inc.*, 7 N.Y.3d 194, 201 (2006) (referencing the Restatement (Third) of Torts: Products Liability § 12); *see also Scarangella v. Thomas Built Buses, Inc.*, 93 N.Y.2d 655, 659 (1999) (citing Restatement (Third) when discussing risk-utility balancing in design defect analysis).

Moreover, even on its own terns, the comment j presumption is materially different from the one that Respondent seeks. Comment j set forth a presumption that in situations where the manufacturer or seller *has provided* a warning, the warning will be read and heeded. *See generally Huitt*, 116 Cal. Rptr. 3d at 467 n.9 ("We are aware of the comment included in Restatement of Torts, cited by plaintiffs, that a sufficient warning permits the seller to assume the warning will be read and followed. . . . Even if this comment creates a presumption, an issue we need not decide, the presumption would be in favor of the seller, not the consumer."). Here, Respondent complains that Crane did *not* provide a warning. The comment j presumption therefore is not applicable on its face.

Respondent offers no cogent reason to expand the repudiated logic of comment j here.

2. Other Presumptions Cited By Respondent Are Inapposite Because They Were Formed Based On Realistic Probabilities—Unlike A Heeding Presumption.

The other presumptions Respondent invokes, Resp. Br. at 68-69, are distinguishable because—unlike the heeding presumption—they correlate with reasonable probabilities widely understood as part of the human experience. Common sense dictates that if a driver falls asleep behind the wheel and his car runs something over, his negligence probably caused the accident. *Id.* at 68. If a scaffold or ladder "collapses for no apparent reason," then it probably was "not

good enough to afford proper protection." *Id.* If a vehicle is being driven by someone other than the owner, the driver probably obtained consent from the owner, and normally did not simply steal the vehicle. *Id.*[22]

These presumptions make sense because, as a case upon which Respondent relies explains, a presumption reflects a "judicial recognition authorizing a jury to take heed of the truth *drawn from general human experience*." *Schelberger v. E. Sav. Bank*, 93 A.D.2d 188, 192 (1st Dep't) (internal quotation omitted) (emphasis added), *aff'd*, 60 N.Y.2d 506 (1983);[23] *see Tot v. United States*, 319 U.S. 463, 467-68 (1943) (statutory presumptions are grounded in "common experience").

The heeding presumption urged here is far different because it runs *against* reasonable probabilities, experience, and common sense. Contrary to Respondent's rule, experience shows that individuals often are inundated with warnings that they routinely do not read and follow. As other courts have observed, a heeding presumption lacks "common sense" because "warnings are everywhere in the modern world and often go unread or, where read, ignored."

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[22] Respondent's citation to *O'Brien v. Erie R. Co.*, 210 N.Y. 96 (1913), is similarly inapposite. That case simply observes that when a person is on a railroad track, sees an oncoming train, and has time to react, the driver of the oncoming train normally "would have the right to assume that [this person] would leave the track in time to escape injury." *Id.* at 100-01.

[23] In *Schelberger*, this Court affirmed a presumption that a death was not caused by suicide in the context of insurance law, observing that it "springs from strong policy considerations as well as embodying natural probability." 60 N.Y.2d at 510. As the First Department explained in the case, a presumption against suicide "arises in recognition of the fact that self-destruction is contrary to the general conduct of mankind." 93 A.D.2d at 192 (internal quotation omitted).

Riley, 856 P.2d at 200 (rejecting heeding presumption). Therefore, "it is not logical to presume that a plaintiff would have" followed a (hypothetical) adequate warning. *Rivera*, 209 P.3d at 277; *see also* note [19], *supra* (citing cases).

Respondent's invocation of *Applebee v. State*, 308 N.Y. 502 (1955), also does nothing to support extending a presumption here. In that case, the plaintiff sought to hold the State liable for failing to provide a stop sign at an intersection. This Court *declined* to presume that the addition of a stop sign—essentially, a warning to stop at the intersection—would have prevented injury, concluding that "[t]he absence of a stop sign contributed not one whit to the collision" because "there is not the slightest basis in this record for inferring that [the driver] would have stopped a single foot before she did had the sign been posted." *Id.* at 508.[24]

A heeding presumption is *especially* illogical in the unique circumstances of this case. Respondent—perhaps recognizing that no additional warning would have been heeded—is vague about what sort of warning Crane should have given (and to whom). Suppose there were a hypothetical warning that respirators always

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[24] Respondent's argument that *dicta* in *Applebee* somehow supports a heeding presumption relies on the following sentence from that opinion: "Had the stop sign been in place, we presume that [the driver] would have *observed* its injunction." *Applebee*, 308 N.Y at 507-08 (emphasis added). Read in context, this sentence merely acknowledges that a stop sign would have been *seen* by the driver—not that it would have changed the driver's conduct or prevented the injury at issue. To the contrary, the Court recognized that the driver already knew to stop at the intersection even without the stop sign (*i.e.*, the driver recognized the obvious risk about which the sign would have warned).

should be worn around asbestos—any such warning was destined to be ineffectual because the Navy never provided respirators on the ships on which Mr. Dummitt served.[25] Even if respirators had been provided, because of the widespread use of asbestos insulation on Navy ships it is nonsensical to presume that sailors would wear respirators at all times, even while resting. Or suppose there were warnings about the potential ultimate risks of asbestos—*e.g.*, "DEADLY HAZARD—Asbestos may kill you or lead to lung cancer or mesothelioma." Any such message would have been demoralizing because sailors had no way to avoid asbestos, given the Navy's widespread use of the material on ships, or to opt-out of service onboard such vessels. *See, e.g.*, Department of Defense Form 1966 (DD1966), *Enlistment/Reenlistment Document – Armed Forces of the United States* (an enlistment agreement is "more than an employment agreement" and requires service even in "combat or other hazardous situations").

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Thus, this Court should not permit Respondent to fill a void in his proof by instructing the jury simply to presume that Mr. Dummitt would have heeded some

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[25] COA 1751 (Interrogatories asked Mr. Dummitt to "State whether you have had available for use during any period of your employment respirators or masks or other dust inhalation inhibitor or protective gear" and he answered "Plaintiff does not recall safety equipment made available"); *id.* at 1350 ("QUESTION: Did anybody from the Navy ever advise you to wear a mask or a respirator? ANSWER [Mr. Dummitt]: No, sir.").

ill-defined warning had it been given by Crane. In addition to defying common sense, the holdings below would create perverse incentives for far-flung manufacturers to try to multiply the number of warnings that sailors receive. Hundreds of equipment manufacturers would have to provide separate and redundant warnings for every potentially dangerous substance on a warship (asbestos, ammunition, solvents, heavy metals, etc.).

As this Court has observed, "[r]equiring too many warnings trivializes and undermines the entire purpose of the rule, drowning out cautions against latent dangers of which a user might not otherwise be aware" and "would neutralize the effectiveness of warnings." *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 242 (1998) (no duty to warn against obvious dangers because such a requirement "could greatly increase the number of warnings accompanying certain product").

C. The Court Below Compounded The Error By Excluding Fair Rebuttal That Would Have Put The Warnings Issue In Context.

The court below further erred in excluding fair rebuttal. Even in the cases that have erroneously applied a heeding presumption, courts have recognized that defendants may rebut the heeding presumption and allowed similar proof as that wrongly excluded here. *See, e.g., Anderson*, 76 F. Supp. 2d at 442 ("The presumption can be rebutted by proof that an adequate warning would have been futile . . ."); *Isgitt*, 156 So. 3d at 673 (same); *see also* note [20]. Defendants may introduce evidence "suggesting a warning was sufficient or additional warnings

would have been ineffective under the circumstances." *Roman v. Sprint Nextel Corp.*, No. 12-CV-276 VEC, 2014 WL 5870743, at *2 (S.D.N.Y. Nov. 13, 2014).

Yet, in this case, the trial court deprived Crane of the opportunity to rebut the new heeding presumption with highly exculpatory evidence: Crane's expert, Rear Admiral Sargent, was prepared to testify that the Navy would have *forbidden* additional warnings from Crane. COA-62 (Friedman, J., dissenting). This testimony "would have tended to show that the hypothetical warnings, even if given, would not have reached Mr. Dummitt." *Id.* In other words, the testimony would have shown that an attempt to offer additional warnings by Crane would have been futile.[26] Evidence that the Navy would have forbidden additional warnings is highly relevant to rebutting plaintiff's causation case here.

For example, in evaluating government contractor defenses, a number of courts have recognized significant limitations on what information the Navy would permit suppliers to present to its personnel. *See generally Ruppel v. CBS Corp.*, 701 F.3d 1176, 1185 (7th Cir. 2012) (discussing testimony that "the Navy did not 'want[ ] any change in the specifications [regarding asbestos] as the performance with the present materials [was] entirely satisfactory'") (first and third alterations

[26] The trial court underscored this error by belatedly instructing the jury that it could look for rebuttable evidence—advising in a "clarification" jury instruction that "you can consider other evidence in the case to see if that other evidence rebuts this presumption," COA 2048; COA-60 n.5 (Friedman, J., dissenting)—even though the court already had excluded this key rebuttal evidence, making its absence all the more keenly felt.

in original); *Harris*, 532 F. Supp. 2d at 1005 (noting affidavits demonstrating that "the Navy dictated every aspect of the design, manufacture, installation, overhaul, written documentation and warnings associated with its ships and did not permit deviation by any of its contractors").

Further, courts routinely allow evidence that the Navy's knowledge regarding asbestos was "state of the art." *Olschewske v. Asbestos Defs. (B-P)*, No. C 10-1729 PJH, 2010 WL 3184317, at *3 (N.D. Cal. Aug. 11, 2010); *Machnik*, 506 F. Supp. 2d at 104 (recognizing the "basis for concluding that the Navy, and not military contractors, was in the best position to know of the health hazards related to asbestos"); *Harris*, 532 F. Supp. 2d at 1006; *Ferguson v. Lorillard Tobacco Co.*, 475 F. Supp. 2d 725, 730-31 (N.D. Ohio 2007); *In re Joint E. & S. Dist. New York Asbestos Litig.* [*Grispo*], 897 F.2d 626 (2d Cir. 1990) (reversing summary judgment because lower court failed to evaluate all of the evidence in the record, including the Government's labeling requirements).

In such cases, federal law may afford the government contractor immunity from suit.[27] The rule in this case would take essentially the opposite approach, effectively presuming liability. At a minimum, these cases underscore that

[27] The government contractor defense protects a private federal government contractor from liability against state products liability claims "when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988).

defendants should be permitted to litigate the question whether the Navy would have permitted additional warnings and whether such additional warnings would have prevented the plaintiff's injury. Here, defendants had no such opportunity and plaintiffs received an essentially irrefutable presumption of causation.

The trial court abused its discretion in excluding rebuttal evidence here. Similar testimony is routinely admitted for a variety of purposes, and is precisely the type of evidence that would have "made a difference" in this case. COA-48.

* * *

The lower courts' legally flawed holdings would improperly convert critical suppliers of Navy parts during wartime into insurers for asbestos products that they neither made nor supplied. To put this opinion in perspective, hundreds of thousands of Navy personnel have worked around GE's steam turbines over the prior decades. And hundreds of materials are used alongside GE's steam turbines. Under the flawed analysis of the decisions below, companies such as GE would face potentially unlimited litigation—and liability—for injuries involving these individuals and materials, based on events that often occurred over half a century ago. GE may shoulder the majority of this burden given that nearly every one of the actual asbestos insulation manufacturers is now bankrupt.

Instead of inviting this anomalous result, this Court should adhere to the well-established tort law principles that (1) it is a defendant who actually makes or

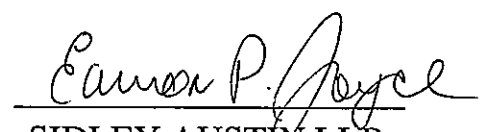
distributes a product that bears a duty to warn about that product's risks and (2) a tort plaintiff must prove that such an entity's failure to warn caused her injury, rather than being entitled to assume this conclusion.

CONCLUSION

For these reasons, and those stated in the brief of Appellant and its other amici, the Court should reverse the decision of the Appellate Division and direct entry of judgment for Crane Co.

Dated: March 18, 2016

Respectfully submitted,



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