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April 11, 2007

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

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RE: *In re* Complex Asbestos Litigation (Watts Regulator Co.), No. S151439 (Petition for review filed Apr. 2, 2007)

Dear Chief Justice George and Associate Justices:

Amici curiae National Association of Manufacturers, Chamber of Commerce of the United States of America, Coalition for Litigation Justice, Inc., Association of California Insurance Companies, American Tort Reform Association, National Federation of Independent Business Legal Foundation, and National Association of Mutual Insurance Companies write pursuant to Rule 8.500(g) in support of Watts Regulator Company's petition for review. It is important for the Court to accept the subject petition to address the proper scope and application of standardized discovery in asbestos cases.

At issue is a sweeping set of standard interrogatories and document production requirements mandated by San Francisco Superior Court General Order No. 129 (*available at* http://www.sfgov.org/site/courts_page.asp?id=10753) in asbestos actions. The Order purports to require a defendant, within 120 days of being served in its first asbestos action, to respond without objection (except for privilege) to comprehensive interrogatories. (Plaintiffs' Standard Interrogatories to All Defendants contain *fifty-three* separate interrogatories – most with four or more subparts – and require defendants to attach *all* documents evidencing the information sought in the interrogatory and its subparts). The defendant must thereafter confirm or supplement its responses annually.

A defendant must respond even if it is not served with the interrogatories, may not object that the information is not reasonably calculated to lead to the discovery of admissible evidence in the action, and may not object that the discovery is unduly burdensome, except that a defendant may assert a "one-time" burden objection in the first ninety days of the first suit against it.

General Order No. 129 may have been an effective and fair way to inject efficiency into asbestos litigation many years ago. Now, however, G.O. 129's "one size fits all" application can lead to unjustifiable, adverse consequences for newer defendants; violations of defendants' statutory and constitutional rights; and may serve as an unfair

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weapon to produce coercive settlements. G.O. 129 is an example of how fairness has sometimes been sacrificed for efficiency in asbestos litigation. *See generally* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247 (2000).

The facts of this case demonstrate how G.O. 129's standardized disclosure requirements can impose unfair, unnecessary, and costly obligations on asbestos defendants that go far beyond the needs of any particular case. Petitioner Watts Regulator Company is a manufacturer of water valves. Plaintiff apparently is asymptomatic and has normal lung function. We understand that at the time of the proceedings below, this action was the only San Francisco asbestos case in which Watts was named as a defendant. When Watts moved for summary judgment, plaintiff opposed the matter by relying on an alleged contact with *one* type of Watts valve used on *one day* at *one location* in 1981. Nevertheless, the San Francisco Superior Court ordered Watts to respond without objection (except as to privilege) to detailed interrogatories about the identity and composition of *all* asbestos-containing products made or sold by Watts in the *twelve-year* period from 1970 through 1981. Declarations submitted by Watts establish that it would take approximately 3.5 person-years of work at a cost of approximately $1 million for it to compile the requested information. As asbestos litigation continues to spread to new peripheral defendants, other companies may be swept into the litigation and find themselves in the same position.

For these reasons, *amici* ask this Court to grant the subject petition and bring the scope of standardized discovery within reasonable, relevant, and legal boundaries.

INTEREST OF *AMICI*

As organizations that represent asbestos defendants and their insurers, *amici* have a substantial interest in promoting the fair administration of justice. Because the operation of G.O. 129 in situations like the present appeal violates this principle, *amici* support the subject petition. Furthermore, as groups representing employers, *amici* are concerned about the potential effects on the economy and international competitiveness that flow from rules such as G.O. 129 that require unnecessary and unduly burdensome discovery that is not relevant to a particular action.

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

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

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

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

The Association of California Insurance Companies (ACIC) is an affiliate of the Property Casualty Insurers Association of America and represents more than 300 property/casualty insurance companies doing business in California. ACIC member companies write 40.9 percent of the property/casualty insurance in California, including 56.1 percent of personal automobile insurance, 42.8 percent of commercial automobile insurance, 39 percent of homeowners insurance, 32.5 percent of business insurance and 46 percent of private workers compensation insurance.

Founded in 1986, the American Tort Reform Association (ATRA) is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The National Federation of Independent Business Legal Foundation (NFIB), a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business. NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. NFIB members own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

Founded in 1895, National Association of Mutual Insurance Companies (NAMIC) is a full-service, national trade association with more than 1,400 member companies that underwrite more than forty percent of the property/casualty insurance premium in the United States. NAMIC members account for forty-seven percent of the homeowners market, thirty-nine percent of the automobile market, thirty-nine percent of the workers' compensation market, and thirty-four percent of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

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[1] The Coalition for Litigation Justice includes ACE-USA companies, Chubb & Son, a division of Federal Insurance Company, CNA service mark companies, Fireman's Fund Insurance Company, Liberty Mutual Insurance Group, and the Great American Insurance Company.

ARGUMENT

I. The Litigation Environment in Which the Petition Must Be Considered

The United States Supreme Court has described the asbestos litigation as a "crisis," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997); *see also* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001); Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002).

"For some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy," *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 201 (3d Cir. 2005). According to a 2006 American Bar Association publication, an estimated eighty-five employers have filed for bankruptcy as a result of the litigation. *See* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29; *see also* Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 392 (1993) (with each bankruptcy, "mounting and cumulative" financial pressure is placed on the "remaining defendants, whose resources are limited."). The RAND Institute for Civil Justice found: "Following 1976, the year of the first bankruptcy attributed to asbestos litigation, 19 bankruptcies were filed in the 1980s and 17 in the 1990s. Between 2000 and mid-2004, there were 36 bankruptcy filings, more than in either of the prior two decades." Stephen J. Carroll *et al., Asbestos Litigation* xxvii (RAND Inst. for Civil Justice 2005), *available at* http://www.rand.org/publications/MG/MG162.

As a result of these bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14; *see also* Steven B. Hantler *et al.*, *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) (discussing spread of asbestos litigation to "peripheral defendants"). One well-known plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).

More than 8,500 defendants have now become ensnarled in the litigation. *See* Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, Columns – Raising The Bar In Asbestos Litig., Aug. 2004, at 5. Many of these defendants are familiar household names. *See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1. Others include small businesses facing potentially devastating liability. *See* Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1. Nontraditional defendants now account for more than half of asbestos expenditures. *See* RAND Rep., *supra*, at 94.

II. As Times Change, So Should General Order No. 129

G.O. 129 was adopted at a time when asbestos cases generally involved former asbestos product manufacturers and other so-called "traditional defendants." Their involvement in the litigation had been longstanding, widespread, and would be likely to continue absent bankruptcy. In that environment, it might have made more sense to adopt a blanket requirement that asbestos defendants produce broad information about asbestos products and activities spanning many years. After all, the information generally would have been compiled already and might be used repeatedly in future cases. In sum, the burden of collection was low and there was value in trying to reduce litigation costs through efficiency.

Today's litigation environment is very different. Virtually all of the traditional defendants have been forced into bankruptcy. They have been replaced by thousands of newer, peripheral defendants that happen to be solvent, such as Watts. For these defendants, G.O. 129's discovery requirements are not low-cost. They are extremely expensive and burdensome. While plaintiffs should have the opportunity to seek information reasonably related to their claims, trial courts should not be permitted to adopt standard interrogatories that compel substantial information that has *no* relevance to a particular action and will *not* result in the discovery of admissible evidence in that case. *See, e.g., Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 967-68 (1997) (general order inconsistent with statewide authority is invalid); *Boyle v. CertainTeed Co.*, 137 Cal. App. 4th 645, 949, 651 (2006) (same).

This Court should invalidate or modify G.O. 129. Doing so would not prevent discovery. A plaintiff can always file discovery against a defendant (as plaintiffs often do in addition to G.O. 129); then, as in any other tort suit, the defendant could file any necessary objections which can then be addressed by the trial court.

If the Court, however, believes that form of standard discovery is warranted, a much more fair and sound approach would be to require a defendant to produce information related to the product or type of product at issue within reasonable time and geographic limits. Perhaps such a rule could be made "standard" without leading to the absurd situation that is the subject of the petition.

III. General Order No. 129 Raises Statutory and Constitutional Problems

G.O. 129's problems extend beyond the potential for extraordinary and unnecessary defense costs; the Order also raises statutory and constitutional concerns.

For example, G.O. 129 impermissibly extends the scope of discovery beyond the pending action to hypothetical claims that might never be filed. Code of Civil Procedure § 2017.010 limits discovery to matters leading to admissible evidence "in the pending action." In contrast, G.O. 129's standard interrogatories require every defendant to answer with respect to *all* asbestos-containing products marketed in *any* form or quantity over a period of many decades. These provisions fail to consider a plaintiff's claims of exposure to a particular product, a particular time period, or actual opportunities for exposure. In the present case, Watts reportedly must account for almost 2,000 unique

model-size water valve combinations with potentially over one million different permutations. G.O. 129's broad requirements clearly violate both the letter and spirit of Code of Civil Procedure § 2017.010.

G.O. 129 also abrogates a responding party's basic right to make a timely objection (except as to privilege) under Code of Civil Procedure § 2030.210(a)(3). Under G.O. 129, an asbestos defendant must file a one-time motion that effectively anticipates all discovery burdens. This requirement is at odds with the Code of Civil Procedure and violates state and federal due process guarantees by denying defendants the right to a meaningful hearing.

In addition, G.O. 129 impermissibly requires answers to interrogatories that have not been served on a defendant. Code of Civil Procedure § 2030.080(a) requires the party propounding interrogatories to serve a copy on the party to whom the interrogatories are directed. Service of interrogatories affords the served party notice of the discovery, and frames the context for response. Moreover, Code of Civil Procedure § 2030.260(a) explicitly starts the time for response only upon service. G.O. 129 disregards this rule.

The cumulative effect of these conflicts reveals an additional constitutional problem – denial of equal protection. Under G.O. 129, asbestos defendants are treated differently under the law compared to other civil defendants without a justifiable reason.

This Court should invalidate G.O. 129 or amend it to comply with statutory and constitutional requirements.

IV. General Order No. 129: A Coercive Settlement Tool That Could Make Asbestos Litigation Worse

G.O. 129 also should be invalidated or modified because, in its current form, the Order is coercive. Nontraditional asbestos defendants are left in a precarious position by G.O. 129. They can choose to expend considerable time, money and resources to comply with the Order's expansive discovery interrogatories or they can settle early in the case (and on potentially unfavorable terms). For defendants with few or no other outstanding claims, the calculus of this decision will almost invariably create pressure to settle for business reasons, regardless of the merits of the claim.

Furthermore, requiring defendants to provide detailed information as to all asbestos product sales essentially means that defendants must provide a "road map" that could be used by unethical counsel to manufacture claims of exposure in future cases. The compelled "road map" also could encourage "witness coaching." *See* Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 Pepp. L. Rev. 33 (2003); Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 Hofstra L. Rev. 833 (2005).

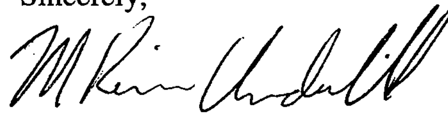
Together, these factors could fuel the trend of "solvent bystanders" being dragged into the litigation. Thus, G.O. 129 may have the unintended effect of worsening the current asbestos litigation climate. *See generally* Victor E. Schwartz & Rochelle M.

Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline The Litigation Have Fueled More Claims*, 71 Miss. L.J. 531 (2001).

CONCLUSION

For these reasons, *amici* ask this Court to grant the subject Petition and invalidate G.O. 129 or amend it to comply with statutory and constitutional requirements. Invalidating G.O. 129 would not prevent any plaintiff from seeking discovery. Discovery would continue as provided in the Code of Civil Procedure – as in other tort suits. This approach would allow the parties, with court assistance (if necessary), to focus on discovery that is relevant to the actual claims at issue.

Sincerely,



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PROOF OF SERVICE

I, Ruby G. Darmstadt, declare:

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 333 Bush Street, Suite 600, San Francisco, California 94107. On April 11, 2007, I served a copy of the following document(s):

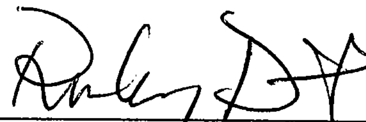
CALIFORNIA GENERAL ORDER 129 AMICUS BRIEF

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

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

Executed on April 11, 2007, at San Francisco, California.



RUBY G. DARMSTADT

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In re Complex Asbestos Litigation (Watts Regulator Co.)

No. S151439

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