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Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-3600

Re: ***Sherman v. Hennessy Industries***
Case No.: S228087

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to California Rules of Court, rule 8.500(g)(1), we write on behalf of the Chamber of Commerce of the United States of America (the Chamber) to support the petition for review filed in this case.[1]

The Chamber is the world's largest federation of business, trade, and professional organizations, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and corporations of every size, from every sector, and in every geographic region of the country. In particular, the Chamber has many members located in California and others who conduct substantial business in the State and have a significant interest in the sound and equitable development of California product liability law. The Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases involving issues of similar vital concern. In fulfilling that role, the Chamber has appeared many times before this Court, the California Courts of Appeal, the United States Supreme Court, and the supreme courts of various other states.

## LEGAL ARGUMENT

The Court of Appeal here held that strict product liability may be imposed upon a manufacturer that somehow "derived" an "economic benefit" from a defective product that it did not design or produce, but was used in conjunction with the manufacturer's

[1] No counsel for a party wrote this letter in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this letter. No person other than the amicus curiae, its members, or its counsel made a monetary contribution to fund the preparation or submission of this letter.

otherwise safe product, leading to an injury. (*Sherman v. Hennessy Industries, Inc.* (2015) 237 Cal.App.4th 1133, 1149.)

The Court of Appeal's decision is another example of the extreme lengths to which some courts have gone in an effort to find a solvent defendant to compensate a plaintiff who may have been exposed to asbestos long ago and has suffered injury following a substantial latency period during which the asbestos-containing product manufacturer has become defunct. (See Rensberger, *Asbestos and the Limits of Litigation* (2003) 44 S. Tex. L. Rev. 1013, 1028 ["The hard facts are that there are insufficient assets among those defendants who caused the asbestos problem and that the current defendants, who are sought out primarily because they are solvent, had little to do with asbestos"].)

Imposing liability on a company that did not manufacture the challenged product stretches strict product liability law to a breaking point. (See *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 348 (*O'Neil*) ["the reach of strict liability is not limitless"].) Although this case arises in the asbestos context, it cannot be assumed that the effect of the Court of Appeal's decision will be so limited. Indeed, the Court of Appeal's strict liability theory is so expansive that it is all but inevitable that it will be relied upon by enterprising plaintiffs' attorneys claiming injuries caused by a broad range of products to impose strict product liability under circumstances far removed from the justifications for the doctrine. (See *id.* at p. 363 [" '[T]he strict liability doctrine derives from judicially perceived public policy considerations and therefore should not be expanded beyond the purview of these policies' "].)

As explained below, the policies anchoring strict product liability are not served by imposing such liability on a company that did not manufacture the allegedly defective product, as the Court of Appeal here found, and this Court should, once again, intervene to circumscribe the boundaries of that legal doctrine.

Encouraging the creation of safe products

California courts have recognized that one of the principle justifications for imposing strict product liability is to encourage manufacturers to make their products as safe as reasonably possible for consumers who are not as well positioned to protect themselves from product defects. (E.g., *Brown v. Superior Court* (1988) 44 Cal.3d 1049, 1056 (*Brown*) ["the manufacturer, unlike the public, can anticipate or guard against the recurrence of hazards . . . it is in the public interest to discourage the marketing of defective products"]; *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 63 ["The purpose of such liability is to insure that the costs of injuries resulting from

defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves"]; *Escola v. Coca Cola Bottling Co.* (1944) 24 Cal.2d 453, 462 (*Escola*) (conc. opn. of Traynor, J.) ["[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot."]; *Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 88 [strict liability rules "provide[s] an economic incentive for improved product safety"].)

But a manufacturer that does not design, produce, or otherwise have any input into the development or creation of a product is in no better position than a consumer to protect against defects in another manufacturer's product. Likewise, imposing liability on one manufacturer for injuries caused by defects in another manufacturer's product does nothing to encourage the latter to promote product safety. A manufacturer cannot reasonably invoke the theory that it might somehow derive an economic benefit from another's product someday as a basis for demanding access to another's intellectual property (i.e., product design and production information) and insisting that the latter implement changes to its product or manufacturing process. (See *O'Neil*, *supra*, 53 Cal.4th at p. 363 ["a manufacturer cannot be expected to exert pressure on other manufacturers to make their products safe"; " 'It does not comport with principles of strict liability to impose on manufacturers the responsibility and costs of becoming experts in other manufacturers' products.' [Citation.] Such a duty would impose an excessive and unrealistic burden on manufacturers."].)

It is already speculative to suggest that strict product liability law actually accomplishes the goal of increased product safety, given the complexities and differences in the laws from one state to another, lack of information concerning potential dangers, the fact that the laws change constantly, the unpredictability of juries, uncertainty concerning what precautions to implement, and a multitude of other factors. (See, e.g., Sugarman, *Doing Away With Tort Law* (1985) 73 Cal. L.Rev. 555, 565-567 [as a result, "many parties will probably ignore the tiny possibility of a crushing financial loss, like the chance of being hit by lightning"]; see generally Williams, *Second Best: The Soft Underbelly of Deterrence Theory in Tort* (1993) 106 Harv. L.Rev. 932.) The ability of strict liability law to achieve that end is exponentially more tenuous when a company will be held strictly liable for a product over which it had no design or manufacturing control.

Accordingly, imposing liability under the test announced by the Court of Appeal cannot be justified on the grounds of promoting product safety.

Enforcing corporate responsibility for products placed into the stream of commerce

"From the outset, strict products liability in California has always been premised on harm caused by deficiencies in the defendant's own product" and has been imposed "only on those entities responsible for placing a defective product into the stream of commerce." (*O'Neil*, *supra*, 53 Cal.4th at pp. 348, 349.) Under this theory of "enterprise liability," a manufacturer is " 'force[d] . . . to include certain enterprise-related costs, such as the costs of injuries caused by defective products, as part of the cost of doing business' " in which the manufacturer " ' "created the risk and reaped the profit by placing the product in the stream of commerce." ' " (*LaRosa v. Superior Court* (1981) 122 Cal.App.3d 741, 756 (*LaRosa*); accord, *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262 [liability should be borne by those who have participated in the "overall producing and marketing enterprise" and have therefore profited from a defective product placed into the stream of commerce]; *Escola, supra,* 24 Cal.2d at p. 462 (conc. opn. of Traynor, J.) [manufacturer should be responsible for product-caused injuries because it "is responsible for [the product] reaching the market"].)

This rationale does not extend to a manufacturer that did not inject a defective product into the stream of commerce and did not reap the profits of that product's sales. And the fact that a manufacturer might at some time derive an amorphous "economic benefit" from the sale of a defective product is no more a sufficient basis for imposing liability outside the stream of commerce than the "mere foreseeability of injury to users of a defective product" when used with a nondefective product. (*O'Neil*, *supra*, 53 Cal.4th at p. 349 ["[t]he mere foreseeability of injury to users of a defective product [is] not sufficient justification for imposing strict liability outside the stream of commerce"].) Furthermore, it is implausible for a manufacturer to accurately price its wares to cover the costs of injuries caused by a *different* manufacturer's business.

Therefore, traditional notions of enterprise liability also do not support the Court of Appeal's decision.

Spreading the cost of injury

Courts and legal scholars have suggested a third "principal justification" for imposing strict product liability: "as the manufacturer created the risk, . . . it properly falls to the manufacturer to distribute the risk by allocating the costs of accidents throughout the pricing to his customers." (1 Owen & Davis, Owen & Davis on Products Liability (4th ed.) § 7:14, fn. 4 (Owen & Davis); accord, *Brown*, *supra*, 44 Cal.3d at p. 1056 ["the cost of injury may be an overwhelming misfortune to the person injured whereas the manufacturer can insure against the risk and distribute the cost among

the consuming public"]; Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer*) (1960) 69 Yale L.J. 1099, 1120 (Prosser) [risk spreading "maintains that the manufacturers, as a group and an industry, should absorb the inevitable losses which must result in a complex civilization from the use of their products, because they are in the better position to do so, and through their prices to pass such losses on to the community at large"].)

As a preliminary matter, market forces may make it implausible for a manufacturer to simply increase product prices to spread the cost of compensating an injured plaintiff. Therefore, in reality, the manufacturer upon whom strict liability is imposed may bear the lion share of that liability on its own. (1 Owen & Davis, *supra*, § 5:11 ["competition often prevents manufacturers from raising prices significantly" and therefore some portion of injury compensation will be incurred instead by "the enterprise that made and sold the defective product"].) Where the defendant is a manufacturer of an entirely different product than the one that caused the injury, such an outcome can hardly be justified under the cost-spreading theory.

And even if injury costs can be spread through an increase in price on a manufacturer's independently safe product, doing so would unfairly place that manufacturer at a competitive disadvantage for something over which it had no authority or control. (See *LaRosa*, *supra*, 122 Cal.App.3d at p. 756 [those who create unsafe products will pass the cost of injury compensation onto consumers, who will instead purchase the "safer" and less expensive competitor product]; *O'Neil*, *supra*, 53 Cal.4th at p. 363 [noting that it is unfair for manufacturers of nondefective products to bear the burden of liability for a defective product].)

It is unsatisfactory to suggest that the manufacturer's insurance will simply cover the losses caused by another's defective product. (See *LaRosa*, *supra*, 122 Cal.App.3d at p. 759 ["the orthodox method of distribution is for the primary burden of the loss to be placed on the insurable seller, for the seller to insure and to spread the premium cost by price increments, and for the insurance carrier to spread the loss cost by premium increments based on overall loss experience"]; Rest.2d Torts, § 402A, com. c, p. 350 [noting that compensation for product-related injuries should "be treated as a cost of production against which liability insurance can be obtained"]; 1 Owen & Davis, *supra*, § 7:14 ["a seller's increased costs caused by liability may be insured against, with such increased costs due to insurance spread among users of the product in the form of higher prices for the products in question"].)

Insurers will have no reasonable means to underwrite policies for manufacturers if they are going to be held responsible for unpredictably broad liability based upon the

failings of other manufacturers. But even if such insurance could be procured, that does not justify imposing liability upon a manufacturer that did not produce the injury-causing product in the first place. (See Prosser, *supra*, 69 Yale L.J. at pp. 1121-1122 ["What insurance can do, of course, is to distribute losses proportionately among a group who are to bear them. What it cannot and should not do is to determine whether the group shall bear them in the first instance—and whether, for example, consumers shall be compelled to accept substantial price increases on everything they buy in order to compensate others for their misfortunes. . . . Liability insurance is obviously not to be ignored; but it is a makeweight, and not the heart and soul of the problem."].)

Thus, even if "risk spreading" principles justify imposing strict liability against a defective product manufacturer, they do not justify the same result against the manufacturer of a separate, safe product.

## CONCLUSION

For the foregoing reasons and those set forth in the petition for review and other supporting letters, the Chamber urges this Court to grant review.

Respectfully submitted,

**HORVITZ & LEVY** LLP
JEREMY B. ROSEN
KAREN M. BRAY

By: Karen M. Bray
Karen M. Bray

Attorneys for Amicus Curiae
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA

cc: See attached Proof of Service

## PROOF OF SERVICE

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On September 11, 2015, I served true copies of the following document(s) described as **AMICUS LETTER OF U.S. CHAMBBER OF COMMERCE IN SUPPORT OF PETITIONER** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on September 11, 2015, at Encino, California.

Kathy Turner

Kathy Turner

**SERVICE LIST**
**SHERMAN v. HENNESSY INDUSTRIES**
**COA 2/4 Case No.: B252566 • CASCT Case No.: S228087**

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| Clerk of the Court<br>California Court of Appeal<br>Second Appellate District • Div. 4<br>300 S. Spring Street<br>2nd Floor • North Tower<br>Los Angeles, California 90013-1213<br>(213) 830-7104 | Case No.: B252566<br>Electronic Service Copy Only<br>http://www.courts.ca.gov/2dca-efile.htm |