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

APL-2014-00261
Erie County Clerk's Index No. I2010-12499
Appellate Division, Fourth Department Docket No. CA-13-01373

Court of Appeals
of the
State of New York

JOANN H. SUTTNER, Executrix of the Estate
of GERALD W. SUTTNER, Deceased, and Individually
as the Surviving Spouse of GERALD W. SUTTNER,

Respondent,

– against –

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

Defendants,

CRANE CO.,

Appellant.

REPLY BRIEF FOR APPELLANT

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Date Completed: March 23, 2015

CORPORATE DISCLOSURE STATEMENT

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

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

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

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

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PRELIMINARY STATEMENT

New York law is widely recognized for its stability and predictability. Although duty need not be the product of an "algebraic formula," as Plaintiff argues (Brief for Plaintiff-Respondent 36 [hereinafter "BFP"]), it does need to derive from some test that courts can meaningfully apply going forward. *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 582 N.Y.S.2d 373 (1992) establishes that test—the sound, widely followed legal principle that a seller of a product that is used with defective materials made and supplied by others generally has no duty to warn of the third parties' defective products, even if it was "foreseeable" that the products could be used together.

On the contrary, Plaintiff's approach to duty is neither stable nor predictable; rather, it is the opposite. Plaintiff's fact-intensive, case-specific approach to duty is supported by no discernible policy rationale other than ensuring that an issue of fact will exist, and summary judgment will thus be unavailable, in every case in which the word "asbestos" is mentioned. Plaintiff provides no meaningful, generally applicable standards for deciding the important question of legal responsibility in cases like this one.

Plaintiff argues that the issues relating to the existence of a legal duty are largely issues of fact—in Plaintiff's words, a "highly situational concept" (BFP 109). Nevertheless, not one of the supposedly dispositive relevant factual

questions (which Plaintiff never attempts to define) was posed to the jury in this matter. Thus, Plaintiff is basically asking this Court to sit as the jury—after the fact—and accept Plaintiff's version of what the jury *could* have found when applying a legal test that Plaintiff never articulates and which the evidence at trial was not submitted to establish. The Court should decline to do so.

This case presents to the Court a fundamental question regarding the scope of tort liability. The issue before the Court is not, as Plaintiff requests, to sit as a fact-finder and decide what companies may have done under various circumstances decades ago, but rather, to decide whether society is willing to impose liability on a company for things that occurred outside of its control, which is something this Court has historically refused to do in the product liability context. *See Codling v. Paglia*, 32 N.Y.2d 330, 340, 345 N.Y.S.2d 461, 468 (1973) (holding it is appropriate to impose liability on those who make defective products because those entities "can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose").

The Court should not abandon its longstanding approach here, where it is undisputed that (1) Crane Co. did not manufacture, sell, or otherwise place into the stream of commerce any alleged injury-causing asbestos-containing product to which Mr. Suttner was exposed, (2) Crane Co. had no connection with any asbestos fiber to which Mr. Suttner was exposed, (3) Crane Co. supplied Mr.

Suttner's employer, General Motors Company ("GM"), with equipment that would function with or without asbestos-containing materials, and (4) Crane Co. did not exercise any control over, or have any input of any kind in, the decisions of GM as to how to use the Crane Co. valves that it installed in its facility. These facts bring this case well within the approach that this Court adopted in *Rastelli*, which has been explicitly relied upon by two state courts of last resort to decide cases just like this one. *See O'Neil v. Crane Co.*, 53 Cal.4th 335, 266 P.3d 987 (2012); *Braaten v. Saberhagen Holdings*, 165 Wash.2d 373, 198 P.3d 493 (2008). The Court should apply the same approach here.

REPLY

I. The Control-Based Rule of *Rastelli* -- and Not Plaintiff's Proposed Methodology -- Is the Correct Approach to Use in Defining Legal Responsibility in Cases Like This One.

Plaintiff's brief argues that everything that Crane Co. says is "wrong." But, entirely absent from Plaintiff's analysis is any indication of the legal rule or principle that Plaintiff believes to be the "right" one to apply to determine legal responsibility in a case like this one, beyond the notion that legal duty is a product of some ultimately undefined, fact-specific "foreseeability" analysis. This argument runs directly counter to well-established New York law, and the Court should reject it and confirm that, pursuant to the *Rastelli* decision and the policies

underlying it, an entity that controls neither the production nor the use of an allegedly defective product does not bear legal responsibility for it.

A. The Court Should Affirm the Rule of *Rastelli* and Direct the Entry of Judgment in Crane Co.'s Favor Pursuant to That Rule.

1. Legal Responsibility Is Not Determined By "Foreseeability."

Plaintiff argues that New York "favors" legal tests that are "complex, case-specific, [and] multi-factor." (BFP 53.) However, Plaintiff never states what these multiple factors are or how their use varies from case to case. Plaintiff asks the Court to adopt a fact-intensive, case-specific test for duty that appears largely based on the concept of "foreseeability."

However, New York precedents are clear in rejecting any fact-based, foreseeability-based test for duty. *See Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 236, 727 N.Y.S.2d 7, 15 (2001) ("[A]ny judicial recognition of a duty of care must be based upon an assessment of its efficacy in promoting a social benefit as against its costs and burdens."); *Sukljian v. Charles Ross & Son Co., Inc.*, 69 N.Y.2d 89, 94-95, 511 N.Y.S.2d 821, 823 (1986) (noting that the imposition of strict liability "rests largely on considerations of public policy"); *Northern Assurance Co., Ltd. v. Nick*, 203 A.D.2d 342, 343, 610 N.Y.S.2d 307, 308-09 (2d Dep't 1994) (holding trial court "must consider the social consequences of imposing a duty" before imposing one). Indeed, contrary to Plaintiff's

argument, both the majority and the dissent in the *Dummitt* matter were very clear that foreseeability does not define legal responsibility in a case such as this one. *In re New York City Asbestos Litigation (Dummitt & Konstantin)*, 121 A.D.3d 230, 252, 990 N.Y.S.2d 174, 190 (1st Dep't 2014) (in the words of the majority, "To be sure, mere foreseeability is not sufficient."); *id.*, 121 A.D.3d at 258, 990 N.Y.S.2d at 195 (in the words of the dissent, "The foregoing instruction was erroneous, as the majority appears to recognize, but I think we should say so more forthrightly. Under precedent of this Court, a firm's duty to warn about dangers arising from products that it neither manufactured nor sold nor distributed, but which could be used in conjunction with products that the firm did manufacture, sell, or distribute, does not extend to all such uses of other products that might be 'reasonably foreseeable.'").

The Court should reject Plaintiff's approach to the question of legal responsibility, which seems designed only to ensure that every "asbestos" case will present issues of fact that a jury must resolve. Instead, the Court should apply exactly the approach it applied in *Rastelli*, which limits legal responsibility to those entities that control the production, sale, or use of the harm-causing product, and which is based on one of the most basic policies of modern product liability law (and, indeed, all of tort law)—the notion that one is responsible only for things that are within his or her control.

2. The Control-Based Rule of *Rastelli* Should Continue to Govern in New York.

In the product liability context, this Court has limited the scope of legal responsibility to those entities that control the production or use of the harm-causing product, because those are the entities that "can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose." *Codling*, *supra*, 32 N.Y.2d at 340, 345 N.Y.S.2d at 468; *accord Sprung v. MTR Ravensburg, Inc.*, 99 N.Y.2d 468, 473, 758 N.Y.S.2d 271, 274 (2003) ("[T]he burden of accidental injuries caused by defective products is better placed on those who produce and market them, and should be treated as a cost of business against which insurance can be obtained."); *Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, Inc.*, 39 N.Y.2d 376, 386-87, 384 N.Y.S.2d 115, 121-22 (1976) (noting that a manufacturer should bear "legal responsibility" for its injury-causing product because the manufacturer is "in the best position to have eliminated . . . dangers"); *Surre v. Foster Wheeler LLC*, 831 F.Supp.2d 797, 801 (S.D.N.Y. 2011) (citing *Rastelli* and holding, under New York law, a manufacturer generally "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," and this rule applies "[e]ven if the defective product is one of a limited number of third-party products that the manufacturer knows will be used in conjunction with its own"); *see also*

Restatement (Second) of Torts § 402A (limiting strict liability to those entities "engaged in the business of selling" the defective product at issue).

Plaintiff argues, in a footnote, that somehow Crane Co. has "condemn[ed]" *Rastelli* and the approach to legal responsibility taken in that decision in its briefing in the *Dummitt* matter, but that claim is entirely inaccurate. (BFP 52.) Crane Co. "condemn[e]d" not *Rastelli*, but rather the "weighing-of-factors/orbit" test for legal responsibility that the *Dummitt* Plaintiff-Respondent proposed. The Plaintiff-Respondent in *Dummitt* proposed a test for legal responsibility that combined incomplete portions of statements from the *Rastelli* opinion with other statements that are nowhere stated or implied in the *Rastelli* decision. This legal standard, Crane Co. explained, distorted *Rastelli's* rule and reasoning, and would lead to results that are absurd on their face. (Reply Brief of Defendant-Appellant in the *Dummitt* matter 12-14.)

The Court should not adopt that test or the vague, "fact-intensive" standard for which Plaintiff advocates here. Instead, the Court should affirm the rule of *Rastelli*. Under *Rastelli*, the Court must conclude that Crane Co. has no legal responsibility for the asbestos-containing materials that Mr. Suttner encountered, as even Plaintiff's characterization of *Rastelli* demonstrates.

3. There Is No Legally Relevant Distinction Between *Rastelli* and This Case.

Although Plaintiff discusses *Rastelli* at length, Plaintiff never articulates how it is that Crane Co.'s case "fails" the test of *Rastelli*.[1] It clearly does not, and the Court should, upon affirming the continuing validity of *Rastelli*, direct the entry of judgment in Crane Co.'s favor.

Plaintiff acknowledges that the *Rastelli* court held that a defendant should have no duty to warn of dangers inherent in the various replacement parts that a purchaser may potentially choose to use with the defendant's product post-sale. (BFP 56.) Plaintiff concedes it is "difficult to imagine" how the tire manufacturer in *Rastelli* could have formulated a meaningful warning regarding defects in third-party rims. (*Id.*) Yet, that is precisely the duty Plaintiff asks the Court to now impose upon Crane Co., by asking Crane Co. to have warned about certain gaskets and packing that may have been used with its valves among the legion various alternatives. *See, e.g., Braaten, supra*, 165 Wash.2d at 394-96, 198 P.3d at 502-03 (noting, for example, that the Navy approved 60 different types of packing for use aboard its ships, and that Crane Co. supplied non-asbestos-containing gaskets and

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[1] The same is true of Plaintiff's analysis of *Tortoriello v. Bally Case, Inc.*, 200 A.D.2d 475, 606 N.Y.S.2d 625 (1st Dep't 1994). (*See* BFP 85-87.) Plaintiff calls that decision "fact-specific," but fails to acknowledge that the pertinent facts here are the same: like the freezer manufacturer in *Tortoriello*, Crane Co.'s valves could have been used with asbestos-containing or non-asbestos-containing sealing products, and Crane Co. exercised no control over the decisions of the relevant product user—Mr. Suttner's employer.

packing in its own catalogs); *see also* R. 6053-54 (1969 catalog of gasket manufacturer Garlock, listing 16 different materials from which Garlock made gaskets).

The Court should reject this request and confirm the continuing validity of *Rastelli*. Here, like the defendant in *Rastelli*, Crane Co. "had no control over the production" or use of the injury-causing products, "had no role in placing [those products] in the stream of commerce, and derived no benefit from [their] sale." *Id.*, 79 N.Y.2d at 297–98, 582 N.Y.S.2d at 376–77. Thus, all of the considerations leading to the *Rastelli* holding are present here, and the result should be the same.

Plaintiff appears to suggest that this case is different from *Rastelli* because Crane Co.'s valves became, in Plaintiff's words, "intensely hot," and somehow made dangerous the asbestos-containing sealing products that GM used to create seals inside of the metal bodies of the valves[2] and between the valves and adjacent "flanged" piping. (BFP 60.) However, Plaintiff's efforts to "distinguish" this case from *Rastelli* along these lines fail on multiple grounds. First, valves do not generate heat. If at all dangerous, the gasket and packing sealing materials at issue here were rendered dangerous by the operation and maintenance of a steam system, which involved removing and replacing these sealing products throughout the

[2] The record contains numerous drawings of Crane Co. valves. Among others, the depiction of the valve on R. 3908 demonstrates where "stem" packing and a "bonnet" gasket created seals inside the metal structure of the valve.

entire system, of which the valves were but a minor part.[3] The valves did not "make" the gasket and packing materials dangerous. Thus, this entire argument demonstrates why the component parts doctrine controls here, since the purported "decay" of the gaskets occurred within the operation of a steam system in which the valves were merely a minor component and over which Crane Co. had no control. (*See* Brief for Defendant-Appellant 39-41 [discussing the application of the component parts doctrine and Restatement (Third) of Torts: Products Liability § 5 (1998)].)

Second, even if the Court were to accept this factually flawed argument, it provides no basis for drawing any distinction between this case and *Rastelli*. The defective rim in *Rastelli* was completely harmless until used with a wheel. Most dangerous products do not become dangerous until someone uses them, but no New York case suggests that this observation alone could support the imposition of legal responsibility, and it certainly did not lead to such a conclusion in *Rastelli*. *See also O'Neil*, *supra*, 53 Cal.4th at 350-51, 266 P.3d at 996-97 (rejecting the same argument); *Braaten*, *supra*, 165 Wash.2d at 392, 198 P.3d at 501 (same).

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[3] Indeed, as noted in Crane Co.'s opening brief, Mr. Suttner's job primarily consisted of maintaining and working on an entirely different component of the steam system at GM, industrial pumps, in the GM "pump shop." (R. 851, 872-73 [Mr. Suttner testifying he made "thousands" of gaskets used on "hundreds" of pumps during his career].)

Finally, the Court should reject Plaintiff's assertion that because Crane Co.'s valve was a "permanent piece of industrial equipment," Crane Co. was in a better position to provide warnings of the dangers of products that Mr. Suttner's employer may have chosen to use with its valves than the very makers and sellers of those third-party products. (BFP 86.) This claim is unsupportable—no party can credibly argue that the legal responsibility of a manufacturer like Crane Co. is not, if anything, secondary to the responsibility of the manufacturers and suppliers of the asbestos-containing gasket and packing materials at issue. This Court has noted for decades that the entire rationale supporting a "stream-of-commerce" approach in product liability actions is the policy recognition that those entities that make and sell allegedly defective products are the ones that are in the best position to eliminate product dangers and bear the costs associated with them.[4] *Sprung*, *supra*, 99 N.Y.2d at 473, 758 N.Y.S.2d at 274 ("[T]he burden of accidental injuries caused by defective products is better placed on those who produce and market them. . . .").

The entities that made and sold the allegedly defective asbestos-containing materials at issue here, or personal injury trusts created to compensate claimants on their behalf, are available to respond to Plaintiff's claims and provide

[4] Indeed, this recognition led to the creation of the strict liability cause of action, a cause of action that applies to all members of a defective product's "chain" of distribution. *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring).

compensation for Plaintiff's injuries. (*See* Brief for Defendant-Appellant 9.) There is no support for Plaintiff's attempt to expand New York's product liability causes of action well beyond their traditional boundaries to secure additional sources of recovery. The approach to the question of legal responsibility that this Court took in *Rastelli* should continue to control in New York, and the Court should reject the vague and ultimately undefined alternative approach to legal responsibility that Plaintiff offers.

B. Crane Co.'s Valves Did Not Require Asbestos-Containing Materials to Function; Under Plaintiff's Own Analysis, This Means Crane Co. Should Bear No Legal Responsibility Here.

Although Plaintiff never clearly articulates a test to govern legal responsibility in cases like this one, Plaintiff appears to at least concede that, as a threshold matter, one manufacturer could *only* be legally responsible for the product of another if the first manufacturer's product *required* the second manufacturer's product to function; mere "compatibility" is not enough.[5] (BFP 72-73; *see also* BFP 69 ["In cases where the defendant's product is merely compatible with an injury-causing component supplied by a third party, the defendant may not be held liable for failing to warn of the hazards associated with using the products

[5] This is Plaintiff's interpretation of *Rogers v. Sears, Roebuck and Co.*, 268 A.D.2d 245, 701 N.Y.S.2d 359 (1st Dep't 2000), which is essentially the same as Crane Co.'s interpretation of that decision. (*See* Brief for Defendant-Appellant 22 [discussing *Rogers*].)

together."].) If, as Plaintiff now appears to believe, such "required use" is a necessary predicate for the imposition of legal responsibility under these circumstances, then it is entirely unclear why Plaintiff did not request that the jury answer the question of whether Crane Co.'s valves "required" the use of asbestos-containing components. The jury was never presented with this question, and had it been, the answer clearly should have been the negative.

Plaintiff secured a verdict by taking advantage of a favorable jury charge that informed the jury that a manufacturer is liable for any injury resulting from the use of any "replacement parts that are foreseeably incorporated into its products." (R. 1347.) On appeal, Plaintiff now appears to back away from this foreseeability test, in favor of a newly developed, fact-intensive approach, to which Plaintiff now seeks to make the evidence "fit." No such "fit" exists, however—Plaintiff presented no evidence that Crane Co.'s valves required asbestos-containing materials, of any type, to function, and so if, as Plaintiff suggests, this evidence is necessary for the imposition of legal responsibility, no such responsibility can lie here.

Indeed, Plaintiff's *own expert witness* confirmed that a Crane Co. valve used with asbestos-containing sealing materials in the past would function perfectly well today in the absence of any such asbestos-containing sealing materials. (R. 588-89; *see also* R. 1054-55 [Crane Co.'s expert witness corroborating the point].) The

historical product literature introduced into evidence similarly demonstrated that, seemingly at all times, Crane Co. valves could function with, and often were supplied with, non-asbestos-containing sealing products. (R. 4032, 4049, 4058, 5680, 5702, 6053-54.)

As discussed in Crane Co.'s opening brief, in 2012, a unanimous Supreme Court of California held that Crane Co. is not legally responsible for gaskets and packing that it did not make, sell, or otherwise place into the stream of commerce, even if those gaskets and packing replaced original materials contained in Crane Co.'s valves at the time of sale. Notably, in addition to so holding, the *O'Neil* court rejected Plaintiff's unsupported proposition that Crane Co. valves used in steam applications required the use of asbestos-containing gaskets and packing. *O'Neil*, *supra*, 53 Cal.4th at 350 n.6, 266 P.3d at 996 n.6 ("A stronger argument for liability might be made in the case of a product that *required* the use of a defective product in order to operate. . . . These difficult questions *are not presented in the case before us* [which involved Crane Co. valves used in steam systems], and we express no opinion on their appropriate resolution.") (emphasis in original in first quoted sentence, emphasis added in second quoted sentence).

This case involves the same products and arguments that *O'Neil* involved, and the observation of the *O'Neil* court is equally applicable here. The fact that Crane Co.'s valves did not require asbestos-containing materials to function takes

this case "out" of any rule of *Rogers*, and thus there is no support for the judgment, even under Plaintiff's view of the relevant authorities.

II. The Court Should Reject the Few Novel Ancillary Arguments That Plaintiff Presents.

Crane Co. has already responded to many of Plaintiff's arguments in Crane Co.'s opening brief in this appeal and in the briefs Crane Co. filed in the *Dummitt* matter, and it will not belabor those arguments here. Below, Crane Co. addresses the several novel points Plaintiff raises.

A. The Allegedly Analogous Decisions Plaintiff Relies Upon Simply Do Not Present the Court With the Question of Legal Responsibility Presented Here.

Plaintiff dismisses the non-New York authorities bearing on the question here (including the decisions of two State Supreme Courts that explicitly relied upon *Rastelli* in reaching their holdings, *O'Neil* and *Braaten*, *supra*), and instead cites New York authorities that simply do not answer the question presented in this matter.

For instance, Plaintiff cites extensively to two other decisions of this Court—*Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 677 N.Y.S.2d 764 (1998) and *Sage v. Fairchild-Swearingen Corp.*, 70 N.Y.2d 579, 523 N.Y.S.2d 418 (1987). Plaintiff never explains how the latter supports the judgment here, since, *inter alia*, Plaintiff presented only a failure-to-warn claim, and not the design defect claim at issue in *Sage*, and Plaintiff presented no evidence that Crane Co., like the

defendant in *Sage*, designed the injury-causing product. The Court should decline Plaintiff's request to "apply" *Sage* here for these reasons, as more fully explained in Crane Co.'s opening brief. (Brief for Defendant-Appellant 29-31.)

In *Liriano*, the Court reiterated the general rule of products liability that a manufacturer may have a duty to warn against latent dangers arising from certain foreseeable uses, or misuses, of its product. In *Liriano*, unlike here, it was undisputed that the product the defendant placed into the stream of commerce was the product that caused the harm—the meat-grinder mechanism that severely injured the plaintiff when he attempted to use the grinder without a safety guard that was supplied with the grinder originally. *See id.*, 92 N.Y.2d at 236, 677 N.Y.S.2d at 766. Thus, *Liriano* simply is not factually analogous. The plaintiff in *Liriano* was injured by the meat grinder, itself; Plaintiff here claims that Mr. Suttner was injured by asbestos that was released from products made and sold by others. Indeed, Plaintiff concedes there is no evidence that Crane Co. made or sold any of the gasket or packing materials that Mr. Suttner allegedly encountered. (BFP 2.) *Liriano*, on the other hand, involved a scenario in which the harm-causing item (i.e., the meat-grinder mechanism) was placed into the stream of commerce by the defendant-manufacturer, and not by someone else. Accordingly, there is a threshold question of one manufacturer's legal responsibility for the

products of another in this case that was not presented in *Liriano*, and *Liriano* provides no answer to that question. *Rastelli* does.

The *Penn v. Jaros, Baum & Bolles*, 25 A.D.3d 402, 809 N.Y.S.2d 6 (1st Dep't 2006) and *Village of Groton v. Tokheim Corp.*, 202 A.D.2d 728, 608 N.Y.S.2d 565 (3d Dep't 1994) decisions are similarly inapposite. Each of these courts analyzed the case before it in light of an observation made in the *Rastelli* opinion—that when two manufacturers supply nondefective products that create a dangerous combination when used together, both may have a duty to warn. *See Penn*, 25 A.D.3d at 403 (distinguishing *Rastelli* on the ground that all of the components of the alarm and fire suppression system that caused plaintiff's decedent's death "acted in the manner in which they were intended"); *Village of Groton*, 202 A.D.2d at 730 ("We are of the view that the case at bar falls within the category of cases distinguished by the *Rastelli* court. None of the products installed in plaintiff's fuel dispensing system was defective, but in combination the sound products, including the Tokheim regulator, created a dangerous condition.").

Contrary to these decisions, here, Plaintiff indicated as early as Plaintiff's opening statement at trial that asbestos fibers are hazardous *regardless* of the form, product, or setting in which they appear. (R. 283-84 [Plaintiff's counsel arguing to the jury that asbestos fibers, like "tobacco," are dangerous no matter what product they are used in].) Accordingly, Plaintiff cannot "have it both ways," securing a

jury verdict on the premise that asbestos-containing products are *per se* defective and unsafe in any form, and then attempting to support that verdict by adopting the irreconcilable argument that asbestos-containing products are inherently safe, and the real "problem" here was the valves.[6]

Plaintiff relies upon *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471, 426 N.Y.S.2d 717 (1980) for the proposition that the legal responsibility of a product manufacturer "is gauged at the time the product leaves the manufacturer's hands." (BFP 43.) That is, however, exactly the problem with Plaintiff's analysis—Plaintiff acknowledges that none of the asbestos-containing materials that allegedly harmed Mr. Suttner passed through Crane Co.'s hands (BFP 2), and there is no evidence that Crane Co. had anything to do with GM's decision to use those products in its plant. Thus, *Robinson* supports entering judgment in Crane Co.'s favor, and not against it.

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[6] If Plaintiff truly believe this, it is difficult to see why Plaintiff sued so many companies that did not make or sell valves, but rather allegedly made and/or sold, *inter alia*, products such as asbestos-containing insulation, felt, gaskets, gunnite, millboard, cement, rope, and block, as well as pumps, boilers, automobiles, automotive parts, soot blowers, fluid products, steam traps, and insurance. (R. 63-74.)

B. Decisions in Similar "Asbestos" Cases in New York Are Hardly the Harmonious Body of Law That Plaintiff Claims Them to Be.

Contrary to Plaintiff's argument, New York authorities are not uniform in imposing on equipment manufacturers like Crane Co. legal responsibility for asbestos-containing products that they did not make, sell, or in any way control. Simply put, the *Surre* decision, *supra*, represents the most comprehensive and well-reasoned examination of New York law in a case like this one. The rule that the *Surre* court discerned upon reviewing New York authorities bearing on the question here is that a manufacturer generally "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." *Surre*, *supra*, 831 F.Supp.2d at 801. That rule derives from *Rastelli*, and the Court should affirm its continuing validity. The Fourth Department applied exactly that rule in its decision in *In re Eighth Judicial Dist. Asbestos Litig. (Drabczyk)*, 92 A.D.3d 1259, 938 N.Y.S.2d 715 (4th Dep't 2012), and there was no basis for departing from it here.

Moreover, the two cases currently pending before the Court and focusing on the question of one manufacturer's legal responsibility for the product of another demonstrate the error in Plaintiff's claim that New York decisions in cases like this one are entirely "harmonious." Rather, as explained in Crane Co.'s opening brief,

the analysis underlying the decision of the Appellate Division here does not support the result reached by the First Department in the *Dummitt* matter, and *vice versa*. (Brief of Defendant-Appellant 27-29.) The *Dummitt* majority held that an equipment manufacturer like Crane Co. may be held legally responsible for asbestos-containing materials it neither made nor sold only if it had a "significant role, interest, or influence in the type of component used with its product after it enter[ed] the stream of commerce. . . ." *Dummitt, supra*, 121 A.D.3d at 250, 990 N.Y.S.2d at 189. Here, Plaintiff does not point to a single piece of evidence that Crane Co. played any role in any decision of Mr. Suttner's employer, because such evidence does not exist. Accordingly, even if the "significant role" test of *Dummitt* were legally correct (it is not, for all of the reasons explained in Crane Co.'s briefing in that appeal), it would not support the judgment here.

Rather, the judgment in this case was seemingly based upon the "endorsement/replacement part" theory of legal responsibility described (and rejected) in, among other decisions, *Ford Motor Co. v. Wood*, 119 Md.App. 1, 703 A.2d 1315 (Md. Ct. Spec. App. 1998). Although Plaintiff argues against this point in some portions of her brief (*see* BFP 28), Plaintiff seems to acknowledge it in others, referring to this matter as a "replacement parts case" (*see* BFP 90). Nevertheless, whatever the exact theory of legal responsibility the trial court and

Fourth Department relied upon here,[7] it clearly was not the First Department's "significant role" test.

The fact that New York litigants face different, and far from clear, standards for imposing legal responsibility for the same basic products and conduct in different New York counties pursuant to Appellate Division decisions refutes any suggestion that New York law on the question before the Court is the harmonious body Plaintiff argues it is.

C. Plaintiff's "Description" of Crane Co. Valves Is Unsupported By the Record.

A number of the sections of Plaintiff's statement of the facts cite to virtually nothing in the appellate record (*see*, *e.g.*, BFP 14-16), and consist of factual assertions that have no support in the record.[8] This Court should reject these unfounded assertions.

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[7] As Crane Co. pointed out in its opening brief, the decision of the Fourth Department is just a couple of sentences long, and the trial court's decision is far from clear on the exact rule of law applied, if any.

[8] Indeed, Plaintiff's "fact" statement is replete with unsupported arguments that Plaintiff sets forth as factual matters. For example, when referencing Mr. Suttner's employer, GM, on page 14 of Plaintiff's brief, Plaintiff adds the comment, "a non-expert in the area of valves." There is not a shred of evidence in this record regarding what "expertise" GM personnel had during the relevant time period (or any other time period) regarding valves, asbestos-containing materials, automobiles, or anything else, and Plaintiff cites nothing in support of this comment. The Court should reject all such commentary and arguments that Plaintiff attempts to cast as the "facts" of this matter without any reference to the record.

- *It is not possible to determine what types of sealing products the Crane Co. valves installed in the GM plant at issue contained at the time of shipment.* Plaintiff acknowledges that Mr. Suttner never came into contact with any sealing product that may have been contained inside of a Crane Co. valve at the time of shipment, and so there is no percipient witness to speak to what those products may have been. (BFP 2.) Indeed, the facility at which Mr. Suttner worked was built in the 1930s (R. 1054), but he did not begin working there until several decades later, in 1960 (R. 85). Plaintiff argues, nevertheless, that "[t]he totality of the evidence suggests . . . that the valves in question were intended for use on high pressure steam-lines that operated at less than 750 degrees Fahrenheit, and that Crane, therefore, at all times supplied asbestos-containing bonnet gaskets as components of the original valves." (BFP 15.) Plaintiff cites nothing in support of these conclusions.[9] (*Id.*) There is no evidence in the record regarding the temperature or pressure maintained in the pipelines at GM during any relevant time. Plaintiff is simply indulging in assumptions that Plaintiff considers favorable to her claim and attempting to improperly shift the burden of proof to Crane Co., without ever having presented any of these factual questions to a jury.

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[9] Indeed, in this entire section of Plaintiff's statement of "facts," Plaintiff cites only to a Crane Co. publication that includes some "facts about gaskets," that have no demonstrated relevance to any gasket Mr. Suttner encountered. (BFP 15.)

As Plaintiff notes, at least one Crane Co. publication from the 1930s noted that, at that time, asbestos-containing gasket materials were seemingly included in certain types of Crane Co. valves as a "default" offering. (R. 4784.) However, Plaintiff fails to point out that that very same publication makes it clear that other, non-asbestos-containing gaskets were available, and a customer could choose any of these materials based upon its unique requirements. (R. 4777-84.) Moreover, there is no evidence that the gaskets in use in the 1930s, when the GM plant at issue was constructed, were "substantially identical" (BFP 15) to those used several decades later, during the time of Mr. Suttner's employment. Once again, Plaintiff is simply stating, in conclusory fashion and without citation to the record, points that Plaintiff's evidence did not establish and on which the jury was not charged.

- *The Crane Co. valve drawings Plaintiff entered into evidence do not have any obvious relevance to any question presented here.* Plaintiff discusses at several points in Plaintiff's brief what Plaintiff calls Crane Co. "product specifications." (BFP 9, 12.) Although Plaintiff never defines that ambiguous term, these documents are simply schematic drawings of valves sold to a few customers at various times, none of which have anything to do with this case. For example, one drawing reflects a valve sold to the Mississippi Power & Light Company for use in its facility in Greenville, Mississippi (R. 5295), and another

reflects a valve sold to National Steel Shipbuilding for use in a facility in San Diego, California (R. 5296). There is no evidence that Mr. Suttner ever worked at either of these facilities or that the valves reflected in these drawings were also supplied to GM for use in its Tonawanda plant. Without such evidence, these materials have no relevance at all.

- *Crane Co.'s valves did not require asbestos-containing materials to function.* As noted above, Plaintiff's own expert witness confirmed this point. (R. 588-89; *see also* R. 1054-55 [Crane Co.'s expert witness corroborating the point].) Plaintiff has no basis for contesting it now.

CONCLUSION

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

March 23, 2015

Respectfully submitted,

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