No. S177401

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BARBARA J. O'NEIL, individually and as successor in interest to PATRICK J. O'NEIL; et al.,

Plaintiffs and Appellants,

v.

CRANE CO. and WARREN PUMPS, LLC,

Defendants and Respondents.

Court of Appeal, Second Appellate Dist., Div. 5, B208225
Los Angeles County Superior Court,
Hon. Elihu Berle, BC360274

WARREN PUMPS, LLC'S OPENING BRIEF

Laurie J. Hepler, No. 160884
James P. Cunningham, No. 121406
CARROLL, BURDICK & McDONOUGH LLP
44 Montgomery St., Suite 400
San Francisco, CA 94104
Tel.: 415.989.5900 / Fax: 415.989.0932
Email: lhepler@cbmlaw.com
Attorneys for Defendant and Respondent
WARREN PUMPS, LLC

No. S177401

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BARBARA J. O'NEIL, individually and as successor in interest to PATRICK J. O'NEIL; et al.,

Plaintiffs and Appellants,

v.

CRANE CO. and WARREN PUMPS, LLC,

Defendants and Respondents.

Court of Appeal, Second Appellate Dist., Div. 5, B208225
Los Angeles County Superior Court,
Hon. Elihu Berle, BC360274

WARREN PUMPS, LLC'S OPENING BRIEF

Laurie J. Hepler, No. 160884
James P. Cunningham, No. 121406
CARROLL, BURDICK & McDONOUGH LLP
44 Montgomery St., Suite 400
San Francisco, CA 94104
Tel.: 415.989.5900 / Fax: 415.989.0932
Email: lhepler@cbmlaw.com
Attorneys for Defendant and Respondent
WARREN PUMPS, LLC

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TREATISES

REGULATIONS

STATEMENT OF ISSUES

Under what circumstances, if any, is the manufacturer of a product liable for harm caused when the purchaser incorporates replacement parts, or affixes new parts, made and supplied by third parties?

I.

INTRODUCTION

Before the Court are the imperatives of World War II, and their intersection with product liability doctrines that this Court adopted two decades later. Through the years since then, the Court expressly shaped product liability law to serve public policy and principles of fairness and practicality. Here it carries on that task.

Plaintiffs are the heirs of Navy engineer Patrick O'Neil, including Mrs. Barbara O'Neil as his successor. Defendants Warren Pumps, LLC and Crane Co. are makers of pumps and valves, respectively, that the United States Navy needed for the steam-propulsion systems on its warships.

Steam-propulsion systems consisted of an array of equipment components such as pumps, valves and boilers, which the Navy connected by flanges to vast quantities of piping. The Navy and the shipyards with which it contracted procured, in accordance with strict specifications, each of these individual components based on the Navy's design for the entire steam-propulsion system. (7 RT 1058-1066 [Plaintiffs' expert]) To prevent leakage, the Navy sealed connections between the piping and the component pumps, valves and boilers with flange gaskets – which Warren did not manufacture or supply.

In order to maintain the vessels' thermal efficiency and protect crew members, the Navy also required shipyards to add tons of external asbestos insulation, which Warren never supplied, to most of the ship's steam-propulsion system, including some pumps. Although the Navy had other insulation options available (14 RT 2488-2490), it used asbestos-containing insulation because asbestos insulated effectively and was lightweight. This permitted Navy ships to move faster and to carry more weapons and armament. (6 RT 779-780; 7 RT 1013)

Asbestos was so essential to the Navy that Plaintiffs' expert Captain William Lowell could not imagine Naval ship construction without it:

> Q. So you don't know of any way that you could have built a warship like the Oriskany without asbestos, do you?
>
> A. I wouldn't know how back then.

(7 RT 1052-1053; see also 14 RT 2490 [Navy made a military decision as to how to allocate asbestos in World War II]; 11 RT 1761.) Indeed, by 1942, "fulfillment of requirements for the defense of the United States ha[d] created a shortage in the supply of Asbestos Textiles for defense" and private use, such that the War Production Board deemed a conservation order "necessary and appropriate in the public interest and to promote the national defense." (Conservation Order M-123, 7 Fed. Reg. 2472 (Mar. 31, 1942))

Equipment manufacturers, including Warren, built their equipment to military specifications that the Navy wrote. (13 RT 2218; 7 RT 1058-1060) All aspects of the pumps, including the content of internal parts, were governed by Navy specifications, with which Warren was obligated to comply. (13 RT 2218-2219; 7 RT 1032-1033) When Warren sold the pumps at issue to the Navy in the early years of the war, some of the pumps had asbestos-containing internal parts – gaskets, packing and/or insulation, all contained within fixed metal housing.

Mr. O'Neil died of mesothelioma in 2005. (Op. at p. 2.) Mesothelioma is a rare, progressive disease that typically takes decades to manifest in symptoms. (*Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1135.) Plaintiffs presented evidence connecting Mr. O'Neil's disease to his asbestos exposure during a period of just over a year, in the mid-1960s, when he served on the USS Oriskany. (*Ibid.*) The appellate court found that some circumstantial evidence allowed an inference that some of that exposure was to asbestos emanating from repairs performed by others on Warren pumps in Mr. O'Neil's vicinity. (Op. at p. 21.)

But this asserted asbestos exposure did not come from parts manufactured or sold by Warren; rather, it came from replacement parts. (Op. at p. 16.) For by the time Mr. O'Neil boarded the Oriskany more than 20 years after the installation of the Warren pumps, Navy personnel had replaced the asbestos-containing internal parts. (*Id.* at p. 15.) Warren did

not manufacture or supply any of the replacement asbestos-containing parts installed aboard the Oriskany in the years after her original construction. (See *id.* at p. 15 n. 8; 7 RT 1017 [plaintiffs' expert Captain Lowell].)

The appellate court held Warren potentially liable in tort. Reversing a nonsuit judgment, the court determined that plaintiffs could pursue theories of design defect and failure to warn, based on injury allegedly arising from the combined operation of the pumps with other manufacturers' asbestos-containing replacement parts. (Op. at p. 2.) The court did not expressly accept the O'Neils' contention that Warren could likewise be held liable for asbestos emanating from external insulation pads and external "flange gaskets" that the Navy later added to the pumps Warren sold, but its loose language left that door open.

Warren asks this Court to reverse and hold that no such potential liability exists, for either replacement parts or external insulation and flange gaskets attached by the Navy after Warren sold the pumps. The extension of traditional product liability doctrine condoned by the appellate court here amounts to absolute liability for a product that Warren did not supply. There is no basis in this Court's jurisprudence for holding a manufacturer strictly liable, or liable in negligence, for harm arising from parts made and sold by others with which the manufacturer's product might foreseeably be used. (Op. at p. 18.) On the contrary, the existing public-policy rationales for strict liability, and this Court's traditional

analysis for determining the existence of a duty of care for purposes of negligence, counsel against invoking either doctrine.

This issue has become a key frontier of asbestos litigation in California, as few plaintiffs can prove exposure to originally-sold asbestos-containing parts. Decisions like the one in this case – bending tort law into the shape required to compensate individuals with asbestos disease – have made the Los Angeles County Superior Court a magnet for plaintiffs from around the country.

But other courts approached this subject with greater respect for traditional tort doctrine. The trial court's judgment here, the First District's precedent in *Taylor v. Elliott Turbomachinery* (Feb. 2009) 171 Cal.App.4th 564, recent Washington Supreme Court decisions, and well-reasoned opinions from around the country correctly apply long-standing product liability principles by refusing to extend manufacturers' liability to products they did not make or sell. This Court's own precedents, and its longstanding insistence on predictability and fairness in defining the scope of product liability, point in the same direction. The answer to the Issue Presented here should be that manufacturers are not liable for harm caused when the purchaser incorporates replacement parts, or adds new parts, made and supplied by third parties.

II.

FACTS[1]

A warship is "probably the most complex machine that man has ever designed and put together." (15 RT 2687) It must contain everything necessary for hundreds or even thousands of people to survive for extended voyages, to propel the ship, to generate electricity, to see over the horizon, and to fight. (15 RT 2687-2690.) By 1943, the United States was building warships at a staggering pace. (7 RT 1012-1013; 15 RT 2772-2773; Soc. of Naval Architects and Marine Engineers, THE SHIPBUILDING BUSINESS IN THE U.S.A. (1948) Vol. I, Ch. 3, Tables 8, 45 and 46.)

A. DURING WORLD WAR II, WARREN SOLD PUMPS TO THE NAVY THAT WERE DESIGNED TO MEET MILITARY SPECIFICATIONS

Warren Pumps, LLC is a pump manufacturing company founded in 1897. (13 RT 2199) The Warren Steam Pump Company, as it was known in the 1940s, manufactured large pumps for specialized

---

[1] This brief cites to the Slip Opinion ("Op.") for facts addressed in it, always with the caveat that on review of a nonsuit judgment, the appellate court "disregard[ed] conflicting evidence, ... and indulge[d] every legitimate inference which [could] be drawn from the evidence in appellants' favor." (Op. at p. 2, fn. 1.) As set forth in Warren's Petition for Rehearing, which was denied, several of the appellate court's inferences from the record were not legitimate, even granting Plaintiffs the benefit of all evidentiary conflicts. In such instances, this brief cites the record, and indicates by "Pet. Rhrg. at p. __" where Warren raised the point below.

Citations to the record *unaccompanied* by such a bracketed reference signal facts that the Slip Opinion omitted, but that do not conflict with it.

applications. (*Ibid.*) At that time, the United States government maintained a list of companies qualified to supply it with equipment (Op. at p. 5; 7 RT 1043-1044), and every supplier had to prioritize War Department and Navy orders, or face potential government seizure of its plant. (Selective Training and Service Act of 1940, Pub. L. No. 76-783, § 9 (Sept. 16, 1940) 54 Stat. 885, 892.)

By around 1943, Warren had supplied dozens of pumps that the Navy needed to power the aircraft carrier USS Oriskany. (Op. at pp. 2-3; 15 RT 2799) The main power source on the Oriskany was steam, produced by eight boilers. (Op. at p. 3; see also 7 RT 890 [steam was primary type of propulsion system for Navy vessels through the 1960s].) The ship's boiler rooms housed many of the Warren pumps. (Op. at p. 3.)

Some of these Warren pumps had asbestos-containing internal parts. (Op. at p. 3.)[2] These included gaskets, packing, and on one type of pump, internal insulation, all contained within the pump's metal

---

[2] And some pumps did not have asbestos-containing parts, depending on the jobs they had to do on the ship. (See, e.g., 7 RT 954 [some internal gaskets were non-asbestos]; 14 RT 2543-2544 [some packing was non-asbestos]; 13 RT 2212 ["There may or may not [be asbestos gaskets and packing in a pump] depending on the application or the pump itself"]; Pet. Rhrg. at pp. 1-2; see also 13 RT 2236-2237 [gaskets or packing on various pumps could be made of plant fiber or other non-asbestos materials if the Navy specification allowed].)

enclosure.[3] (Op. at p. 3; 7 RT 1037-1038; 14 RT 2541; see also Appendix, final page.) A gasket is a seal placed between two compressed metal surfaces that do not fit precisely together, to prevent leaks. (7 RT 908-909) Packing is simply material installed around a pump shaft, at the point where it meets the pump casing, for the same purpose. (7 RT 907)

As set forth below, Warren pumps were designed to move liquids around the Oriskany's steam-power system, and to empty the bilge area (7 RT 949), as quickly and as well as the United States Navy demanded. The Navy, through instructions to shipyards and written specifications, determined what tasks and level of performance each pump had to achieve. (7 RT 938-939 and 1058-1060) As explained primarily by Plaintiffs' expert Captain Lowell, it was the Navy's specifications for a given pump's performance – temperature, pressure, and the like – that demanded asbestos content for that pump in the World War II era. (Pet. Rhrg. at pp. 4, 7-8.) Navy specifications expressly called for asbestos-containing components for various applications, and, as a practical matter, there was no other material available to Warren in 1943 that satisfied the Navy's technical performance requirements for pumps. (13 RT 2218-

---

[3] The Navy required the internal insulation on the steam cylinder end of Warren's steam reciprocating pumps. (7 RT 1041-1042) The Navy specification required this internal insulation to contain asbestos. (7 RT 1037-1042) Warren covered this insulation with metal, per Navy specification, prior to shipment of the pump. (7 RT 1037-1038; 15 RT 2715-2716; 14 RT 2541; Pet. Rhrg. at p. 5 fn. 2.)

2219, 2236-2237; 7 RT 1015-1016, 1032-1037, 1042, 1052-1054, 1058-1061; 14 RT 2468-2469, 2488-2490.)

The Navy's Bureau of Ships (BUSHIPS) was responsible for overseeing the design specifications and construction for warships such as the Oriskany. (15 RT 2685-2686) Navy design engineers were responsible for the ship design, system design, subsystem design, and the location and determination of which components could meet the Navy's needs. (15 RT 2692) A division of the Navy's Bureau of Supply and Accounting (BUSANDA) was assigned to BUSHIPS, and was responsible for purchasing everything necessary to run a ship – food, paper, pencils, pumps, replacement gaskets, weapons and missiles. (15 RT 2698-2699) BUSANDA was also in charge of purchasing any spare parts needed for Navy warships. (*Ibid.*)

While BUSHIPS engineers might interface with a product manufacturer during the design phase about that manufacturer's product and whether it met the Navy's needs, once the Navy developed its design and wrote its specifications, manufacturers had to comply fully with those specifications. (7 RT 1032-1034 [Plaintiffs' expert Captain Lowell], cited in Pet. Rhrg. at p. 4.)

Warren had no role in the development of these military specifications, Captain Lowell explained. (7 RT 1016; see also 7 RT 1040-1041) Lowell testified that ship builders directed qualified equipment

manufacturers to the specifications that the Navy wrote – for example, that a pump should deliver 600 gallons a minute, be turbine driven, and able to operate at temperatures of up to 600 degrees. (Op. at p. 3; 7 RT 938-939, 1058-1060; see also 13 RT 2236-2237 [Doktor].) Producing an acceptable drawing for a particular piece of equipment sometimes involved a back-and-forth process with the Navy (Op. at p. 5), leading to a drawing that the Navy ultimately approved (7 RT 1036-1037), as well as manuals identifying "piece numbers" for the equipment's various parts (7 RT 940). Indeed, one of the reasons manufacturers developed product drawings was to inform the Navy that the manufacturer was complying with Navy specifications in manufacturing its equipment. (7 RT 1036-1037)

To comply with those Navy specifications, there was no available substitute for asbestos gaskets or packing in 1943. (7 RT 1052-1054) As Plaintiffs' expert Captain Lowell put it: "virtually all of those World War II pumps had asbestos packing and asbestos gaskets." (7 RT 921-922)

B. THE NAVY INTEGRATED WARREN'S PUMPS INTO A COMPLEX STEAM SYSTEM, ADDING CERTAIN NEW PARTS THAT WARREN NEVER PROVIDED

The United States Navy purchased "many, many different components" for a warship. (15 RT 2692; 7 RT 938-939 [Plaintiffs' expert Lowell]) Once suppliers such as Warren delivered equipment to a shipyard, the shipyard was responsible for constructing the ship and its

steam-propulsion system, pursuant to Navy specifications.

The shipyard connected an array of steam-propulsion equipment such as pumps, valves and boilers to pipes by adding "flange gaskets" to the flanges of each piece of equipment and piping. (7 RT 1064-1065 [Lowell]) Where flange gaskets contained asbestos, it was because the Navy or its design agent specified that material. (7 RT 1064-1066; 8 RT 1142-1143) Warren did not manufacture or supply flange gaskets. (7 RT 954; Pet. Rhrg. at p. 17.)

The Oriskany's steam-propulsion system operated at very high temperatures, and thus the Navy covered all valves, flanges, and fittings in insulation. (Op. at p. 3; see also Plaintiffs' expert Horn: 6 RT 677-678; 779-780 [steam pipes].) The Navy thereby minimized the loss of the heat required for steam-propulsion, and made it possible for sailors to work around its steam-propulsion system. (6 RT 677-678)

The Navy or its design agent drafted insulation plans that the shipyards followed when constructing the Oriskany's steam-propulsion system. (Plaintiffs' expert Captain Lowell: 7 RT 899-900, 918, 1064) Shipyards insulated the piping with half-round insulation, which, at the time the Oriskany was built, typically contained 15 percent asbestos. (Op. at p. 3; 7 RT 901, 1015-1016, 1022) The Navy made that design decision because asbestos insulated effectively and was lightweight, allowing ships to move faster and to carry more weapons and armament. (6 RT 779-780;

7 RT 1013) Shipyards also added external insulation to some of the equipment (e.g., pumps, valves and boilers), at the Navy's direction and using insulation pads produced by the Navy itself. (Lowell: 7 RT 1062-1064; 1084-1087; Delaney: 14 RT 2488; Sargent: 15 RT 2714-2715; 13 RT 2233:25 – 2234:1 and 2243:27 – 2244:22; see Pet. Rhrg. at pp. 17-18 and p. 5 fn. 2.)

There is neither direct nor circumstantial evidence that Warren had any role in the integration of its pumps into the Oriskany's steam-propulsion system. That system was exclusively a Navy product. (See Pet. Rhrg. at pp. 11-12; 16 RT 3008, 3010 [trial court finding that the steam system was "manufactured in essence by the United States Navy"].) Both sides' military experts agreed that the Navy solely controlled how the Oriskany's steam system was built, and that equipment suppliers were not involved in the design of the steam system of an aircraft carrier. (7 RT 1087 and 1064-1066 [plaintiffs' expert Captain Lowell]; 15 RT 2692 [defendants' expert Admiral Sargent]).

Moreover, while "respondents knew" generally how the Navy used their products (Op. at p. 12), they had no control whatsoever over anything that occurred after delivery of their products to a shipyard. (15 RT 2693-2696) They had no capacity to "even conceptualize how to put together a test scheme" for the whole steam system, much less to assemble it; the Navy was the only entity capable of that. (15 RT 2694-2625) Navy

design engineers made all decisions regarding ship design, system design, subsystem design, and location and determination of which equipment met the Navy's needs. (15 RT 2692)

C. NO ORIGINAL ASBESTOS-CONTAINING PARTS REMAINED IN THE PUMPS AT THE TIME MR. O'NEIL SERVED ON THE ORISKANY

It is undisputed that gaskets and packing were sometimes removed from Warren's pumps and/or replaced during maintenance. (Op. at p. 3.) As the appellate court put it: "*The heat involved in steam power* meant that these parts would bake onto the equipment, and could only be removed by being scraped off with a chisel or knife or wire brush." (Op. at pp. 3-4, italics added.) That heat came from the ship's boilers, not from Warren's pumps. Again, Plaintiffs' expert Captain Lowell testified: "We have to start with boilers and we got to make steam. Steam is going to be your life blood on an aircraft carrier ... ." (7 RT 896-897 [going on to describe interconnectedness of pumps throughout that steam system.].)

But all agree that by the time Mr. O'Neil boarded the Oriskany more than 20 years after Warren's sale of these pumps, the Navy had replaced all the asbestos-containing parts supplied inside them. (Op. at p. 15) Warren did not make or sell any of those replacement parts. (Cf. Op. at p. 15 n. 8 [so stating as to Crane Co., omitting Warren]; 7 RT 1017 [plaintiffs' expert Lowell: "I know of none of the defendants here today that made asbestos [-containing parts]"]; Pet. Rhrg. at p. 17.)

Moreover, Warren did not control what replacement part the Navy used once Warren sent a pump to a shipyard, i.e. once it relinquished control of its own product. Rather, the Navy decided what to use as replacement parts. (13 RT 2237:17-21; 15 RT 2695-2696, 2698-2699.) The Navy installed replacement gaskets and packing manufactured by other companies, which BUSANDA purchased. (11 RT 1902; see Pet. Rhrg. at p. 9 fn. 3; 15 RT 2698-2699.) The Navy trained its sailors and controlled all aspects of their work aboard ships, including work in the spaces in which Mr. O'Neil served. (11 RT 1889-1890; 7 RT 1098)

D. MR. O'NEIL WAS EXPOSED TO ASBESTOS ON THE ORISKANY IN THE 1960S, BUT NONE OF IT CAME FROM WARREN

Patrick O'Neil was born in 1943 (12 RT 2152), by which time Warren had already supplied the pumps at issue here to the Navy. He died in 2005 of mesothelioma. (Op. at p. 2.) Plaintiffs presented evidence connecting his disease to asbestos exposure during his service aboard the Oriskany from June 1965 to August 1966. (*Ibid.*)

During Mr. O'Neil's work aboard the Oriskany, he encountered a massive amount of asbestos insulation, specified by the Navy and installed by shipyards. Plaintiffs' expert Dr. Horn testified that tons of asbestos insulation covered miles of steam pipes throughout the Oriskany, exposing everyone aboard. (6 RT 823-825) Celotex and Johns-Manville – long bankrupt companies – supplied that material to the Navy. (11 RT

1897-1898; see Pet. Rhrg. at p. 18.)

But some circumstantial evidence, the appellate court found, also allowed an inference that Mr. O'Neil's exposure to asbestos was from repairs performed on Warren pumps in Mr. O'Neil's vicinity. (Op. at p. 21.) As a Main Engine Junior Officer, and then a Boiler Division Officer, Mr. O'Neil stood watch in the machinery spaces, that is, in the boiler rooms, engine rooms and machine room, where he was responsible for supervising repairs and maintaining equipment in those rooms. (Op. at p. 2.) Douglas Deetjen, Mr. O'Neil's shipmate, worked in the Oriskany's boiler and engine rooms.

Mr. Deetjen described the process of re-packing valves and pumps, and of removing insulation from the equipment in the course of repair or maintenance. He testified that during these repairs, the dust floated all over the room, so that there was no way to avoid breathing the dust. (Op. at p. 4.) There was no evidence Mr. O'Neil ever personally worked on a Warren pump or supervised anyone who did (7 RT 1047-1048) – but Mr. Deetjen testified that work on Warren pumps created dust, and that he saw Mr. O'Neil in the room when work of some kind was performed on Warren pumps. (Slip Op. at p. 4; 10 RT 1736; 11 RT 1935; Pet Rhrg. at pp. 18-19.)

Even this exposure evidence, however, did not involve asbestos dust from parts manufactured or sold by Warren. Rather, the dust came

from added or replacement parts. (Op. at p. 16; see also, e.g., 8 RT 1211; 11 RT 1902-1903.) And as for how any asbestos from gaskets or other parts became airborne dust at all: the appellate court acknowledged that it "baked" on and became friable because of "the heat involved in steam power." (Op. at p. 3; cf. 7 RT 896-897 [Captain Lowell].)

There is no basis for the court's later assertions – contrary to the Plaintiffs' own expert's testimony – that "[t]he danger was caused by the operation of respondents' products" (Op. at p. 20) or "by the operation of respondents' products with replacement products which had the same dangerous propensities as the original parts." (Op. at pp. 17-18; Pet. Rhrg. at pp. 1-3.) No evidence showed that any feature of defendants' products did the "baking"; rather, the danger of friable asbestos derived from the steam generated by the Oriskany's boilers – which the Navy connected to Warren pumps and hundreds of other components in a massively complex propulsion system. (See 6 RT 677 [Plaintiffs' expert Horn: "Well, the Navy produced steam vessels. Steam vessels require steam pipes with steam in the pipes which are hot"].)

In summary, Mr. O'Neil's claimed asbestos exposures may be divided into two categories of products:

- *Later-added parts:* external flange gaskets and external insulation pads that the Navy attached to pumps after purchase, when assembling the ship's steam-propulsion

system.

- *Replacement parts:* gaskets and packing inside pumps, and internal insulation covered by sheet-metal on one type of pump, all of which the Navy placed inside Warren pumps long before Mr. O'Neil boarded the Oriskany.

Warren never made or sold any of these products. Rather, companies unrelated to Warren manufactured and sold both the later-added and replacement parts.

E. NO ONE WARNED MR. O'NEIL THAT ASBESTOS PRESENTED A POTENTIAL LONG-TERM DANGER

The Navy sometimes required pump manufacturers to provide manuals containing information about installation, operation, and maintenance. (See Op. at p. 4.) No manual from any defendant manufacturer included a warning about asbestos dust, or any recommendation concerning use of respirators or dust-reduction methods such as wetting friable asbestos. (*Ibid.*; 10 RT 1737) Indeed, it is undisputed that during his 14 months in the Navy, Mr. O'Neil never saw or heard warnings about asbestos from any source.

As for what any such warning could have said: the appellate court was wrong to assert that Warren Pumps had "actual knowledge of the dangers of asbestos." (Op. at pp. 5-6 [asserting the same about the Navy].) Warren had no such knowledge at any time in the 1940s, when it sold the

pumps at issue, or indeed the 1960s when Mr. O'Neil served in the Navy. (Pet. Rhrg. at p. 15.) The *only* evidence on the subject of Warren's actual knowledge was the testimony of Warren's representative Roland Doktor that Warren issued no warnings about asbestos because "[Warren] never really felt it was a hazard as used in our products." (13 RT 2197-2198.)

As for what was theoretically "knowable" about various asbestos-related risks, Plaintiffs' expert Dr. Barry Horn testified that no studies existed anywhere, even at the time Mr. O'Neil served – more then 20 years after Warren sold pumps for use on the Oriskany – showing any risk from the use of asbestos gaskets or packing. (6 RT 807-808)

Dr. Horn did testify about the historical development of medical literature with respect to risks from asbestos generally. (6 RT 719-732) But Plaintiffs' never presented any evidence, through Dr. Horn or otherwise, that any studies available by 1943 showed that work with any manufactured asbestos-containing product caused mesothelioma. Dr. Horn's testimony, even on direct, confirmed that a study published *in Germany* in 1943 was the only study worldwide suggesting any connection between asbestos and any form of cancer, anywhere near the time that Warren sold the pumps at issue. (6 RT 725) Dr. Horn noted that an abstract was published in the United States the next year (*ibid.*); it is unclear whether Plaintiffs contend that Warren should have warned Navy sailors about any information contained in that abstract.

The evidence from both sides' experts at trial revealed that the Navy itself knew all there was to know about asbestos risks during the years before, during, and after Mr. O'Neil's service, and participated in developing that knowledge. From the 1920s through the 1960s, the Navy had a robust industrial hygiene program and was fully aware of any information published in the medical literature about the dangers of asbestos. (11 RT 1754-1760, 1776-1777, 1858-1859) In 1946, Navy commanders and the Chief Health Consultant to the U.S. Maritime Commission (which oversaw vessel construction) published a report recommending a variety of procedures for reducing asbestos-dust inhalation. (6 RT 776-778, 784-785, 791-792) The Navy at times led the state of the art knowledge of the potential hazards of asbestos, including during the World War II era. (11 RT 1776-1777 [Defendants' expert Dr. Forman]; see also Plaintiffs' expert Captain Lowell at 8 RT 1139-1140; 1147 [Navy was "highly sophisticated" regarding the insulation and gasket material it used on board its ships].)

This is why the trial court concluded that the Navy "had more knowledge than the defendants with regard to … the use of asbestos on naval vessels." (16 RT 3000, 3007) Of course, the Navy had the ability to warn of any dangers it perceived aboard its ships, and could require the use of respirators if it so chose. [Plaintiffs' expert Captain Lowell: 7 RT 1051-1052]

III.

THE TRIAL COURT ENTERED A NONSUIT JUDGMENT, BUT DIVISION 5 OF THE SECOND DISTRICT REVERSED

At the close of evidence, Warren Pumps and the other defendants filed motions for nonsuit. (1 AA 69-154) At the hearing, Warren joined in Crane Co.'s motion arguing that the component-parts doctrine precluded a plaintiffs' verdict (16 RT 2976), and the trial court granted the motion on that ground. (3 AA 349-442)

One year later, in *Taylor v. Elliott Turbomachinery Co., Inc.* (Feb. 25, 2009) 171 Cal.App.4th 564 ("*Taylor*"), the First District Court of Appeal supplied powerful additional support for the trial court's ruling, in an almost identical factual context. The *Taylor* court rejected both strict liability and negligent failure-to-warn theories against equipment manufacturers for harm caused by added or replacement parts that they did not manufacture or distribute. (*Id.* at pp. 592, 596.) One of several grounds for rejecting strict liability was the component-parts doctrine, which in appropriate circumstances precludes liability for the manufacturer of a component (e.g., a pump or a valve) that the purchaser incorporates into its own product or system – there and here, a Navy ship's steam-propulsion system. (*Id.* at pp. 584-586.)

The appellate court here disagreed with all of *Taylor*'s conclusions, and reversed the nonsuit judgment. The court held that

Plaintiffs could pursue against Warren theories of design defect and failure to warn, based on injury allegedly arising from the combined operation of its pumps with other manufacturers' asbestos-containing *replacement* parts. (Op. at p. 2, 17-18.) The court did not expressly accept the O'Neils' contention that Warren could likewise be held liable for asbestos emanating from external insulation pads and external flange gaskets that the Navy later *added* to the pumps Warren sold, but its loose language left that door open. (*Id.* at p. 20.) The appellate court also rejected application of the component-parts defense to the pumps – even though the pumps did not function on their own, and Mr. O'Neil's harm occurred only as a result of the Navy's integration of the pumps into the Oriskany's steam system. (*Id.* at pp. 7-15.)

Following the decision in this case, Divisions 2 and 3 of the Second District followed *Taylor* in *Merrill v. Leslie Controls* (Nov. 17, 2009) 101 Cal.Rptr.3d 614, 627 [design-defect claims are barred to the same extent as failure-to-warn claims, where plaintiffs have no evidence of exposure to asbestos from parts sold or distributed by a defendant]; and Hall v. Warren Pumps LLC (Feb. 16, 2010) 2010 WL 528489, *3 [affirming defense judgment entered under Code Civ. Proc., §631.8]. This Court granted review of *Merrill*, with briefing deferred pending the decision in this case. (S178957, February 3, 2010.)

Warren Pumps' argument is divided into three sections. First, we explain why the Court should find no **strict liability** for any parts the Navy added to or replaced into Warren pumps. We then set forth why the Court should hold that Warren has no **negligence** liability on any theory for harm arising after and as a result of the Navy's introduction of such products. Finally, Warren contends that whatever other conclusions the Court reaches, it should for several reasons foreclose recovery of damages by individuals for asbestos-containing equipment sold to the United States military.

IV.

MANUFACTURERS SHOULD NOT BE STRICTLY LIABLE FOR LATER-ADDED PARTS, OR FOR REPLACEMENT PARTS, THAT THEY DID NOT MAKE OR SELL

This Court has never endorsed holding one manufacturer liable for injury arising from foreseeable association with another's product. This notion continues to infect – and partly drive – asbestos litigation in trial courts across California. That should end here.

We address in turn the two categories of products that Plaintiffs allege caused harm to Mr. O'Neil, as described in section II above: (A) *Later-added parts*, i.e. the external insulation pads and external flange gaskets attached by the Navy, that Warren never supplied; and (B) *Replacement parts*, i.e. gaskets and packing, and internal insulation on one

kind of pump, that the Navy replaced with parts made by others long before Mr. O'Neil boarded the Oriskany.

A. A MANUFACTURER OWES NO DUTY TO WARN ABOUT HAZARDS ASSOCIATED WITH ADD-ON PRODUCTS THAT OTHER COMPANIES MADE AND SOLD

Longstanding principles of California law foreclose strict product liability for later-added parts made by other manufacturers. Warren owed no duty to warn about potential harm from products attached by the purchaser that it did not make or sell, regardless of the likelihood they would be used together with Warren's pumps. Moreover, even if Warren's pumps were somehow deemed to "combine" with the external insulation or flange gaskets to create the danger of airborne asbestos – which Warren denies – the component-parts doctrine precludes any duty to warn.

After delivery of Warren pumps to a naval shipyard, during construction of the Oriskany's steam-propulsion system, the Navy attached insulation pads and asbestos-containing flange gaskets that Warren never originally supplied to the outside of some Warren pumps. It is undisputed that Warren never made or sold any of these products; the Navy procured these added parts from other manufacturers pursuant to its own specifications.

Plaintiffs nevertheless assert that Warren and other equipment manufacturers have a duty to warn of the dangers inherent in *other*

manufacturers' products that will foreseeably be added to their own. That is: Plaintiffs first contend as a factual matter that Warren could reasonably foresee at the time it sold its own pumps that the Navy would wrap asbestos-containing insulation around the pumps and use asbestos-containing flange gaskets to connect them to the Oriskany's pipes (and continue to do so for decades). They then contend that if that premise is true, Warren should somehow have warned sailors not to breathe asbestos dust freed from those attached products.[4] (Cf. Op. at p. 20; see, e.g., 3 AA 416-417.) This argument is not supported by California law.

California product liability law "provides generally that manufacturers, retailers, and others in the marketing chain of a product are strictly liable in tort for personal injuries caused by a defective product." (*Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1188 (*Peterson*).) "The rules of products liability 'focus responsibility for defects, whether negligently or nonnegligently caused, on the manufacturer of the completed product.'" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 478-479, quoting *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 261 (*Vandermark*).) As this Court explained in *Daly v. General Motors*

---

[4] Plaintiffs have never claimed that Warren *designed* any other manufacturers' external insulation or flange gaskets, and of course Warren did not do so. Rather, Plaintiffs seek to hold Warren and other equipment defendants liable for *failing to warn* about the danger from those added parts.

Corp. (1978) 20 Cal.3d 725, 739, the basis for imposing strict products liability on a particular defendant is that "he has marketed or distributed a defective product." These and many cases since, the *Taylor* court observed, reflect "a bright-line legal distinction tied to the injury-producing product in the stream of commerce." (171 Cal.App.4th at p. 576.)

There are excellent reasons for this clear rule precluding liability for manufacturers that did not put the dangerous product into the chain of distribution. "Other manufacturers cannot be expected to determine the relative dangers of various products they do not produce or sell and certainly do not have a chance to inspect or evaluate." (*Ibid.*) Rather, this Court assigns product liability only to entities that play "an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products." (*Vandermark, supra*, 61 Cal.2d at p. 262; *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 477.) It is irrational and unfair to impose liability on a defendant manufacturer that lacks any business relationship with the company that made or sold a defective attachment; such a defendant has no practical ability to exert pressure on the other company to make its product safe. (See *Peterson*, 10 Cal.4th at p. 1199 [rejecting landlord liability for injury caused by a slippery bathtub for this and related reasons]; compare *Vandermark, supra*, 61 Cal.2d at pp. 262-263 [retailers "may be in a position to exert pressure on the manufacturer" to make the product safe].)

In particular, California recognizes a product liability cause of action for failure to warn where a manufacturer's *own* product cannot be used safely without sufficient warnings about *that product's* character or features. (See generally *Finn v. G.D. Searle & Co.* (1984) 35 Cal.3d 691, 699; *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002 (*Anderson*); *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64 (*Johnson*).) California law has never required, nor should it now require, a manufacturer to warn about dangers inherent in others' products that might be used with it, even when such use is foreseeable.

To the contrary, courts in this State have always held that a manufacturer owes no duty to warn about hazards associated with products made by others. The leading case is *Garman v. Magic Chef Inc.* (1981) 117 Cal.App.3d 634. *Garman* concerned a foreseeably attached part not made by the defendant, which emitted dangerous material – as Plaintiffs assert here.

The defendant in *Garman* manufactured a stove for use in a motor home. (*Id.* at p. 636.) Propane gas leaked from a defective connection in a nearby copper tube, which serviced both the stove and the water heater. (*Ibid.*) When the plaintiff's wife lit the stove, the flame ignited the leaking gas and caused an explosion. (*Id.* at pp. 636-637.) Plaintiff argued that "the stove manufacturer had a duty to warn that a lighted but properly operating stove might ignite gas leaking from some

other place." (*Id.* at p. 637.)

The Court of Appeal affirmed summary judgment for the stove manufacturer, holding that it was "under no duty to warn of the possible defect in the product of another." (*Garman, supra*, 117 Cal.App.3d at pp. 638-639.) Noting that "[a] failure to warn may create liability for harm caused by use of an unreasonably dangerous product," the court still concluded that rule did not apply where "it was not any unreasonably dangerous condition or feature of respondent's product which caused the injury." (*Id.* at p. 638.) "The use of any product can be said to involve some risk because of the circumstances surrounding even its normal use," the court reasoned. "Nonetheless, the makers of such products are not liable ... for merely failing to warn of injury which may befall a person who uses that product ... in conjunction with another product which because of a defect or improper use is itself unsafe." (*Ibid.*)

That is the situation here with respect to external insulation and flange gaskets made by other entities and attached to Warren pumps by the United States Navy after sale. Plaintiffs claim that Warren could foresee the Navy adding asbestos insulation and flange gaskets to Warren pumps, resulting in the release of dangerous fibers during maintenance. But it was also foreseeable in *Garman* that a stove made for a motor home needed a propane gas supply, and such lines do sometimes leak. The court nevertheless found that the defendant stove manufacturer had no duty to

warn of potential defects in other companies' gas–line products.

Garman found no duty to warn about the attached product because nothing about the stove in particular caused the harm; "the explosion was bound to occur as soon as someone lit a match for a cigarette ... or for any other reason." (*Id.* at p. 639.) Likewise, there is no evidence that any feature of a Warren pump caused the release of fibers from external insulation or flange gaskets as Navy sailors ripped or scraped them off. The fiber release would occur no matter what equipment the Navy or any other purchaser attached those materials to – as scores of judicial decisions have recounted for over a generation. This Court should hold that Navy equipment manufacturers have no duty to warn about any risk of asbestos emitted from these added parts.[5]

The Chief Judge of the Northern District of California reached a similar result in *In re Deep Vein Thrombosis* (N.D.Cal. 2005) 356 F.Supp.2d 1055. In that case, airline passengers who developed deep vein thrombosis (DVT) sued aircraft manufacturer Boeing, alleging that prolonged and cramped seating on aircraft created a risk of developing

---

[5] See also *Blackwell v. Phelps Dodge Corp.* (1984) 157 Cal.App.3d 372, 378 [seller of sulfuric acid had no duty to warn of danger from formation of pressure in a tank car selected by the purchaser for transport, "where it was not any unreasonably dangerous condition or feature of a defendant's product which caused the injury"]; *Powell v. Standard Brands Paint Co.* (1985) 166 Cal.App.3d 357, 364 ["the law does not require a manufacturer to study and analyze the products of others and to warn users of risks of those products"].

DVT. (*Id.* at p. 1058.)

But Boeing sold its product without seats, and while it certainly knew the airlines would added seats, and that many passengers would sit in them for many hours, the court rejected any duty to warn either the airlines or the passengers about the risk of DVT. (*Id.* at p. 1067.) It found no precedent for the contention that "a manufacturer, after its product is sold to a purchaser, is under a duty to warn a third party (with whom the manufacturer has never had contact) that the purchaser may or may not have supplemented the manufacturer's completed product with an allegedly defective piece of equipment." (*Id.* at p. 1068)

The Washington Supreme Court held the same 15 months ago, on facts indistinct from those here, in the companion cases *Braaten v. Saberhagen Holdings* (2008) 165 Wash.2d 373, 379, 198 P.3d 493 (*Braaten*) [Navy applied external insulation to pumps and valves], and *Simonetta v. Viad Corp.* (2008) 165 Wash.2d 341, 346, 197 P.3d 127 [same for evaporator, used to desalinate sea water] (*Simonetta*).[6] "[A] manufacturer is not liable for failure to warn of the danger of exposure to asbestos in insulation applied to its products if it did not manufacture the insulation and was not in the chain of distribution of the insulation. It

---

[6] *Taylor*, *supra*, called these cases "*Braaten II*" and "*Simonetta II*," to distinguish them from the intermediate appellate decisions that were extant during the parties' briefing.

makes no difference whether the manufacturer knew its products would be used in conjunction with asbestos insulation." (*Braaten*, 198 P.3d at p. 498, citing *Simonetta*, 197 P.3d at p. 136.)

These holdings depended on the same chain-of-distribution analysis that has always guided this Court:

> We justify imposing [strict] liability on the defendant who, by manufacturing, selling, or marketing a product, is in the best position to know of the dangerous aspects of the product and to translate that knowledge into a cost of production against which liability insurance can be obtained. Here, Viad did not manufacture or market the asbestos insulation [attached to its evaporator]. Nor did Viad have control over the type of insulation the navy selected.

(*Simonetta*, 197 P.3d at p. 134; see also *id.* at p. 133 [similar analysis for negligence].)

Accordingly, the First District in *Taylor* applied these principles to the situation at issue here, holding that pump and valve manufacturers are not liable for harm arising from external insulation. (171 Cal.App.4th at pp. 590-591; see also *id.* at p. 585 ["As the California Supreme Court explained three decades ago, the basis for imposing strict products liability on a particular defendant is that 'he has marketed or distributed a defective product'"], quoting *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 739.)

Finally, *Taylor* rejected the notion that "a duty to warn exists whenever it is foreseeable that the intended use of a product will expose

users or consumers to a risk created solely by the product of another." (171 Cal.App.4th at p. 580.) Following a detailed assessment of the relevant appellate court decisions and informative decisions from this Court (*id.* at pp. 580-583), the court concluded: "to date, California case law has not imposed on manufacturers a duty to warn about the dangerous propensities of other manufacturers' products. California courts will not impose a duty to warn on a manufacturer where the manufacturer's product 'did not cause or create the risk of harm.'" (*Id.* at p. 583, quoting *Garman*, *supra*, 117 Cal.App.3d at p. 638.)

Like the defendants in *Braaten*, *Simonetta* and *Taylor*, Warren was not in the chain of distribution of either the external insulation or the flange gaskets added to its pumps by the Navy. Under those cases and longstanding products liability decisions of this Court and the appellate courts, Warren has no liability for any harm caused by those products.

B. STRICT LIABILITY SHOULD NOT EXTEND TO HARM OCCURRING AFTER THE PURCHASER REPLACES ALLEGEDLY DANGEROUS ORIGINAL PARTS WITH GOODS MADE AND SOLD BY OTHERS

The original asbestos-containing parts inside Warren pumps wore out long before Mr. O'Neil boarded the Oriskany a generation after sale. As explained in sections II-C and -D, the Navy replaced the internal gaskets and packing as well as internal insulation covered by sheet-metal on one type of pump (collectively: "gaskets and packing") with asbestos-

containing parts manufactured and sold by others.

The Court here confronts new theories aimed at recovering damages from companies not fairly or reasonably responsible for Mr. O'Neil's injury. Traditional product liability law attributes such damages to the replacement-parts manufacturers. In the replacement-part context, Plaintiffs assert not only strict-liability failure to warn (addressed just above), but also a species of "design defect" under which a pump is defective if it was "designed to be used with" asbestos-containing parts that would release dangerous fibers during foreseeable maintenance. The appellate court here approved this (Slip Op. at p. 14), while the *Taylor* court, the Washington Supreme Court, and other courts around the country have rejected it. This Court should also reject it.

1. NO LIABILITY SHOULD ATTACH FOR HARM CAUSED BY ASBESTOS RELEASED FROM REPLACEMENT PARTS

This Court announced the essential principle of strict liability for design defect twenty years after Warren sold the pumps at issue here to the Navy for use on the Oriskany: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62 ("*Greenman*").) The Court grounded this rule of law on a public policy that, Warren will show, does not support liability for harm

caused following replacement of original parts claimed to be dangerous: "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 ... ." (*Id.* at p. 63; see also *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 733.)

The *Greenman* court established a plaintiff's burden of proof for strict liability design-defect: he must show "that he was injured while using the [defendant's product] in a way it was intended to be used[,] *as a result of* a defect in design ... of which plaintiff was not aware that made the [defendant's product] unsafe for its intended use." (59 Cal.2d at p. 64, italics added.) Mr. O'Neil was not injured as a result of a defect in the design of Warren's product, since nothing about that design as such brought Mr. O'Neil into contact with the asbestos he inhaled in the 1960s. He was injured as a result of a defect in the design of the asbestos-containing parts that the Navy later selected to replace into Warren's products, to be installed using methods that the Navy exclusively controlled.

For those reasons, this case is just like *Taylor*. On the record in *Taylor*, the court viewed the replacement gaskets and packing as the defective products causing the plaintiff's injury. (*Taylor*, 171 Cal.App.4th at p. 587 ["Mr. Taylor's injuries were caused not by any action of respondents' products, but rather by the release of asbestos from products

produced by others"].) The First District thus concluded there could be no liability for failure to warn of dangers inherent in products that other companies distributed, even where "the use of asbestos-containing materials with respondents' equipment was both foreseeable and anticipated by respondents." (171 Cal.App.4th at pp. 571, 585.)

On this record too, the replacement gaskets and packing caused any harm that Mr. O'Neil suffered in connection with Warren pumps. (See section II-D; cf. *Arena v. Owens Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1189 ["even when raw asbestos is incorporated into a finished product, it is the raw asbestos, and not some defect in the finished product, that ultimately causes the harm"].) Warren's pumps did not create or contribute to that harm, for even assuming that intense heat "baked" gasket and packing material onto the pumps (later to be scraped off, possibly producing dust), that heat came from the Oriskany's boilers – i.e. from the steam-propulsion system built by the Navy. No evidence suggests that any feature intrinsic to Warren pumps (or any other equipment for that matter) had anything to do with asbestos gaskets or packing "baking onto" them. On the contrary, the record reveals the same thing would happen to (and did happen to) gaskets and packing inside any equipment the Navy incorporated into its steam-propulsion system. (See section II-D.)

Thus, for all the reasons explained in section IV-A with respect to harm caused by *added* parts that Warren did not make or sell, Warren

should likewise have no duty to warn about harm caused by *replacement* gaskets and packing that Warren did not make or sell. In summary:

- Warren did not play "an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective [replacement parts]." (*Vandermark, supra*, 61 Cal.2d at p. 262.) Warren **cannot adjust its financial dealings with any supplier to spread the cost** of liability for replacement parts, as it could have with the suppliers that sold Warren the original gaskets and packing. (See *id.* at pp. 262-263; *Peterson, supra*, 10 Cal.4th at p. 1207.)
- Nor was Warren "in the best position to know of the dangerous aspects of the product and to translate that knowledge into a cost of production against which liability insurance can be obtained." (*Simonetta, supra*, 197 P.3d at p. 134.) Warren had **no ability to test** the replacement parts at the time the Navy selected and used them, and it never claimed that it stood behind the safety of such parts. (See *Baughman v. General Motors Corp.* (4th Cir. 1986) 780 F.2d 1131, 1133 [seller of a product "cannot be charged with testing and warning against any of a myriad of replacement parts supplied by any number of manufacturers"].)
- Warren derives **no economic benefit** from replacement parts made by others, making it unfair to expect Warren to absorb the

costs of injury resulting from those parts. This differentiates the replacement-parts situation from the "original parts" scenario in which the manufacturer *does* "derive[] an economic benefit from the sale of the product that incorporates the defective [original part]." (*Weyerhaeuser Co. v. Thermogas Co.* (Iowa 2000) 620 N.W.2d 819, 825; see also *Baughman, supra*, 780 F.2d at pp. 1132-1133.)

- Likewise, such liability would not serve the policy of **preventing future harm**. (See *Romito v. Red Plastic Co.* (1995) 38 Cal.App.4th 59, 66-67.) Imposing tort liability on Warren now would do nothing to prevent injuries due to alleged exposure from asbestos that took place decades ago, nor can it impact Warren's current conduct as a manufacturer since Warren (like virtually all of American industry) long ago ceased any use of asbestos.[7]

---

[7] Courts in other jurisdictions have also relied on the policy considerations discussed above in refusing to hold assemblers liable for defective replacement parts that the assembler neither manufactured nor placed into the stream of commerce. (See, e.g., *Lindstrom v. A-C Product Liability Trust* (6th Cir. 2005) 424 F.3d 488, 495 [marine valve manufacturer not liable for asbestos-containing replacement parts]; *Spencer v. Ford Motor Co.* (Mich.App. 1985) 367 N.W.2d 393, 396 [vehicle manufacturer not liable for defective replacement wheel rim assembly].)

2. EVEN IF THIS RECORD *DID* JUSTIFY AN INFERENCE OF "COMBINED CAUSATION" OR A DESIGN INHERENTLY CONTEMPLATING THE USE OF ASBESTOS REPLACEMENT PARTS, THIS COURT SHOULD FIND NO LIABILITY AS A MATTER OF LAW AND POLICY

Warren's pumps did not "require" asbestos-containing replacement parts to function, nor were they "designed to go with" asbestos-containing replacement parts, in any way justifying imposition of design-defect or failure-to-warn liability. It was not the design of the pump that required the use of asbestos. Rather, the Navy designed a steam-propulsion system that demanded pumps that could accomplish particular jobs, which in turn drove the inclusion of asbestos-containing parts in some of the pumps aboard the Oriskany. That is the *only* sense in which Warren pumps "needed the asbestos-containing products in order to function" (Op. at p. 17) or were "necessarily used in conjunction with" those products (*id.* at p. 20).

Nevertheless, the appellate court perceived a basis for a finding of combined causation. "Asbestos does of course have inherent dangers," the court allowed, "but there was no evidence that the asbestos packing or insulation was dangerous until it was baked on and removed" – a premise from which the court illogically inferred that "[t]he danger was caused by the operation of respondents' products." (Op. at p. 20.)

No evidence shows that any feature of Warren's products did

the "baking." Asbestos insulation and packing would "bake onto" any equipment the Navy hook into its steam-propulsion system. No evidence supports the inference that "[t]he danger was caused by the operation of respondents' products"; rather, the danger derived from the operation of the Navy's system as a whole.

Relying on its prior decision in *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577 – in which a demurrer required the court to assume that "[t]he use of the defendant's 'own product' created the harm" (Op. at p. 20) – the court here inferred that Plaintiffs might be able to show Mr. O'Neil's "injury was caused by *the operation of [Defendants'] products with* replacement [asbestos-containing parts]," which the Defendants' products "needed … in order to function." (*Ibid.*, italics added.) "*Tellez-Cordova* holds that a manufacturer is liable when its product is necessarily used in conjunction with another product, and when danger results from the use of the two products together." (Op. at p. 20.)

Setting aside Warren's contention that these inferences were not legitimate, and instead taking them at face value, the Court should nevertheless decline to impose replacement-part liability. Rather, it should continue its longtime practice of drawing fair and predictable lines based on sound public policy, and avoid making any manufacturer an insurer for all time of its own or others' products.

All of the policy rationales noted in the prior section apply with equal force even where the accused product is purported to be "the pump itself operating in conjunction with replacement parts," or "the pump itself, designed to use asbestos-containing replacement parts." Warren is still unable to test the operation of its pumps with whatever replacement parts the Navy might in the future select, and remains without any power to control the manner in which those parts are installed – the circumstance allegedly yielding the harm. Warren derives no additional economic benefit from the operation of its pumps with replacement parts beyond that which it derived from those pumps as originally sold. Warren still cannot spread the cost of those injuries to the supplier most deserving to bear them. And it remains a mirage to imagine that imposing liability for sales made long before the installation of replacement parts serves to protect any person from harm.

There are more reasons, as well, why the Court should determine that even combined-causation / "designed to go with asbestos parts" evidence is insufficient to support strict liability against an equipment manufacturer for harm caused after assertedly dangerous parts are replaced with like parts. Indeed, "no reported decision has held a manufacturer liable for its failure to warn of risks of using its product, where it is shown that the *immediate efficient cause* of the injury is a product manufactured by someone else." (*Powell v. Standard Brands*

(1985), 166 Cal.App.3d at 362, italics added [explosion occurred when plaintiff ran out of defendant's floor cleaner and began using another cleaner in same area].)

The leading case of *Ford Motor Co. v. Wood* (Md.App. 1998) 703 A.2d 1315 (Wood) [abrogated on other grounds in *John Crane, Inc. v. Scribner* (Md. 2002) 800 A.2d 727], concluded on highly analogous facts that a manufacturer did not owe a duty to warn about dangerous or defective replacement parts made by others.

In *Wood*, the plaintiffs brought wrongful death actions against Ford Motor Company, alleging that the decedents were injured from their exposure to Ford's asbestos-containing brake and clutch products. (*Wood*, *supra*, 703 A.2d at p. 1318.) Judgment in favor of one plaintiff was reversed because the evidence presented at trial was insufficient to create a jury question as to whether the decedent was exposed to Ford's products. (*Id.* at p. 1333.) Although it was undisputed that Ford manufactured brake and clutch parts which contained asbestos, those original parts were all replaced by asbestos-containing parts manufactured by other companies by the time the plaintiff alleged that the decedent was exposed. (*Id.* at p. 1329.)

Acknowledging the lack of evidence that Ford supplied the brakes to which Mr. Wood was exposed (see *id.* at p. 1331, fn. 7), the plaintiff argued – echoing Plaintiffs' "combined use" argument here – that

"Ford had a duty to warn of the dangers associated with the foreseeable uses of its vehicles," i.e. their operation with replacement brakes. (*Id.* at p. 1331.) The court rejected the plaintiff's argument, noting that the usual policy justifications for imposing liability upon finished product manufacturers – "economic benefit," "ability to test and inspect the component," and "represent[ations] to the consumer and ultimate user that the component is safe" – would not be advanced by making a manufacturer liable for replacement parts that it neither marketed nor placed into the stream of commerce. (*Ibid.*) The court observed that "limiting liability to those in the chain of distribution is not only equitable, it preserves a bright line in the law of strict liability." (*Ibid.*)

It is both equitable and sensible to preserve that bright line in California law. First, it is unfair for the manufacturer of durable equipment to be assigned strict liability for harm arising *primarily* from others' products for decades after sale, while the manufacturers of the replacement parts themselves incur liability only for the relatively brief time each spends connected with the equipment – if such can be determined at all.

Second, strict liability for "similar" replacement parts would impose burdens on courts that are unwarranted by any advancement of justice. Courts would have to decipher for every kind of product *how similar* a given replacement must be to the original for the equipment manufacturer to remain strictly liable. In the case of asbestos-containing

parts, this would require, at a minimum, examination of the replacement's ingredients (chrysotile or amosite?) and composition (5% or 15% or 50% asbestos; readily friable or bound in a matrix?), with no principled basis for discerning "how similar is similar enough." Such a burdensome approach would not achieve a just distribution of responsibility for harm from product defect; no manufacturer can predict or accommodate its conduct to the future winds of technology or purchaser preference, and strict liability would "blink on and off" as *sufficiently* and *insufficiently* similar replacement traded out through years of use.

Strict liability doctrine should not countenance such irrational and unpredictable results. The more fair and reasonable approach is to draw the line of equipment manufacturer liability short of the point at which parts made and sold by others become the source of toxic material alleged to have harmed the plaintiff.

V.

THE COMPONENT-PARTS DOCTRINE AND THE RECORD DISPOSE OF ANY CONTENTION THAT WARREN'S PUMPS CAUSED HARM "IN COMBINATION WITH" ADDED OR REPLACEMENT PARTS

To avoid the very novel proposition that manufacturers be required to warn about newly-attached or replacement products that they never made or sold, Plaintiffs have in the appellate phases of this case advanced a theory that Warren's pumps are necessarily used in conjunction

with those other products, and the potential danger results from this combined use. (See Op. at p. 20.) It was foreseeable, Plaintiffs will argue, that personnel such as those Mr. O'Neil supervised would need to remove replacement parts as well as external insulation and flange gaskets that the Navy attached to the pumps, and in the process would be exposed to the asbestos found in those other products. This theory has a patina of "combined use" that attracted the appellate court despite the total lack of evidence to support it, and despite affirmative evidence from Plaintiffs' Navy expert to dispel it. We explain here why even that wrong-headed approach to the evidence does not support liability.

A. THE ESSENTIAL NATURE OF THE COMPONENT-PARTS DOCTRINE AND WHY IT APPLIES HERE

The component-parts doctrine holds that the manufacturer of a non-defective component, which becomes dangerous only when integrated into a larger finished product, is not liable for injuries caused when that occurs. This Court has not yet addressed the role of this doctrine in California product liability law, but should do so now.[8]

---

[8] A somewhat related point arose in *Jimenez*, *supra*, where the Court held that the manufacturer or supplier of a component part installed in a mass-produced home may be held strictly liable when a conceded defect in the component causes damage to other parts of the structure. (29 Cal.4th at p. 481.) But *Jimenez* did not address whether the manufacturer of a component (pump) installed in a steam-propulsion system may be held liable for failure to warn about risks to persons arising from foreseeable handling of *parts added* by the builder of that system.

This "combined use" danger arose only because of the Navy's decisions in integrating Warren pumps into the Oriskany's steam-propulsion system. Specifically, the Navy attached asbestos-containing insulation and flange gaskets, and replaced old internal asbestos-containing parts with products the Navy selected, ordered and controlled, in such a manner that Mr. O'Neil and others could be exposed to asbestos from those products when the pumps were undergoing maintenance. (See *supra*, sections II-B through D) Nothing about the Warren pumps in particular required the Navy to do any of this, and none of it could have occurred prior to the Navy's incorporation of the pumps into the steam-propulsion system that the Navy alone designed for the Oriskany.

That is the exact situation in which the component-parts doctrine applies. (See *Taylor*, *supra*, 171 Cal.App.4th at pp. 584-586.) The Restatement (Third) of Torts: Products Liability articulates the basic principle adopted by California appellate courts and widely followed in other jurisdictions: The manufacturer or supplier of a nondefective component part is not liable for injuries caused when the component is integrated into a finished product unless "the seller or distributor of the component substantially participates in the integration of the component into the design of the product." (Rest.3d Torts, § 5(b).) The full text of section 5 is as follows (emphasis added):

> One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated **if**:
>
> (a) the component is defective in itself, as defined in this Chapter, and the defect causes the harm; **or**
>
> (b)(1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and
>
> (2) the integration of the component causes the product to be defective, as defined in this Chapter; and
>
> (3) the defect in the product causes the harm.

The comments to the Restatement summarize the rationale for the rule as follows:

> If the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective. Imposing liability would require the component seller to scrutinize another's product which the component seller had no role in developing. This would require the component seller to develop sufficient sophistication to review the decisions of the business entity that is charged with responsibility for the integrated product. (Rest.3d Torts § 5, cmt. a.)

Under this rule and its rationale, Warren did not owe a duty to warn about hazards associated with the Navy's decision to attach asbestos-containing insulation and flange gaskets to the exterior of any pump, or to select particular replacement parts. This is so for several reasons.

First, the pumps were components of a vastly more complex steam-propulsion system (see section II-_ above), and had "no functional capabilities unless integrated into" such systems. (Rest.3d Torts, § 5, cmt. a; see, e.g., *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 837 (*Artiglio*).) Indeed, Plaintiffs acknowledged below that Warren's pumps were "sold to the Navy to be installed as part of the steam-propulsion and auxiliary steam systems that provided power for the Oriskany." (Appellants' Opening Brief in the appellate court, at p. 4.)

Second, Plaintiffs theorize no defect in the design of Warren pumps that connects Warren to any asbestos dust released from either replacement parts or from external parts attached by the Navy as it built the Oriskany's steam system. (See Rest.3d Torts § 5, cmt. f ["The component seller is not liable for harm caused by defects in the integrated product that are unrelated to the component."]) Plaintiffs assert that some of Warren's pumps were defective when first delivered because they originally had internal asbestos-containing parts that would release respirable asbestos fibers during normal maintenance. (See, e.g., 3 AA 418.)

Plaintiffs have never even hinted how any such defect *caused asbestos release* from parts the Navy later selected and attached, or from replacement parts selected and incorporated by the Navy long after sale. (*Jimenez*, *supra*, 29 Cal.4th at p. 480; *Taylor*, *supra*, 171 Cal.App.4th at p. 585; Rest.3d Torts § 5(a).) They cannot. When Warren delivered the

pumps to Navy shipyards, any original asbestos-containing parts were within the metal housing. Plaintiffs' expert Dr. Barry Horn conceded that actual exposure to asbestos dust is required; merely being around an undisturbed gasket inside a pump is not enough. (6 RT 858) The danger from later-added asbestos insulation and flange gaskets, and from replacement asbestos-containing parts, arose only as a result of the Navy's incorporation of the pumps into a steam-propulsion system that the Navy alone designed.

Third, Warren did not participate in the design or construction of that steam system. (See section II-B above.) Merely designing a component part to a customer's specifications, as Warren did with respect to each pump sold for use on the Oriskany, does not constitute substantial participation in the design of the finished product and therefore does not give rise to a duty to warn. (See, e.g., Rest.3d Torts § 5, cmt. e; *Artiglio*, *supra*, 61 Cal.App.4th at p. 841.)

Fourth, this Court should reject any contention that the component-parts doctrine is inapplicable whenever the danger posed by integration of the component into the finished product is "foreseeable," as other courts already have. (See *Artiglio*, *supra*, 61 Cal.App.4th at pp. 838-839 ["[T]he alleged foreseeability of the risk of the finished product is irrelevant to determining the liability of the component part manufacturer because imposing such a duty would force the supplier to retain an expert

in every finished product manufacturer's line of business and second-guess the finished product manufacturer whenever any of its employees received any information about any potential problems"], internal quotations omitted; accord *Taylor*, *supra*, 171 Cal.App.4th at pp. 584-585; *In re TMJ Implants Prods. Liability Litig.* (8th Cir. 1996) 97 F.3d 1050, 1057; *Kealoha v. E.I. Du Pont de Nemours & Co.* (9th Cir. 1996) 82 F.3d 894, 901; *In re Silicone Gel Breast Implants Prods. Liability Litig.* (N.D.Ala. 1997) 996 F.Supp. 1110, 1116.)[9]

Finally, "it would be unjust and inefficient to impose liability" on Warren simply because the U.S. Navy – "the manufacturer of the integrated product"— added asbestos to the outside of steam equipment in a manner that rendered the entire system dangerous to sailors. The imposition of such liability assumes that Warren could have scrutinized the Navy's final steam-propulsion system aboard the Oriskany, with all the sophistication that the Navy alone had accumulated in its monumental shipbuilding effort, and that Warren could have compelled the Navy to refrain from using the products it later added onto or replaced into Warren pumps. (See Rest.3d Torts § 5, cmt. a.) That is very far from reality.

---

[9] See also the following cases in which other jurisdictions have adopted the principle reflected in Section 5 of the Restatement Third: *Crossfield v. Quality Control Equip. Co.* (8th Cir. 1993) 1 F.3d 701, 703-704; *Zaza v. Marquess & Nell, Inc.* (N.J. 1996) 675 A.2d 620, 633; *Mitchell v. Sky Climber, Inc.* (Mass. 1986) 487 N.E.2d 1374, 1376; *Kohler v. Marcotte* (Fla.App. 2005) 907 So.2d 596, 598.)

B. THE SHAPE OF THE DOCTRINE THIS COURT SHOULD ADOPT

California courts applied variations of the component-parts doctrine before its promulgation in the final Restatement Third. (See, e.g., *Artiglio, supra* [silicone incorporated into breast implants]; *Lee v. Electric Motor Division* (1985) 169 Cal.App.3d 375, 385 [motor incorporated into meat grinder]; *Walker v. Stauffer Chemical Corp.* (1971) 19 Cal.App.3d 669 [sulfuric acid incorporated into drain cleaner].) The appellate court here read these and other cases to require "fungibility" of the component product (i.e. ease of substitution with other like products for the same application), and substantial alteration by the buyer during incorporation of the component into a larger product, before the doctrine will apply to absolve a component manufacturer of liability for harm arising from the purchaser's final product . (Op. at p. 12.)

This Court should instead adopt the Restatement Third's approach to the component-parts doctrine. The Restatement requires neither fungibility nor substantial alteration by the purchaser. While either of those circumstances might *commend* application of the doctrine, no such evidence should be required. Non-fungible components may have as little responsibility for the ultimate harm as fungible components, so long as they had no original defect that caused that harm (as the Restatement proposes). And the concept of substantial alteration by the assembler is subsumed in the Restatement's more direct and comprehensive focus on

which entity bears responsibility for designing the final product or system and integrating the component into it. If the component manufacturer substantially participated in that process, it should not matter whether its component was altered; if not, the purchaser should bear sole responsibility regardless of whether it altered the component.

In short, this Court should deem the component-parts defense to arise where no defect in the component manufacturer's own product caused the ultimate harm, and the manufacturer had no role in designing the product or system that did. Both are true here. Contrary to the appellate court's conclusion, Warren *did* "supply a 'building block' [product], dangerous only when incorporated into a final product over which [Warren] had no control." (Op. at p. 12.) Warren did not make a separate product with a specific use (*contra ibid.*), since no pump by itself had any use at all.

Accordingly, *Taylor*, *supra*, supplies the model. The First District there found it reasonable to apply the defense to pumps and valves (1) that did not and could not have hurt anyone on their own, and (2) which the Navy purchased to incorporate, without the manufacturers' participation, into massive steam-propulsion systems on its ships. (171 Cal.App.4th at pp. 584-586.) This Court should do the same.

Of course, this case and others like it present a circumstance not present in a purely commercial context, but it does not justify any different result. Plaintiffs cannot sue the U.S. Navy for building the steam-propulsion system that was, as a whole, the true cause of Mr. O'Neil's injury. That is of course because the Navy was and is executing the most fundamental role of the Government: providing for the common defense. But Plaintiffs' lack of a remedy against the Navy does not warrant imposing liability on Warren that the law would not otherwise support, particularly for sales of products almost 70 years ago that the Navy required for the defense of the United States.

VI.

WARREN CAN HAVE NO NEGLIGENCE LIABILITY BECAUSE IT DID NOT OWE PLAINTIFFS A DUTY OF CARE

To establish negligence liability for harm purportedly caused either by the design of a Warren pump or a failure to warn Mr. O'Neil about the potential risks associated with asbestos-containing parts, Plaintiffs must first establish that when Warren sold these pumps to the Navy, it owed Plaintiffs a legal duty to avoid that kind of harm. (*Merrill v. Navegar, Inc.*, *supra*, 26 Cal.4th at p. 477.) The existence and scope of such a duty are questions of law for the court to determine.[10] (*Ibid.*)

---

[10] The appellate court's failure to decide the viability of Plaintiffs' negligence claims was inappropriate, and this Court should resolve that issue now along with strict liability. As explained in Warren's Petition for

"'[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done.' [Citation.]" (*Ibid.*, quoting *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 933.) While Civil Code section 1714, subdivision (a), generally imposes liability for "an injury occasioned to another by ... want of ordinary care or skill in the management of [one's] property or person," courts have established exceptions based on public policy, after considering a variety of factors. (*Merrill v. Navegar, Inc.*, *supra*, 26 Cal.4th at p. 477.)

The major factors are: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [Citations.]" (*Ibid.*, quoting *Rowland v.*

Review, the Second District dismissed the issue in a footnote, claiming that although Plaintiffs themselves had made arguments about Defendants' negligence liability in their briefing, "we need not consider it, because respondents did not move for nonsuit on that ground." (Op. at p. 19, fn. 9.) To the contrary, Warren and Crane Co. plainly did seek nonsuit of Plaintiffs' negligence claims (1 AA 69-70, 78-79; 16 RT 2976), and briefed the issue on appeal.

Christian (1968) 69 Cal.2d 108, 113.) All of these factors weigh against recognition of a duty running from Warren to Plaintiffs.

A. MR. O'NEIL'S INJURY WAS NOT REASONABLY FORESEEABLE IN THE EARLY 1940S

As the *Taylor* court explained in the context of this same duty-of-care analysis, "[w]hat must be foreseeable is *the harm to the plaintiff*, not the mere fact asbestos-containing materials would be used with respondents' equipment." (*Taylor*, *supra*, 171 Cal.App.4th at p. 594, italics in original.)

Plaintiffs here offered no evidence, because none exists, that any manufacturer in the early 1940s could reasonably foresee that replacement asbestos-containing parts, external insulation or flange gaskets would – in combination with pumps or otherwise – contribute to causing mesothelioma. To the contrary, Plaintiffs' expert Dr. Horn testified that no studies existed anywhere, even at the time Mr. O'Neil served (much less, at the time Warren sold pumps for use on the Oriskany), showing any risk from work with asbestos gaskets or packing. (6 RT 807-808). Thus the foreseeability-of-injury factor is not met.

But in all events, the Court need not definitively resolve that question, because the other relevant policy considerations "dictate a cause of action should not be sanctioned no matter how foreseeable the risk." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 274 [disallowing recovery for

negligent infliction of emotional distress and loss of consortium by unmarried cohabitant who witnessed partner's tortious injury and death].) Even where the defendant's negligence is clear – which Warren posits only for the sake of argument – this Court recognizes "the need to limit the number of persons to whom [that] defendant owes a duty of care." (*Id.* at p. 276; see also *Thing v. La Chusa* (1989) 48 Cal.3d 644, 668 ["there are clear judicial days on which a court can foresee forever ... but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages"].)

B. ANY CONNECTION BETWEEN MR. O'NEIL'S INJURY AND WARREN'S CONDUCT IS NOT "CLOSE"

While Mr. O'Neil's injury was certain in the sense that he developed mesothelioma as a result of asbestos exposure, its remoteness from any Warren Pumps conduct is equally certain. There is no meaningful "connection between [Warren's] conduct" and the injury (see *Taylor*, 171 Cal.App.4th at pp. 594-595); in between were miles of insulated pipe, years of replacement parts, and a network of Navy system-design decisions.

Moreover, Warren did not manufacture or supply the asbestos-containing products that Mr. O'Neil worked around years after the pumps at issue were sold. Thus, as with the equipment manufacturers in *Taylor* (*id.* at p. 595), Warren was in no position to investigate and warn about the

dangers of later-added or replacement products supplied by third parties and controlled by the Navy.

C. NO MORAL BLAME ATTACHES TO WARREN'S CONDUCT

Manufacturers earn no blame for supplying equipment crucial to the defense of the nation. Aside from the Selective Training and Service Act of 1940 that *required* Warren to fill Navy orders before all others, and the Navy specifications that set the standards by which Warren had to do so, the USS Oriskany simply could not have launched without Warren's products. It should go without saying that assisting the Navy in its defense of the United States – at any time, but especially during a world war – is not blameworthy. But given the persistent negligence claims by these Plaintiffs and others against 1940s military supply efforts, we say it plainly: Warren did nothing *wrong* here.

Specifically with respect to the use of asbestos in those supply efforts: the product sales at issue took place at a time when the War Department compelled American industry to divert all available asbestos textiles to national-defense needs. (Conservation Order M-123, 7 Fed. Reg. 2472 (Mar. 31, 1942).) Warren can bear no blame for having supplied products that used those materials to meet Navy requirements, or for having failed to warn against the use of its pumps with similar replacement parts.

The *Taylor* court noted a related consideration in determining the existence of a legal duty to avoid harm to a plaintiff. Citing *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 473-476, the appellate court considered the *social utility* of a defendant's conduct. (171 Cal.App.4th at p. 593.) It went on to acknowledge the manifest social utility of "provid[ing] parts essential to powering an aircraft carrier that was used to defend the United States during the greatest armed conflict of the 20th century." (*Id.* at p. 596.) This Court should reach the same conclusion.

D. OTHER FACTORS ALSO WEIGH AGAINST RECOGNITION OF A DUTY OF CARE RUNNING FROM WARREN TO PLAINTIFFS

No amount of liability imposed upon Warren in the context of asbestos litigation can "prevent future harm," because Warren no longer uses asbestos in its products. On the contrary, continuous multiplication of liability at this point does nothing but impose a mounting burden on Warren that bears no rational connection to its twenty-first century business.

Moreover, "the consequences to the community of imposing a duty to exercise care with resulting liability for breach" include crushing transaction costs for the continuing support of asbestos litigation in California courts. For years now, our trial courts have burned through jury pools, delayed other civil cases, and devoted countless judicial-management hours to the special and disproportionate demands of asbestos

injury claims. (See, e.g., Hon. J. McBride, San Francisco Superior Court Presiding Judge, remarks at Judicial Forum on Asbestos (June 3, 2009), available at <http://litigationconferences.com/?p=6669> (as of March 8, 2010) ["[I]t is a massively inefficient system"].)

Importantly, this Court has never approved as part of the due-care analysis any considerations of "risk-spreading" or transfer of the costs of injury. It should not do so now, whether expressly or in practical effect.

The traditional factors weigh against recognition of a duty of care running from Warren to Plaintiffs. Accordingly, the Court should reject negligence liability for Warren products on either a design-defect or failure-to-warn theory as a matter of law.

VII.

THE COURT SHOULD DECLINE TO IMPOSE LIABILITY UPON MILITARY EQUIPMENT MANUFACTURERS FOR HARM TO INDIVIDUALS

This Court should be especially reluctant to require equipment manufacturers to answer in tort for harm to individuals alleged to result from equipment sales to the armed forces. Setting aside for present purposes the issue of military contractor immunity (*Boyle v. United Tech. Corp.* (1988) 487 U.S. 500; *Snell v. Bell Helicopter Textron, Inc.* (9th Cir. 1997) 107 F.3d 744), which is not presented on this record, there remain at least three reasons why the Court should, at a minimum, foreclose asbestos product liability in the Navy context.

1. This Court's decision in *Macias v. State of California* (1995) 10 Cal.4th 844, illustrates why the Court should avoid imposing a duty to warn about hazards potentially arising during military use of a product.

In *Macias*, the plaintiffs sued manufacturers of the insecticide malathion, which the State purchased for use in its aerial-spraying campaign to eradicate the Mediterranean fruit fly ("Medfly"). The plaintiffs' son was left blind after he ventured into his front yard during one of the aerial sprays and suffered heavy exposure to malathion. The State warned the general public to cover their cars during malathion spraying, but issued no warnings regarding health hazards posed by exposure to the chemical. (*Id.* at pp. 848-849.) Although it was undisputed that the State knew as much as the defendants about the relevant dangers posed by malathion (*id.* at p. 851), the plaintiffs alleged that the defendants owed a duty to warn the public about those hazards because the defendants knew that the warnings provided by the State were inadequate.

This Court emphatically rejected the imposition of any such duty. The Court explained: "To hold in these circumstances that a private citizen or corporation was compelled, at the risk of potentially substantial civil damages, to interfere with the State's comprehensive efforts to respond to the Medfly emergency would be truly extraordinary." (*Id.* at p.

857.)

What the plaintiffs asked the Court to do, in effect, was to impose a duty on private actors "to judge independently the adequacy of the State's emergency warning protocol and, if found wanting, to undertake a separate public information campaign in direct conflict with that promulgated by the State." (*Id.*) Taking such action would interfere with the State's ability to respond effectively to the Medfly emergency, because if the public had "received urgent notices from defendants stating that malathion posed a substantially different and far more serious health threat than that allowed by the State, the eradication program might have been fatally compromised." (*Id.* at p. 859.)

The same reasoning applies with respect to the private tort duty Plaintiffs will urge this Court to impose in the military context. At trial, Plaintiffs did not contest that the Navy knew at least as much as the Defendants about the relevant hazards posed by asbestos exposure – and the trial court found the Navy knew more. Nevertheless, the Navy for its own reasons did not provide warnings to its sailors or instruct them to take necessary precautions.

It was up to the Navy to judge whether the need for operational efficiency in maintaining combat-ready vessels was more or less important than protecting sailors from long-term health risks by requiring them to take cumbersome precautions when handling asbestos-containing products.

Private commercial entities should have no duty to "judge independently" the adequacy of the Navy's warning protocol for its sailors and, "if found wanting," to undertake a warning campaign of their own "in direct conflict" with the protocol implemented by the Navy.

2. Next, the purpose of requiring adequate warnings on products cannot reasonably be served in the military context. That purpose is "to inform consumers about a product's hazards and faults of which they are unaware, so that the consumer may then either refrain from using the product altogether or avoid the danger by careful use." (*Taylor*, *supra*, 171 Cal.App.4th at p. 577, citing *Johnson*, *supra*, 43 Cal.4th at p. 64; see also *Finn v. G.D. Searle & Co.*, *supra*, at p. 699 [warnings may instruct consumer as to product's proper use or inform consumer of risks or side effects that may follow foreseeable use of the product].)

Assuming without conceding that a Navy officer such as Mr. O'Neil is a "consumer" within the contemplation of California product liability law – as Plaintiffs contend in arguing that Warren should have warned Mr. O'Neil about the risks associated with added and replacement asbestos-containing parts – Plaintiffs presented no evidence suggesting that Mr. O'Neil or anyone else in his position could have "refrained from using the product altogether." That would have amounted to abandonment of duty – in Mr. O'Neil's case, to supervise repairs and maintenance of equipment in the boiler rooms and engine rooms of the Oriskany. (See Op.

at p. 2.) To the contrary, Mr. O'Neil was required, like all Navy personnel (especially but not exclusively in times of war), to do exactly the job the Navy told him to do, in the manner the Navy told him to do it. (Plaintiffs' experts Horn and Lowell: 6 RT 798-799; 7 RT 1098.)

There is likewise no evidence that in the mid-1960s, Mr. O'Neil could have or would have avoided the danger of airborne asbestos fibers through the use of any precautions. None were yet in common use on the Oriskany. (See 11 RT 1911 [no one wore masks or respirators]; 11 RT 1895-1896 [Navy told O'Neil's shipmate nothing about protection from insulation dust]; 6 RT 789-790 [at time Mr. O'Neil served, Navy was not employing precautions that would have reduced his risk].) Given the Navy's failure to implement such measures as part of its shipboard procedure, no juror could reasonably conclude that Mr. O'Neil would have done so had he only seen a warning in a Warren Pumps manual.

3. Finally, Warren's wartime sales of pumps to the U.S. Navy did not place those products "on the market" within the meaning or intent of this Court's strict-liability doctrine. "[T]he courts have refused to hold a defendant strictly liable where the policy justifications are not applicable even if the defendant could be technically viewed as a 'link in the chain' in getting the product to the consumer market." (*Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 774, citing *Peterson, supra*, 10 Cal.4th 1185 [landlords and hotel proprietors not

strictly liable for defective products installed in rented space]; *Tauber-Arons Auctioneers Co. v. Superior Court* (1980) 101 Cal.App.3d 268, 281-282 [secondhand dealer not strictly liable for a defective used product].)

As explained in section IV above, the purpose of strict 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 ... ." (*Greenman, supra*, 59 Cal.2d at p. 63; *Daly, supra*, 20 Cal.3d at p. 733.) But Warren did not place its pumps "on the market" where any of millions of consumers in our "increasingly complex and mechanized society" (*id.* at p. 733) could purchase them in reliance on their safety for normal use. On the contrary, the Warren products at issue here were inaccessible to the commercial market; Warren manufactured these products pursuant to an exacting set of criteria for a single purchaser that held *and exercised* the power to command priority for all such products: the United States Navy.

For this and other reasons, the Ninth Circuit Court of Appeals recognized that military personnel cannot expect the same product protections as civilian users. (*McKay v. Rockwell Int'l Corp.* (9th Cir. 1983) 704 F.2d 444, 452 ["members of the armed forces are not ordinary consumers with respect to military equipment"; their "'reasonable expectations of safety' are much lower than those of the ordinary consumer"].) Strict product liability should not extend to military equipment sold outside the traditional "stream of commerce."

VIII.

CONCLUSION

The expansive application of products liability law posited by Plaintiffs disregards both the public policies this Court has enunciated and fundamental notions of fairness and practicality. The judgment of the Court of Appeal should be reversed, and this Court should direct judgment of nonsuit in favor of Warren Pumps, LLC.

Respectfully submitted,

Dated: March 8, 2010

CARROLL, BURDICK & McDONOUGH LLP

By _____
Laurie J. Hepler
Attorneys for Defendant and Respondent
Warren Pumps LLC

CERTIFICATE OF WORD COUNT

I certify that according to the word count of the computer program used to prepare the foregoing brief, it contains 13,810 words, including footnotes.

CARROLL, BURDICK & McDONOUGH LLP

By 
Laurie J. Hepler

Attorneys for Defendant and Respondent
Warren Pumps, LLC

CBM-SF\SF474066.2

APPENDIX

Selective Training and Service Act of 1940,
Pub. L. No. 76-783, § 9 (Sept. 16, 1940) 54 Stat. 885, 892

Conservation Order M-123,
7 Fed. Reg. 2472 (Mar. 31, 1942)

Soc. of Naval Architects and Marine Engineers,
THE SHIPBUILDING BUSINESS IN THE U.S.A. (1948)
Vol. I, Ch. 3, Tables 8, 45 and 46

***O'Neil* Defense Trial Exhibit 5405:**
a Warren Pumps steam reciprocating / bilge pump.
Identified and admitted into evidence on February 6, 2008.
(See 14 RT 2540-2541; see also 15 RT 2715-2716.) Attached for the Court's reference as an example of the Warren products at issue.

UNITED STATES STATUTES AT LARGE

CONTAINING THE

LAWS AND CONCURRENT RESOLUTIONS
ENACTED DURING THE SECOND AND THIRD SESSIONS OF
THE SEVENTY-SIXTH CONGRESS
OF THE UNITED STATES OF AMERICA

1939–1941

AND

TREATIES, INTERNATIONAL AGREEMENTS OTHER
THAN TREATIES, PROCLAMATIONS, AND
REORGANIZATION PLANS

COMPILED, EDITED, INDEXED, AND PUBLISHED BY AUTHORITY OF LAW
UNDER THE DIRECTION OF THE SECRETARY OF STATE

VOLUME 54

IN TWO PARTS

PART 1

PUBLIC LAWS
AND
REORGANIZATION PLANS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1941

[CHAPTER 720]

AN ACT

To provide for the common defense by increasing the personnel of the armed forces of the United States and providing for its training.

September 16, 1940
[S. 4164]
[Public, No. 783]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the Congress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States.

Selective Training and Service Act of 1940.
Declarations of Congress.

(b) The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service.

(c) The Congress further declares, in accordance with our traditional military policy as expressed in the National Defense Act of 1916, as amended, that it is essential that the strength and organization of the National Guard, as an integral part of the first-line defenses of this Nation, be at all times maintained and assured. To this end, it is the intent of the Congress that whenever the Congress shall determine that troops are needed for the national security in excess of those of the Regular Army and those in active training and service under section 3 (b), the National Guard of the United States, or such part thereof as may be necessary, shall be ordered to active Federal service and continued therein so long as such necessity exists.

39 Stat. 166.

Registration.
Age limits.

SEC. 2. Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of every male alien residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of twenty-one and thirty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner and in such age group or groups, as shall be determined by rules and regulations prescribed hereunder.

Liability for training and service.

SEC. 3. (a) Except as otherwise provided in this Act, every male citizen of the United States, and every male alien residing in the United States who has declared his intention to become such a citizen, between the ages of twenty-one and thirty-six at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States. The President is authorized from time to time, whether or not a state of war exists, to select and induct into the land and naval forces of the United States for training and service, in the manner provided in this Act, such number of men as in his judgment is required for such forces in the national interest: *Provided*, That within the limits of the quota determined under section 4 (b) for the subdivision in which he resides, any person, regardless of race or color, between the ages of eighteen and thirty-six, shall be afforded an oppor-

Number of men to be selected and inducted.

Proviso.
Volunteering for induction.

Employment of members of Communist Party, etc.

(i) It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the service of the United States of an employee pursuant to the provisions of this Act such vacancy shall not be filled by any person who is a member of the Communist Party or the German-American Bund.

Placing of orders for material, etc.

SEC. 9. The President is empowered, through the head of the War Department or the Navy Department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

Compliance obligatory.

Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition or parts of ammunition, or any necessary supplies or equipment for the Army or Navy, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War or the Secretary of the Navy shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War or the Secretary of the Navy, or who shall refuse to furnish such arms, ammunition, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War or the Secretary of the Navy, as the case may be, then, and in either such case, the President, through the head of the War or Navy Departments of the Government, in addition to the present authorized methods of purchase or procurement, is hereby authorized to take immediate possession of any such plant or plants, and through the appropriate branch, bureau, or department of the Army or Navy to manufacture therein such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and a fine not exceeding $50,000.

Precedence over all other orders.

Taking possession of certain manufacturing plants.

Authorization.

Failure to comply.

Penalty.

Compensation for use of plants, etc.

The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just: *Provided*, That nothing herein shall be deemed to render inapplicable existing State or Federal laws concerning the health, safety, security, and employment standards of the employees in such plant.

Proviso.
Employment standards.

FEDERAL REGISTER

VOLUME 7 NUMBER 62

Washington, Tuesday, March 31, 1942

Rules, Regulations, Orders

TITLE 7—AGRICULTURE

Chapter VII—Agricultural Adjustment Agency, Agricultural Conservation and Adjustment Administration

[ACP-1940-17]

PART 701—NATIONAL AGRICULTURAL CONSERVATION PROGRAM

SUBPART B—1940

Pursuant to the authority vested in the Secretary of Agriculture under sections 7 to 17, inclusive, of the Soil Conservation and Domestic Allotment Act, as amended, (49 Stat. 1148, 1915, 50 Stat. 329, 52 Stat. 31, 204, 205, 53 Stat. 550, 573; 16 U.S.C. 1940 ed. 590g to 590q), the 1940 Agricultural Conservation Program, as amended, is hereby further amended as follows:

1. Section 701.104 (a) is amended by adding the following subparagraph and renumbering the present subparagraphs (2) and (3) to be (3) and (4), respectively.

§ 701.104 *Division of payments and deductions*—(a) *Payments and deductions in connection with general soil-depleting crops, crops for which special crop acreage allotments are determined, and restoration land.*

* * * * *

(2) In cases where the landlords, tenants, or sharecroppers have lost their interests in the general soil-depleting crops or any crops for which special crop acreage allotments are determined, after planting but prior to harvest thereof, by reason of the acquisition of title to, or lease of, their farms for use in the national defense program, the net payment or deduction computed with respect to such crops shall be divided among such persons in the same proportion that the county committee determines that such persons would have been entitled, as of the time of harvest, to share in the proceeds of such crops except for such acquisition of title or lease.

2. Section 701.110 (a) (1) is amended to read as follows:

§ 701.110 *General provisions relating to payments*—(a) *Payment restricted to effectuation of purposes of the program.* (1) All or any part of any payment which otherwise would be computed for any person under the 1940 program may be withheld or required to be returned (a) if he adopts or has adopted any practice which the Secretary determines tends to defeat any of the purposes of the 1940 or previous agricultural conservation programs, (b) if, by means of any corporation, partnership, estate, trust, or any other device, or in any manner whatsoever, he has offset, or has participated in offsetting, in whole or in part, the performance for which such payment is otherwise authorized, or (c) if, with respect to forest land or woodland owned or controlled by him, he adopts or has adopted any practice which the Agricultural Adjustment Agency of the Agricultural Conservation and Adjustment Administration finds is contrary to sound conservation practices.

3. Section 701.111 (a), item (1), is amended to read as follows:

§ 701.111 *Application for payment*—(a) *Persons eligible to file applications.* * * *

(1) who at the time of its harvest is entitled to share in any of the crops grown on the farm under a lease or operating agreement, or who is a landlord, tenant, or sharecropper who lost his interest in the general soil-depleting crops or any crops for which special crop acreage allotments are determined, after planting but prior to harvest thereof, by reason of the acquisition of title to, or lease of, the farm for use in the national defense program and who did not otherwise receive full compensation for the amount of the payments in connection with such acquisition of title or lease, or

4. Section 701.111 (b), the first sentence is amended as follows:

CONTENTS

RULES, REGULATIONS, ORDERS

(Continued on next page)

ance therewith would work an exceptional and unreasonable hardship upon him, that it would result in a serious problem of unemployment in the community, or that compliance with this Order would disrupt or impair a program of conversion from non-defense to defense work may appeal to the "War Production Board, Washington, D. C., Ref.: L-81", setting forth the pertinent facts and the reasons such person considers that he is entitled to relief. The Director of Industry Operations may thereupon take such action as he deems appropriate.

(h) *Communication to War Production Board.* All reports required to be filed hereunder and all communications concerning this Order shall, unless otherwise directed, be addressed to: War Production Board, Washington, D. C. Ref.: L-81.

(i) *Applicability of other Orders.* Insofar as any other order issued by the Director of Priorities or Director of Industry Operations, or to be issued hereafter by the Director of Industry Operations, limits the use of any material in the production of toys to a greater extent than the limits imposed by this Order, the restrictions in such other order shall govern unless otherwise specified therein.

(j) *Applicability of Priorities Regulation No. 1.* This Order and all transactions affected thereby are subject to the provisions of Priorities Regulation No. 1 (Part 944), as amended from time to time, except to the extent that any provisions hereof may be inconsistent therewith, in which case the provisions of this Order shall govern.

(k) *Effective date.* This Order shall take effect on April 1, 1942. (P.D. Reg. 1 as amended, 6 F.R. 6680; W.P.B. Reg. 1, 7 F.R. 561, E.O. 9024, 7 F.R. 329; E.O. 9040, 7 F.R. 527; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Law 89, 77th Cong.)

Issued this 30th day of March 1942.

J. S. KNOWLSON,
Director of Industry Operations.

[R. F. Doc. 42-2795; Filed, March 30, 1942; 11:36 a. m.]

PART 1172—ASBESTOS TEXTILES

CONSERVATION ORDER M-123

The fulfillment of requirements for the defense of the United States has created a shortage in the supply of Asbestos Textiles for defense, for private account and for export; and the following Order is deemed necessary and appropriate in the public interest and to promote the national defense:

§ 1172.1 *Conservation Order M-123.* (a) Unless otherwise specifically authorized by the Director of Industry Operations, after April 4, 1942, no manufacturer of Asbestos Textiles shall deliver Asbestos Textiles except

(1) For use in the manufacture of industrial packings or

(2) On orders bearing a preference rating of A-10 or higher.

(b) *Applicability of Priorities Regulation No. 1.* This Order and all transactions affected hereby are subject to the provisions of Priorities Regulation No. 1 (Part 944), as amended from time to time, except to the extent that any provision hereof may be inconsistent therewith, in which case the provisions of this Order shall govern.

(c) *Appeals.* Any person affected by this Order who considers that compliance herewith would work an exceptional and unreasonable hardship upon him may appeal to the War Production Board, setting forth the pertinent facts and the reasons such person considers that he is entitled to relief. The Director of Industry Operations may thereupon take such action as he deems appropriate.

(d) *Communications.* All communications concerning this Order, shall, unless otherwise directed, be addressed to:

War Production Board, Washington, D. C. Ref: M-123.

(e) *Violations.* Any person who wilfully violates any provision of this Order, or who by any act or omission falsifies records to be kept or information to be furnished pursuant to this Order may be prohibited from receiving further deliveries of any material subject to allocation, and such further action may be taken as is deemed appropriate, including a recommendation for prosecution under section 35 (A) of the Criminal Code (18 U.S.C. 80).

(f) *Effective date.* This Order shall take effect immediately. (P.D. Reg. 1, as amended, 6 F.R. 6680; W.P.B. Reg. 1, 7 F.R. 561, E.O. 9024, 7 F.R. 329; E.O. 9040, 7 F.R. 527; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Law 89, 77th Cong.)

Issued this 30th day of March 1942.

J. S. KNOWLSON,
Director of Industry Operations.

[F. R. Doc. 42-2787; Filed, March 30, 1942; 11:31 a. m.]

PART 1173—RUBBER YARN AND ELASTIC THREAD

CONSERVATION ORDER NO. M-124

The fulfillment of requirements for the defense of the United States has created a shortage in the supply of rubber for defense, for private account and for export; and the following Order is deemed necessary and appropriate in the public interest and to promote the national defense:

§ 1173.1 *Conservation Order No. M-124.*—(a) *Definitions.* For the purpose of this Order:

(1) "Person" means any individual, partnership, association, business trust, corporation, governmental corporation or agency, or any organized group of persons whether incorporated or not.

(b) *Restrictions on sales and deliveries.* Except as specifically authorized by the Director of Industry Operations, no Person shall, during the period beginning at 12:01 o'clock A. M. on March 29, 1942 and ending at 12:01 o'clock A. M. on April 30,

THE SHIPBUILDING BUSINESS IN THE UNITED STATES OF AMERICA

VOLUME I

Written by a Group of Authorities

Editor

PROFESSOR F. G. FASSETT, JR.
Carnegie Institution of Washington

Published by

THE SOCIETY OF NAVAL ARCHITECTS AND MARINE ENGINEERS
29 WEST 39TH STREET, NEW YORK 18, N. Y.
1948

longer than on the seaboard, so that the demand for new Lake tonnage is controlled more by other conditions, such as additional business, improved design and deeper channels and harbors than by obsolescence, which is a much less important factor than in the case of seagoing vessels.

The first American ship on the Lakes was built at Erie, Pa., in 1797. The first steam-propelled vessel was built on Lake Ontario at Oswego, N. Y., in 1816. The *Vandalia,* launched in 1841, was the first Lake steamer fitted with a propeller. Previous to that time all Lake steamers were of the side-wheel type. By 1850 there were fifty propeller-driven vessels aggregating 13,247 gross tons. Motor vessels appeared in 1897, all of them of small size as their total number in 1915 was only 773, with a gross tonnage of only 9,902. Previous to 1881 the average steamer was but a little over 200 gross tons. In that year several vessels were built averaging about 450 gross tons.[3]

Supplemental Statistics on Merchant Shipbuilding. While the foregoing tables show shipbuilding by years throughout our life as a nation, there is much more statistical information available for recent years than in the earlier years of our history. Of particular interest is the shipbuilding history of the United States from the outbreak of World War I to the end of World War II. Statistics for this era are recorded in the tables that follow. Shipbuilding in the United States during both world wars has not been equalled by any other nation at any time in the world's history.

Table 8 shows by gross tonnage and numbers

[3] Corps of Engineers, U. S. Army.

TABLE 8.—TABLE SHOWING GROSS TONNAGE AND NUMBERS OF STEEL SELF-PROPELLED MERCHANT VESSELS, BY GEOGRAPHICAL REGIONS, BUILT IN THE PRIVATE SHIPYARDS OF THE UNITED STATES AND DELIVERED IN THE YEARS INDICATED BELOW

(Includes only vessels of 2,000 gross tons and over)

Year	East Coast		Great Lakes and Rivers		Gulf Coast		Pacific Coast		Total U. S.	
	No.	Gross tons	No.	Gross tons	No.	Gross tons	No.	Gross tons	No.	Gross tons
1914	15	83,495	7	34,833	...	.....	2	12,131	24	130,459
1915	18	101,443	2	4,614	...	.....	3	14,837	23	120,894
1916	35	194,248	21	82,656	...	.....	11	72,584	67	349,488
1917	45	272,422	47	178,918	...	.....	28	177,955	120	629,295
1918	104	531,396	136	316,422	...	.....	146	824,144	386	1,671,962
1919	327	1,686,236	175	445,442	7	32,760	171	1,025,850	680	3,190,288
1920	246	1,287,524	53	139,674	31	165,084	120	720,376	450	2,312,658
1921	73	590,470	1	2,677	15	90,550	49	354,000	138	1,037,697
1922	12	115,107	3	22,600	1	7,953	2	18,148	18	163,808
1923	8	44,802	9	67,235	...	.....	2	12,947	19	124,984
1924	5	26,892	6	49,424	...	.....	1	7,286	12	83,602
1925	4	25,647	7	55,365	...	.....	...	.....	11	81,012
1926	6	37,741	2	16,302	...	.....	...	.....	8	54,043
1927	10	81,764	9	73,179	...	.....	...	.....	19	154,943
1928	4	61,728	...	.....	...	.....	1	3,092	5	64,820
1929	4	38,444	2	15,863	...	.....	1	3,088	7	57,395
1930	15	143,244	1	7,964	...	.....	...	.....	16	151,208
1931	14	150,949	...	.....	...	.....	...	.....	14	150,949
1932	15	145,470	...	.....	...	.....	...	.....	15	145,470
1933	4	49,527	...	.....	...	.....	...	.....	4	49,527
1934	2	9,544	...	.....	...	.....	...	.....	2	9,544
1935	2	19,022	...	.....	...	.....	...	.....	2	19,022
1936	8	63,428	...	.....	...	.....	...	.....	8	63,428
1937	14	116,409	1	5,443	...	.....	...	.....	15	121,852
1938	20	148,294	6	37,364	...	.....	...	.....	26	185,658
1939	28	241,052	...	.....	...	.....	...	.....	28	241,052
1940	46	398,957	1	2,345	4	27,879	2	15,546	53	444,727
1941	63	519,279	1	7,416	5	42,320	26	180,090	95	749,105
1942	259	2,024,189	5	51,470	97	689,004	363	2,628,290	724	5,392,953
1943	571	4,448,969	23	166,925	231	1,718,102	836	6,165,877	1,661	12,499,873
1944	572	4,554,399	28	106,540	287	2,164,248	576	4,579,217	1,463	11,404,404
1945	324	2,533,495	57	210,810	298	1,710,960	388	3,208,097	1,067	7,663,362
32 yrs.	2,873	20,745,586	603	2,101,481	976	6,648,860	2,728	20,023,555	7,180	49,519,482

Shipbuilders Council of America, 21 West Street, New York 6, N. Y.

TABLE 45.—TABLE SHOWING THE NUMBER AND DISPLACEMENT TONNAGE OF STEEL COMBATANT NAVAL VESSELS BUILT IN THE SHIPYARDS OF THE UNITED STATES AND DELIVERED IN THE YEARS INDICATED BELOW BY GEOGRAPHICAL REGIONS

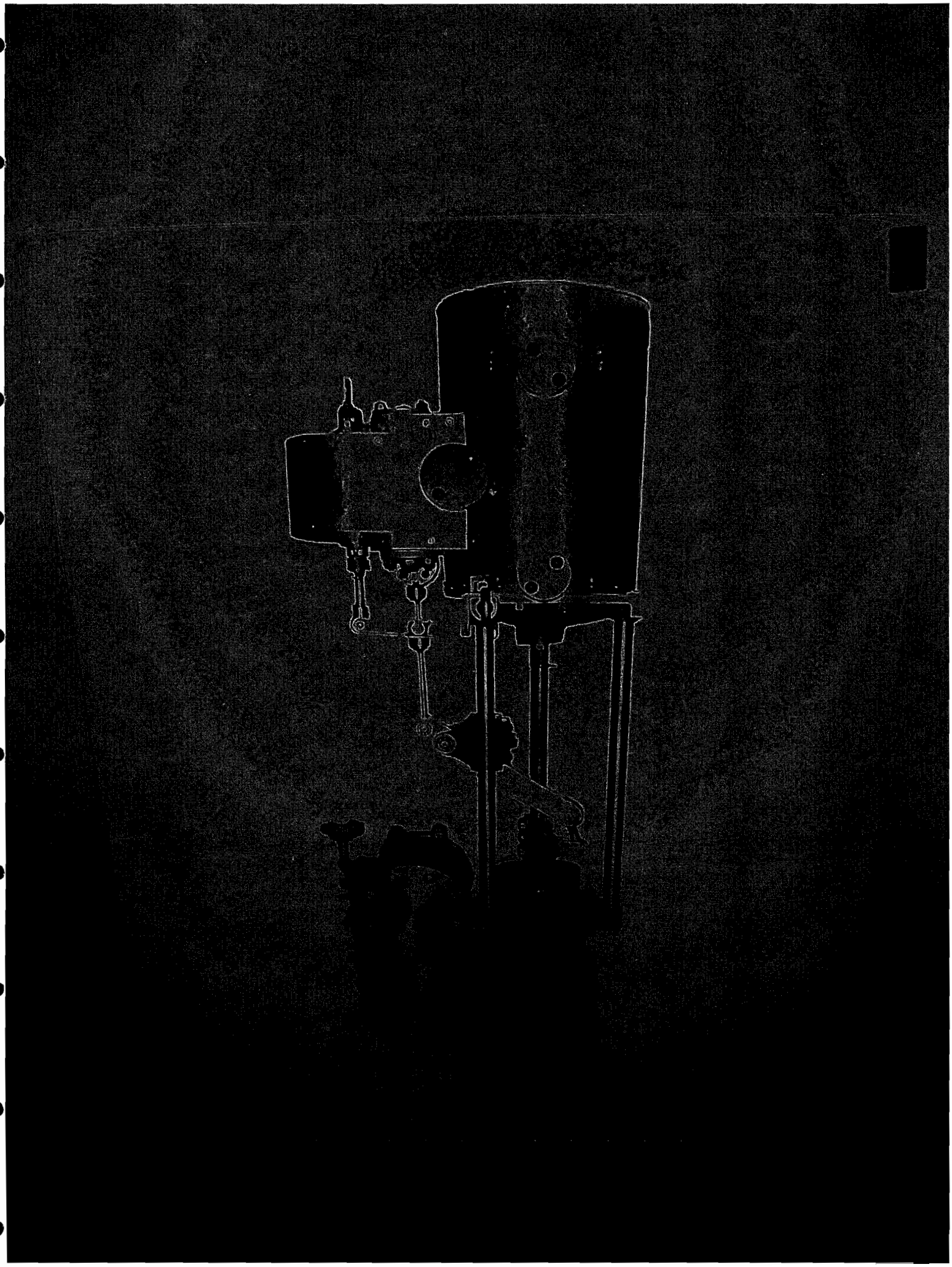
Year delivered	Built in Private Shipyards								Built in Navy Yards						Combined total	
	East Coast		West Coast		Gulf and Inland		Total		East Coast		West Coast		Total			
	No.	Tons	No.	Tons	No.	Tons	No.	Tons	No.	Tons	No.	Tons	No.	Tons	No.	Tons
1914	12	35,695	3	1,176	..	.....	15	36,871	1	27,000	2	408	3	27,408	18	64,279
1915	..	.....	..	.....	..	.....	..	.....	7	8,135	..	.....	7	8,135	7	8,135
1916	19	100,405	..	.....	..	.....	19	100,405	1	31,400	..	.....	1	31,400	20	131,805
1917	4	35,610	4	1,494	..	.....	8	37,104	1	676	2	2,411	3	3,087	11	40,191
1918	55	55,723	19	15,950	..	.....	74	71,673	3	33,707	12	8,902	15	42,609	89	114,282
1919	110	156,603	18	22,509	..	.....	128	179,112	5	5,493	..	.....	5	5,493	133	184,605
1920	55	69,823	26	32,796	..	.....	81	102,619	9	41,488	..	.....	9	41,488	90	144,107
1921	12	45,216	17	22,236	..	.....	29	67,452	4	35,731	2	2,616	6	38,347	35	105,799
1922	6	5,826	1	854	..	.....	7	6,680	1	876	3	3,924	4	4,800	11	11,480
1923	14	111,400	9	7,200	..	.....	23	118,600	4	3,640	..	.....	4	3,640	27	122,240
1924	9	25,950	1	800	..	.....	10	26,750	1	2,000	..	.....	1	2,000	11	28,750
1925	5	10,250	..	.....	..	.....	5	10,250	1	2,000	..	.....	1	2,000	6	12,250
1926	..	.....	..	.....	..	.....	..	.....	1	2,000	..	.....	1	2,000	1	2,000
1927	2	66,000	..	.....	.	.....	2	66,000	..	.....	..	.....	..	.....	2	66,000
1928	..	.....	..	.....	..	.....	..	.....	1	2,710	..	.....	1	2,710	1	2,710
1929	1	10,000	..	.....	..	.....	1	10,000	..	.....	..	.....	..	.....	1	10,000
1930	3	30,000	..	.....	..	.....	3	30,000	2	12,730	1	2,730	3	15,460	6	45,460
1931	1	10,000	..	.....	..	.....	1	10,000	..	.....	2	20,000	2	20,000	3	30,000
1932	1	10,000	..	.....	..	.....	1	10,000	1	1,540	..	.....	1	1,540	2	11,540
1933	1	10,000	..	.....	..	.....	1	10,000	1	1,110	..	.....	1	1,110	2	11,110
1934	5	27,900	..	.....	..	.....	5	27,900	2	20,000	2	20,000	4	40,000	9	67,900
1935	..	.....	..	.....	..	.....	..	.....	7	9,950	1	1,410	8	11,360	8	11,360
1936	17	35,920	..	.....	..	.....	17	35,920	2	4,000	3	4,430	5	8,430	22	44,350
1937	10	42,360	..	.....	..	.....	10	42,360	12	26,610	5	7,330	17	33,940	27	76,300
1938	11	69,900	2	3,000	..	.....	13	72,900	6	25,800	1	1,450	7	27,250	20	100,150
1939	16	32,600	..	.....	..	.....	16	32,600	9	30,060	2	2,950	11	33,010	27	65,610
1940	12	31,705	..	.....	..	.....	12	31,705	14	21,060	1	1,630	15	22,690	27	54,395
1941	15	45,915	..	.....	..	.....	15	45,915	13	87,360	3	4,555	16	91,915	31	137,830
1942	75	310,015	14	22,820	5	9,925	94	342,760	29	80,685	6	9,150	35	89,835	129	432,595
1943	206	622,425	60	112,095	121	148,950	387	883,470	119	253,790	39	48,050	158	301,840	545	1,185,310
1944	175	527,050	65	106,645	147	175,610	387	809,305	66	258,750	16	25,805	82	284,555	469	1,093,860
1945	87	345,835	17	41,200	40	65,580	144	456,615	31	189,105	3	5,725	34	194,830	178	651,445
Totals	939	2,880,126	256	390,775	313	404,065	1,508	3,674,966	354	1,219,406	106	173,476	460	1,392,882	1,968	5,067,848

Source: Shipbuilders Council of America, 21 West Street, New York 6, N. Y.

TABLE 46.—TABLE SHOWING THE NUMBER AND DISPLACEMENT TONNAGE OF STEEL AUXILIARY NAVAL VESSELS BUILT IN THE SHIPYARDS OF THE UNITED STATES AND DELIVERED IN THE YEARS INDICATED BELOW BY GEOGRAPHICAL REGIONS

Year delivered	Built in Private Shipyards								Built in Navy Yards						Combined total	
	East Coast		Gulf and Inland		West Coast		Total		East Coast		West Coast		Total			
	No.	Tons	No.	Tons	No.	Tons	No.	Tons	No.	Tons	No.	Tons	No.	Tons	No.	Tons
1914	1	1,408	..	.....	..	.....	1	1,408	..	.....	..	.....	..	.....	1	1,408
1915	1	7,150	..	.....	1	3,580	2	10,730	..	.....	1	14,500	1	14,500	3	25,230
1916	..	.....	..	.....	..	.....	..	.....	..	.....	2	29,000	2	29,000	2	29,000
1917	2	7,600	..	.....	..	.....	2	7,600	2	15,000	1	14,500	3	29,500	5	37,100
1918	2	19,470	1	3,850	..	.....	3	23,320	..	.....	..	.....	..	.....	3	23,320
1919	..	.....	..	.....	..	.....	..	.....	1	14,800	..	.....	1	14,800	1	14,800
1920	..	.....	..	.....	..	.....	..	.....	1	14,800	1	11,058	2	25,858	2	25,858
1921	..	.....	..	.....	2	27,850	2	27,850	2	28,725	1	10,600	3	39,325	5	67,175
1922	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....
1923	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....
1924	..	.....	..	.....	..	.....	..	.....	2	21,200	1	10,000	3	31,200	3	31,200
1925	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....
1926	..	.....	..	.....	..	.....	..	.....	..	.....	1	10,600	1	10,600	1	10,600
1927	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....
1928	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....
1929	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....
1930	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....
1931	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....
1932	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....
1933	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....
1934	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....
1935	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....
1936	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....
1937	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....
1938	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....
1939	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....	..	.....
1940	4	36,500	..	.....	..	.....	4	36,500	..	.....	..	.....	..	.....	4	36,500
1941	1	9,180	..	.....	..	.....	1	9,180	..	.....	3	12,640	3	12,640	4	21,820
1942	..	.....	..	.....	10	93,765	10	93,765	3	9,300	3	12,390	6	21,690	16	115,455
1943	..	.....	1	5,220	61	386,545	62	391,765	..	.....	1	9,000	1	9,000	63	400,765
1944	..	.....	10	63,696	59	329,431	69	393,127	1	8,300	1	9,000	2	17,300	71	410,427
1945	..	.....	2	11,220	22	162,902	24	174,122	..	.....	1	8,680	1	8,680	25	182,802
Totals	11	81,308	14	83,986	155	1,004,073	180	1,169,367	12	112,125	17	151,968	29	264,093	209	1,433,460

Source: Shipbuilders Council of America, 21 West Street, New York 6, N. Y.



Barbara J. O'Neil, et al. v. Buffalo Pumps, Inc., et al.
Supreme Court of California, Action No. S177401
California Court of Appeal, Second Appellate District,
Div.5, Action No. B208225

PROOF OF SERVICE BY MAIL

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On March 9, 2010 I served the enclosed:

WARREN PUMPS, LLC'S OPENING BRIEF

on the following interested party(s) in said cause:

Paul C. Cook, Esq. Michael B. Gurien, Esq. Waters & Kraus, LLP 222 North Sepulveda Blvd., Suite 1900 El Segundo, CA 90245 (310) 414-8146 Fax: (310) 414-8156	Attorneys for Plaintiffs/Appellants Barbara J. O'Neil, Individually and as successor in interest to Patrick J. O'Neil, Deceased; and Michael P. O'Neil and Regan K. Schneider
Jeffrey I. Ehrlich The Ehrlich Law Firm 411 Harvard Avenue Claremont, CA 91711 (909) 625-5565 Fax: (909) 625-5477	Attorneys for Plaintiffs/Appellants Barbara J. O'Neil, Individually and as successor in interest to Patrick J. O'Neil, Deceased; and Michael P. O'Neil and Regan K. Schneider
Nicholas P. Vari K&L Gates LLP 535 Smithfield Street Pittsburgh, Pennsylvania 15222-2312 (412) 355-6500 Fax (412) 355-6501	Attorneys for Defendant/Respondent Crane Co.
Raymond L. Gill, Esq. K&L Gates LLP 55 Second Street, Suite 1700 San Francisco, CA 94105 (415) 882-8200 Fax (415) 882-8220	Attorneys for Defendant/Respondent Crane Co.

David M. Axelrad
Curt Cutting
Horwitz & Levy LLP
15760 Ventura Blvd., 18th Floor
Encino, CA 91436-3000
(818) 995-0800
Fax (818) 995-3157

Attorneys for
Defendant and Respondent Crane Co.

Court of Appeal
Second Appellate District, Div. 5
Attn: Clerk of Court
300 S. Spring Street, 2nd Fl., N. Tower
Los Angeles, CA 90013

1 Copy

Via Mail by enclosing a true and correct copy thereof in a sealed envelope and, following ordinary business practices, said envelope was placed for mailing and collection in the offices of Carroll, Burdick & McDonough LLP in the appropriate place for mail collected for deposit with the United States Postal Service. I am readily familiar with the Firm's practice for collection and processing of correspondence/documents for mailing with the United States Postal Service; they are deposited with the United States Postal Service in the ordinary course of business on the same day.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on March 9, 2010 at San Francisco, California.

Stephanie Ferrell