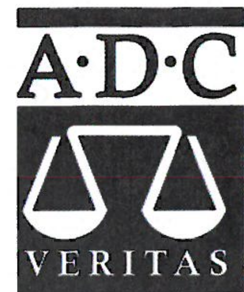

Association of Defense Counsel of Northern California and Nevada

ASCDC
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

September 4, 2015

AMICUS LETTER IN SUPPORT OF REVIEW
(California Rules of Court, rule 8.500(g)(1))

VIA FEDERAL EXPRESS

Honorable Tani G. Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
CALIFORNIA SUPREME COURT
350 McAllister Street
San Francisco, California 94102

Re: *Sherman v. Hennessy Industries*, No. S2280877

We write on behalf of the Association of Southern California Defense Counsel, as well as the Association of Defense Counsel of Northern California and Nevada, to urge this Court to grant review in this case.

Interest of Amicus

The Associations are among the nation's largest and preeminent regional organizations of lawyers who routinely defend civil actions. They are comprised of more than 1,800 leading civil litigation defense attorneys in Southern California and Northern California. The Associations are active in assisting courts on issues of interest to its members, having appeared numerous times as amicus curiae in this Court and the Courts of Appeal. They also provide its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multi-faceted support, including a forum for the exchange of information and ideas.

The Associations' members regularly defend civil cases in which product liability claims are asserted, including for alleged asbestos exposures as in *Sherman*. They are concerned that clear, even-handed rules must apply to such cases. And, its members have a similarly deep concern that their clients are not exposed to potentially unending liability—which is a serious threat here when the Court of Appeal held that a manufacturer of a product that did not contain asbestos can be held liable for injuries caused by using it with asbestos-containing brake-linings that were designed, manufactured and sold by others. As other courts hold in refusing to impose such

potentially ruinous liability, these concerns and recurring issues apply far beyond the hundreds of asbestos cases that are filed each year in California, which underscores the need for this Court to grant review.

For many reasons that are discussed below, the Associations support the Petition and respectfully request this Court to grant review of all issues presented.

No party has paid for or drafted this letter.

Why Review Should Be Granted

Conflict Among Appellate Courts On Issues Of Widespread Importance: As the Petition discusses, there is a conflict among the Courts of Appeal concerning the same brake-grinder exposure claim asserted in *Sherman*, as well as the broader issue that can apply to virtually every product: Whether a manufacturer can be subject to a product liability claim for harm caused by another product that is used with the defendant's product. (See Petition, Issue No. 1, and pages 7-13.)

Plaintiffs' Answer Brief notably does not mention and hence does not deny that the following cases demonstrate that there is a split among the appellate courts concerning the very claim involved in the present case: *Sanchez v. Hitachi Koki, Co.* (2013) 217 Cal.App.4th 948 [manufacturer of a grinding machine had no liability for a defective blade manufactured by a third party, which was used with the grinding machine and injured the plaintiff] and *Barker v. Hennessy Industries, Inc.* (2012) 206 Cal.App.4th 140, 141 Cal.Rptr.3d 616 (depublished) [manufacturer of a brake-grinding machine was not liable for asbestos exposures and injuries caused by asbestos-containing brake-linings used with the same machine involved in *Sherman*.].)[1]

Sherman also conflicts with many other appellate decisions, including *Garman v. Magic Chef, Inc.* (1981) 117 Cal.App.3d 634, 638 ["The use of any product can be said to involve some risk because of the circumstances surrounding even its normal use. Nonetheless, the makers of such products are not liable under any theory, for merely failing to warn of injury which may befall a person who uses that product in an unsafe place or in conjunction with another product which because of a defect or improper use is itself unsafe."]; *Taylor v. Elliott Turbomachinery Co.* (2009) 171 Cal.App.4th 564, 579

[1] *Barker* and another unpublished decision cited *infra* are referenced to illustrate the disunity and conflict among the appellate courts, which supports review to "secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500 (b)(1).) They are not cited for precedential value.

["*Peterson* and *Cadlo* make clear that respondents cannot be strictly liable for failing to warn of the dangers inherent in the asbestos-containing materials that were used with their [valve] products. Respondents were not part of the 'chain of distribution' of the gaskets, packing, discs, and insulation that Mr. Taylor encountered"]; and *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 361 ["California law does not impose a duty to warn about dangers arising entirely from another manufacturer's product, even if it is foreseeable that the products will be used together. Were it otherwise, manufacturers of the saws used to cut insulation would become the next targets of asbestos lawsuits."].

Unlike *Sherman*, the appellate courts in *Sanchez* and *Barker* applied the principles set forth in *O'Neil, Taylor, Garman* and other cases discussed in the Petition, to hold the grinding machine manufacturers were not liable for injuries caused by using those products with brake-linings and a saw blade that were manufactured and sold by other companies. Recognizing the broad impact of imposing liability, the Court of Appeal in *Barker* stated: "In sum, the relevant policy considerations weigh heavily against the imposition of a duty ...***California law has never imposed a duty of care on a manufacturer to prevent harm that may result from every other product with which its product might foreseeably be used.***" (141 Cal.Rptr.3d at 631-32; emphasis added.) But now *Sherman* does what California law has never allowed.

Before the current split created by cases like *Sherman,* the First Appellate District affirmed an order granting summary judgment to a grinding wheel manufacturer for asbestos exposures caused by using the wheel to cut asbestos-containing pipe. (*Cullen v. Indus. Holdings Corp.,* 2002 WL 31630885, at *7.) The Court recognized that the same issues presented here involve important public policy concerns, which warrant review:

> "The social consequences of a rule imposing a duty in these circumstances would be to widen the scope of potential liability for failure to warn far beyond persons in the distribution chain of the defective product to whole new classes of defendants whose safe products happen to be used in conjunction with a defective product made or sold by others. ***Manufacturers, distributors, and retailers would incur potential liabilities not only for the products they make and sell, but also for every other product with which their product might be used.*** As but one example, IHC points out that makers of cigarette lighters, matches, and other products associated with

> cigarette smoking, would thereby become liable for smoking-related injuries. The same policy considerations that militate against extending strict liability to actors outside the defective product's direct distribution chain (see *Peterson v. Superior Court, supra*, 10 Cal.4th at pp. 1198-1200, 43 Cal.Rptr.2d 836, 899 P.2d 905), also counsel against so extending liability for negligent failure to warn." (2002 WL 31630885, at *7; emphasis added.)

The Issues Involve Potentially Ruinous Liability: Even if one just considers the vast numbers of asbestos products that were manufactured over the past fifty years and the hundreds of asbestos cases filed each year in California, the *Sherman* Court's holding will be disastrous for companies who have manufactured and sold products in California.

Asbestos had significant "commercial utility" due to its "tensile strength, durability, flexibility, and resistance to heat, wear, and corrosion." (*Mullen v. Armstrong World Indus., Inc.* (1988) 200 Cal.App.3d 250, 255.) As a result, asbestos figured prominently "in commercial production for more than a century," in which "[o]ver 3,000 separate uses of asbestos have been identified." (*Id.)*[2] These thousands of asbestos-containing products alone highlight the far-reaching impact that *Sherman* will have because it subjects countless manufacturers to liability if their non-asbestos products are used with those that did contain asbestos.

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[2] As *Mullen* noted, the products that contained asbestos included "floor tile; gaskets and packing; friction products; paints; coatings; sealants; plastics; asbestos-cement pipe; asbestos textiles; asbestos paper; [] asbestos-cement sheet...flooring; valve, flange, and pump sealants; clutch, transmission, and brake components; industrial friction materials; automobile coatings; roof coating and patch; electric motor components; piping; conduits for electric wires; packaging components; gasket components; heat and fireproof clothing; insulation for wiring; theater curtains; fireproof drapery; table pads and heat protective mats; molten glass handling equipment; insulation products; filters for beverages; appliance insulation; hood vents for corrosive materials; electric switchboards; miscellaneous building materials; appliance components; [] cooling tower components....piping; decorative building panels; plaster and stucco; molded plastics; acoustical products; asphalt paving; caulking; motor armatures; paints; welding materials; drip cloths; fire doors; car components; oven and stove insulation; siding; shingles; floor tiles; chemical tanks; fire hoses; garments; gloves; filter media; boiler insulation; furniture; motion picture screens; roofing; rugs; wallboard; acoustical ceiling materials; insulation; electrical switches; hair dryers; clothes dryers; toasters; humidifiers; and toothbrushes." (200 Cal.App.3d at 257, fn.7.)

This involves potentially ruinous liability, even if considered solely in the context of asbestos-litigation—which has been described as an "elephantine mass" and "crisis." (*Ortiz v. Fibreboard Corp.* (1999) 527 U.S. 815, 821; *Amchem v. Windsor* (1991) 521 U.S. 591, 597) It has already driven scores of companies that employed thousands of people into bankruptcy.[3] "With each bankruptcy the remaining defendants come under greater financial strain," and "the funds available for compensation become closer to exhaustion." (*Norfolk & Western Ry. v. Ayers* (2003) 538 U.S. 135, 169.)

For many years, it has been recognized that the "California courts are already overburdened with asbestos litigation." (*Hansen v. Owens-Corning Fiberglas Corp.* (1996) 51 Cal.App.4th 753, 760.) A 2010 publication by the Administrative Office of the California Courts noted that asbestos-litigation is the "longest running and costliest mass-tort in U.S. history." It also estimated that, over the next three decades, 1.7 to 2.6 million asbestos-cases will continue to be filed, which involve "unique and substantial burdens." (See DataPoints, *Improving Asbestos Case Management In The Superior Court of San Francisco*, pp. 1-3, November 2010, AOC Office Of Court Research.)[4]

When the impact of the *Sherman* Court's holding is considered in a broader context, involving *all* products that could be used with another injury-producing product, the enormity of its impact is undeniable and staggering. Just looking around at any grocery store, auto-parts store and toy store will reveal many products that can foreseeably be used with another product manufactured by a different company, which could cause an injury when used together.

For example, consider a glass-cleaning solution that is manufactured by Company A, which is sold in the same store as a pair of eye-glasses manufactured by Company B. The eye-glass lens is made of a special plastic that enhances night-vision and is required to be cleaned with a special solution that contains acidic qualities. Company A's solution is designed to clean Company B's eye-glasses. A person uses both products together over a two year period. Unfortunately, the chemicals in Company A's glass-cleaning solution cause a serious eye injury. Because the two products were used together and the eye-glass manufacturer "indirectly derived economic benefit from their sale" (Opinion, p. 19), a

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[3] In *Haver v. BNSF Ry. Co.* (2014) 226 Cal.App.4th 1104, 1110, which is currently under review by this Court, the Second Appellate District acknowledged the financially devastating impact of asbestos-litigation, which all courts should be "wary of" when considering the consequences of extending liability "too far, especially when asbestos litigation has already rendered almost one hundred corporations bankrupt."

[4] This article can be obtained at www.courts.ca.gov/documents/asbestos-final1112.pdf.)

plaintiff attorney would likely use *Sherman* to sue both companies. And, no doubt, the eye-glass manufacturer would be the target if the company who manufactured the injury-producing solution was bankrupt or had limited assets.

The same situation and potential lawsuit could occur with countless products that can be and are used together every day. The Petition and this letter brief discuss numerous authorities that should preclude liability for injuries caused by another manufacturer's product. However, the *Sherman* Court refused to follow these authorities, opening the door to a new wave of product liability cases—in which companies can be sued because their products are used with another product that caused a plaintiff's injury. This Court should grant review of the far-reaching and critically important issues presented in this case, which impact virtually every manufacturer and retailer who sells products that can be used in conjunction with others.

The "Indirect Economic Benefit" Rule Would Open The Flood-Gates: The *Sherman* Court stated the following to support imposing liability on Hennessy for asbestos exposures from brake-linings that it did not manufacture or sell:

> "Because the manufacturer's tool was useable only with certain other products, it ***indirectly derived economic benefit*** from their sale. Accordingly, as the combined use of the tool with those products inevitably created a hazardous condition, it was ***fair to require the tool manufacturer to share liability*** for the resulting injuries." (Opinion, p. 18-19.)

Plaintiffs' Answer Brief tries to downplay the significance of this statement by arguing that it is not a legal rule that other courts must follow, but rather just a discussion of "the policy rationale underlying the *Tellez-Cordova* exception." (Answer Brief, p. 30.) Of course, when future arguments are made to trial courts, it is doubtful that plaintiffs will downplay the significance of this statement or say that it can be disregarded. Rather, they will likely seize upon it to advance claims of liability.

Regardless, the statement above is wrong and unsupported. Notably, the *Sherman* Court did not cite any page from *Tellez-Cordova* or any other case to support the proposition that companies may be held strictly liable because they "indirectly derived economic benefit" from the sale of another product. Neither does Plaintiffs' Answer Brief. The reason for this omission is clear: This purported rule or rationale was not set forth in *Tellez-Cordova* or any other case. To the Associations' knowledge, from

conducting Westlaw searches with this language, no other California appellate court has ever stated that this is a proper basis to impose liability on a manufacturer.

Moreover, this new "indirect economic benefit" theory conflicts with principles set forth by this Court. In *O'Neil*, 53 Cal.4th at 349, when discussing its earlier decision in *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, this Court instructed that, "although many potentially defective products are used" on a company's premises or with their products, "the mere circumstance that it was contemplated customers of these businesses would use the products ***or be benefited by them*** does not transform the owners of the businesses into the equivalent of retailers of the products." (*O'Neil*, 53 Cal.4th at 349, citing *Peterson*, 10 Cal.4th at 1199-1200; emphasis added.) Contrary to premising liability on indirectly deriving an economic benefit from another company's product, this Court "stressed that strict products liability should be imposed only on those entities responsible for placing a defective product into the stream of commerce." (*O'Neil*, 53 Cal.4th at 349, citing *Peterson*, 10 Cal.4th at 1198–99.)

Because the doctrine of *stare decisis* requires trial courts to follow all decisions by the Courts of Appeal (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), there is a serious risk that plaintiffs will now cite *Sherman* to impose liability under an "indirect economic benefit" theory. This is no small matter, as one could argue that many manufacturers derive an indirect economic benefit from the sale of another product—including complex products that have many components such as an automobile and the most simple consumer products such as a pencil.

For example, it could certainly be argued (and will be if review is not granted) that an automobile manufacturer derives an indirect economic benefit from the sale of after-market replacement parts manufactured by other companies. This can include tires, batteries, windshields, brake-linings and the hundreds of other parts that can be bought from a local auto-parts store. Similarly, it could be argued that a pencil manufacturer indirectly derives an economic benefit from the sale of another company's erasers. And, what would happen if the company who manufactured a defective replacement auto-part that injured a plaintiff was bankrupt? Or if the erasers included a toxic substance that injured many children who used them with pencils, but the eraser manufacturer could not be sued because they were bankrupt or located in a foreign country? Under *Sherman*, a plaintiff could argue that the automobile and pencil manufacturers should alone shoulder all liability because they indirectly derived economic benefit from both the sale of their non-defective products and the defective products that were manufactured by others.

Unless review is granted, *Sherman* will place at risk the businesses of many companies who have manufactured products that can be used with defective products

manufactured by another company. Industrious counsel will use the "indirect economic benefit" theory of liability in an effort to extend product liability law beyond proper limits. Review should be granted to ensure that this does not occur.

Public Policy Factors Also Support Granting Review: There are many reasons—based on practicality and public policy concerns—why liability should not have been imposed here for asbestos exposures that resulted from brake-linings manufactured by other companies, even if it was foreseeable that they would be used with Hennessy's grinding machine. Each of these concerns further support the need to grant review.

First, imposing liability in circumstances like this case would place "significant burdens on defendants" because they "could incur liability not only for their own products, but also for every other product with which their product might foreseeably be used." (*Taylor,* 171 Cal.App.4th at 595-96.)

Second, it would effectively require all manufacturers to become experts about the potential hazards of every other product that could be used with theirs. This is an impractical, onerous duty that should never be imposed. (*Taylor,* 171 Cal.App.4th at 596; *Artiglio v. Gen. Elec. Co.* (1998) 61 Cal.App.4th 830, 837.) "Understandably, the law does not require a manufacturer to study and analyze the products of others and to warn users of risks of those products." (*Powell v. Standard Brands Paint Co* (1985) 166 Cal.App.3d 357, 364.)

Third, "[b]ecause it may often be difficult for a manufacturer to know what kind of other products will be used or combined with its own product," they "might well face the dilemma of trying to insure against 'unknowable risks and hazards.'" (*Taylor*, 171 Cal.App.4th at 596, citing *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1003-1004 fn. 14.) Thus, "this factor also weighs against imposition of liability." (*Taylor,* 171 Cal.App.4th at 596.)

Fourth, imposing liability will not serve the policy of preventing future harm because manufacturers cannot realistically control the types of products that are used with their equipment after they are sold. (*Taylor*, 171 Cal.App.4th at 595.)

Conclusion: The *Sherman* case opens the door to potential liability for alleged injuries caused by *other* products that are used with a defendant's product. This involves far-reaching and recurring issues of statewide importance because virtually every product can be used with another that ultimately causes an injury.

Here, the claim involved asbestos-containing brake linings used with the defendant's brake-grinding machine. The logical progression that can be presented by the next wave of cases—which is why other courts have warned against imposing such liability—can involve countless other tools such as knives, power-saws, chippers, tile-cutters and mixers that were commonly used with asbestos-containing products.[5] The wave of cases after that can reach beyond asbestos-containing products to involve lighters, matches and other products commonly used with cancer-causing cigarettes.[6] And then a tidal wave of more cases can involve products that are used with the numerous solvents and chemicals that can cause injury.[7] Of course, the list could go on and on, to involve any product that might be used with another product that causes an injury.

The failure to grant review will have significant adverse ramifications beyond the many asbestos cases that place tremendous burdens on the California courts (*Hansen*, 51 Cal.App.4th at 760). Certainly, the volume of asbestos cases will increase because plaintiffs will seek to take advantage of *Sherman* to further spread the large net of claims that they are casting. This net will capture countless more product liability cases because the principles in *Sherman*—such as the "indirect economic benefit" theory—can be applied to every product that can foreseeably be used with another. Allowing such potentially unlimited liability will be disastrous for many manufacturers and retailers, including those who have been and will be sued in the "elephantine mass" of asbestos

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[5] See *Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 466 [The "standard way" to remove asbestos-containing insulation material "was to cut the cloth covering with a linoleum knife, and then to saw through the insulation down to the underlying pipe. This procedure generated 'sawdust' consisting of the insulation material."]; *Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 667 [Tradesmen "cut, sawed, mixed, applied, sanded, and swept-up asbestos containing materials."]; *Saller v. Crown Cork & Seal Co.* (2010) 187 Cal.App.4th 1220, 1227 [Workers often installed asbestos insulation by cutting it to fit pipes, pumps and valves. "They would use a saw, utility knife or a power tool with a brush which would create a gray dust."]

[6] See *Cullen v. Indus. Holdings Corp.,* 2002 WL 31630885, at *7 ["IHC points out that makers of cigarette lighters, matches, and other products associated with cigarette smoking, would thereby become liable for smoking-related injuries."]

[7] See *Jones v. ConocoPhillips* (2011) 198 Cal.App.4th 1187, 1192 [Plaintiff asserted claims for exposure to products that contained "organic solvents and cardiotoxic, hepatotoxic, nephrotoxic and other toxic chemicals."]; *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 976 [Plaintiff asserted claims for exposure to chemicals that included "benzene; toluene; chloroform; 1,1–dichloroethene; methylene chloride; tetrachloroethene; 1,1,1–trichloroethane; trichloroethene; and vinyl chloride. Of these, both benzene and vinyl chloride are known to be human carcinogens. Many of the others are strongly suspected to be carcinogens."].)

litigation that has forced scores of companies into bankruptcy. Uncertainty and confusion will also result when trial courts are pushed by plaintiffs to follow *Sherman* instead of the cases cited in the Petition and this letter brief.

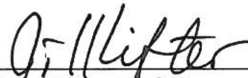
Thus, on behalf of the Associations, who represent many companies that will be adversely impacted by the *Sherman* case, this Court is urged to grant review.

Respectfully submitted,

ASSOCIATION OF SOUTHERN
CALIFORNIA DEFENSE COUNSEL

By:
David K. Schultz of Polsinelli LLP

ASSOCIATION OF DEFENSE COUNSEL
OF NORTHERN CALIFORNIA AND NEVADA

By: 
Jill J. Lifter of Ryan & Lifter

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and not a party to the within action; my business address is 2049 Century Park East, Suite 2300, Los Angeles, CA 90067.

On September 4, 2015, I served the following document(s) described **AMICUS LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

See Attached Service List

BY FIRST CLASS MAIL: I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with United States Postal Service. The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of such business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 4, 2015, at Los Angeles, California.

Eartha M. Guzman

SERVICE LIST

Sherman v. Hennessy Industries, Case No. S228087

ADDRESSEE	
Michael B. Gurien, Esq. WATERS KRAUS & PAUL 222 North Sepulveda Blvd., Suite 1900 El Segundo, CA 90245	**Attorneys for Plaintiffs, Appellants and Respondents** MICHAEL SHERMAN, RICHARD SHERMAN and VICKI MARLOW
Don Willenberg, Esq. GORDON & REES LLP 1111 Broadway, Suite 1700 Oakland, CA 94607	**Attorneys for Defendant, Respondent and Petitioner** HENNESSY INDUSTRIES, INC.
Mitchell B. Malachowski, Esq. GORDON & REES LLP 101 West Broadway, Suite 2000 San Diego, CA 92101	**Attorneys for Defendant, Respondent and Petitioner** HENNESSY INDUSTRIES, INC.
David K. Schultz, Esq. POLSINELLI LLP 2049 Century Park East, Suite 2900 Los Angeles, CA 90067	**Attorneys for** ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL
Jill J. Lifter, Esq. RYAN & LIFTER 2010 Crow Canyon Place, Suite 330 San Ramon, CA 94583-1344	**Attorneys for** ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA
Superior Court of California County of Los Angeles Central Civil West Courthouse Honorable Emilie H. Elias 600 South Commonwealth Ave., Dept. 324 Los Angeles, CA 90005	Case No. BC481282 / JCCP No. 4674
Court of Appeal Second Appellate District, Division Four 300 South Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	Case No. B252566