S218176

In the Supreme Court of the State of California

Flavio Ramos, *et al.*,

Plaintiffs and Appellants,

v.

Brenntag Specialties, Inc., *et al.*,

Defendants and Respondents.

After a Decision by the Court of Appeal,
Second Appellate District, Division Four
Case No. B248038

Los Angeles County Superior Court, Case No. BC449958
The Honorable Amy D. Hogue

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AND FEDERATION OF DEFENSE & CORPORATE COUNSEL IN SUPPORT OF DEFENDANTS AND RESPONDENTS

SNELL & WILMER L.L.P.
*Mary-Christine Sungaila (#156795)
Jenny Hua (#294984)
600 Anton Boulevard, Suite 1400
Costa Mesa, California 92626
Tel: 714-427-7000 • Fax: 714-427-7799
mcsungaila@swlaw.com

Attorneys for *Amici Curiae* International Association of Defense Counsel and Federation of Defense & Corporate Counsel

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

TO THE HONORABLE CHIEF JUSTICE:

Under rule 8.520(f) of the California Rules of Court, the International Association of Defense Counsel (IADC) and Federation of Defense & Corporate Counsel (FDCC) request permission to file the attached *Amici Curiae* Brief in support of defendants and respondents.

INTEREST OF *AMICI CURIAE*; HOW THE *AMICI CURIAE* BRIEF WILL ASSIST THE COURT

Amicus curiae International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

The Federation of Defense & Corporate Counsel ("FDCC") was formed in 1936 and has an international membership of 1,400 defense and corporate counsel. FDCC members work in private practice, as general counsel, and as insurance claims executives. Membership is limited to attorneys and insurance professionals nominated by their peers for having achieved professional distinction and demonstrated leadership in their respective fields. The FDCC is committed to promoting knowledge and professionalism in its ranks and has organized itself to that end. Its members have established a strong legacy of representing the interests of civil defendants.

The parties' briefs primarily focus on one ground for reversing the Court of Appeal and dismissing the complaint in this case: the raw material/component parts doctrine. Here, we discuss in more depth an alternative ground for reversal addressed more briefly by the parties: the sophisticated purchaser doctrine. (See also *Webb v. Special Electric,* Supreme Court Case No. S209927 [sophisticated purchaser doctrine also being considered by this Court in the context of a supplier of raw asbestos].) We describe the contours of the doctrine and explain why this Court should, for the same reasons it adopted the sophisticated user doctrine seven years ago, adopt the sophisticated purchaser doctrine as an exception to a supplier's general duty to warn.

NO PARTY OR COUNSEL FOR A PARTY AUTHORED OR CONTRIBUTED TO THIS BRIEF

The IADC and FDCC provide the following disclosures required by rule 8.520(f)(4) of the California Rules of Court: (1) no party or counsel for a party in this appeal authored or contributed to the funding of this brief, and (2) no one other than *amici curiae* or its counsel in this case made a monetary contribution intended to fund the preparation or submission of this brief.

CONCLUSION

For the foregoing reasons, the IADC and FDCC request that the court permit the filing of the attached *Amici Curiae* Brief in support of defendants and respondents.

March 19, 2015

Respectfully submitted,

SNELL & WILMER L.L.P.

By: 

Mary-Christine Sungaila
Attorneys for *Amici Curiae*
International Association of Defense Counsel and Federation of Defense & Corporate Counsel

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AMICI CURIAE BRIEF OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AND FEDERATION OF DEFENSE & CORPORATE COUNSEL IN SUPPORT OF DEFENDANTS AND RESPONDENTS

INTRODUCTION

As the opening brief on the merits explains, Plaintiff Flavio Ramos worked for Supreme Casting & Pattern, Inc. (Supreme), an industrial foundry that made metal parts. After Ramos developed interstitial pulmonary fibrosis, Ramos and his wife sued several companies, including Alcoa, that supplied the raw materials used by the foundry. Ramos contended

that when the aluminum provided by Alcoa was melted in furnaces, the molten aluminum generated hazardous metal fumes. Alcoa Inc.'s briefs on the merits (joined in by the other defendants and respondents) explain that "as the supplier of multi-use raw materials, Alcoa is not responsible for the injuries allegedly caused by the plaintiff's employer's own manufacturing process" under two related, but independent doctrines: the raw materials/component parts doctrine and the sophisticated purchaser doctrine. This *amici* brief explains why this Court should, for the same reasons it has adopted the sophisticated user doctrine, adopt the sophisticated purchaser doctrine as an exception to a supplier's general duty to warn, which would preclude liability in this case.

"The duty to warn 'is perhaps the most widely-employed claim in modern products liability litigation." (Cheney, *Not Just for Doctors: Applying the Learned Intermediary Doctrine to the Relationship Between Chemical Manufacturers, Industrial Employers, and Employees* (1991) 85 Nw. U.L. Rev. 562.) In general, a manufacturer or supplier has a duty to warn consumers about the dangers and risks inherent in the use of its product. (*Collin v. Calportland Company* (2014) 228 Cal.App.4th 582, 601 (citations omitted).) This state recognizes several related doctrines that limit this duty. For example, a manufacturer has no duty to warn consumers of obvious dangers. (See, e.g., *Bojorquez v. House of Toys, Inc.* (1976) 62 Cal.App.3d 930,

933-34 [slingshot that lacked a warning was not defective because "the seller does not need to add a warning when 'the danger, or potentiality of danger is generally known and recognized.'"]; see also *Guyer v. Sterling Laundry Co.* (1916) 171 Cal. 761, 762-63 [recognizing that "the master is not liable for failure to warn the servant of the danger where that danger is obvious;" moreover, "the employee ordinarily assumes the known risks and dangers of his occupation."].) In *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 71, (hereafter, *American Standard*) this Court recognized that, as an outgrowth of the obvious danger rule, a supplier had no duty to warn a sophisticated user of a product where "the plaintiff knew, or should have known, of the particular risk of harm from the product giving rise to the injury." The Court reasoned that public policy favored adoption of the defense because it discouraged overwarning and therefore "help[ed] ensure that warnings will be heeded." (*Id.* at p. 70.)[1]

This court should extend the sophisticated user doctrine to sophisticated purchasers and hold that where, as here, a product is sold to a sophisticated or knowledgeable purchaser, the manufacturer or supplier has no duty to directly warn the ultimate product users (the purchaser's

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[1] Because a warning would have been futile, this Court likewise acknowledged that the lack of any warning could not have caused the injury. (*American Standard, supra,* 43 Cal.4th at p. 65 ["Because these sophisticated users are charged with knowing the particular product's dangers, the failure to warn about those dangers is not the legal cause of any harm that product may cause."].)

employees) of any hazards posed by the product (particularly where those hazards are not inherent in the product itself, but arise from the purchaser's own manufacturing processes) because the purchaser either has or can be expected to have independent knowledge of the hazards, and has an independent duty to warn employees like the plaintiff of those hazards.

LEGAL DISCUSSION

I

California Has Adopted the "Sophisticated User Doctrine" as an Extension of the Obvious Danger Rule

In 2008, faced with a question of first impression, this Court joined 28 other states when it unanimously adopted the "sophisticated user" doctrine in failure to warn cases. (*American Standard, supra*, 43 Cal.4th at p. 61; see Sungaila & Mayer, *Limiting Manufacturers' Duty to Warn: The Sophisticated User and Purchaser Doctrines* (2009) 76 Def. Couns. J. 196 [Cataloging cases in other jurisdictions].)[2] The plaintiff in *American Standard* was a trained and certified heating, ventilation, and air conditioning (HVAC) technician who sued various chemical manufacturers, chemical suppliers, and manufacturers of air conditioning equipment for their alleged failure to warn him that brazing refrigerant lines as part of his work would expose him to a hazardous gas, which could later cause him to develop pulmonary fibrosis.

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[2] The Defense Counsel Journal is the scholarly journal of *amicus* the International Association of Defense Counsel.

(*American Standard, supra,* 43 Cal.4th at pp. 61-62.) Determining that the plaintiff belonged to a class of professionals who knew or should have known of the product's potential danger, this Court affirmed a grant of summary judgment in favor of the defendants and held that a manufacturer need not warn a sophisticated user like Johnson about dangers generally known to his trade or profession. (*Id.* at p. 67.) This Court further explained that the sophisticated user defense evolved out of the Restatement Second of Torts, section 388 and the obvious danger rule, which are both accepted principles and defenses in California. (*Id.* at pp. 65, 66.)

This Court reasoned that where a manufacturer reasonably believes the user will know or should know about a given product's risk, the manufacturer need not warn the user of that risk, "especially when the user is a professional who should be aware of the characteristics of the product." (*Id.* at p. 66, citing *Strong v. E. I. DuPont de Nemours Co., Inc.* (8th Cir. 1981) 667 F.2d 682, 687.) Because "[l]egal duties must be based on objective general predictions of the anticipated user population's knowledge, not case-by-case hindsight examinations of the particular plaintiff's subjective state of mind," "[t]he sophisticated user defense will always be employed when a sophisticated user should have, but did not, know of the risk." (*American Standard, supra,* 43 Cal.4th at p. 74.) Just as a failure to warn cannot be the legal cause of harm where a danger is obvious to an ordinary consumer, this

Court observed, the lack of a warning also cannot be the legal cause of harm when a class of users to which the plaintiff belongs is sophisticated. (*Id.* at pp. 65, 71.)

II

The Same Rationale for Adopting the "Sophisticated User Doctrine" Supports Adoption of the "Sophisticated Purchaser Doctrine," Which Is Recognized by a Myriad of Other Jurisdictions

The sophisticated purchaser doctrine is a natural extension of the sophisticated user doctrine. Like the sophisticated user doctrine, "[t]he rationale supporting the [sophisticated purchaser] defense is that 'the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer's employees or downstream purchasers.' [T]his is because the user's knowledge of the dangers is the equivalent of prior notice." (*American Standard, supra*, 43 Cal.4th at p. 65 [internal citations omitted]; but see *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 29; *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1296, as modified on denial of reh'g (Nov. 27, 2013), review withdrawn (Feb. 19, 2014) ["in actions by employees or servants, the critical issue concerns their knowledge (or potential knowledge), rather than an intermediary's sophistication."].)

In adopting the sophisticated user doctrine, this Court traced the doctrine's development (*American Standard, supra*, 43 Cal.4th at pp. 64-70)

and cited favorably to cases holding that a supplier had no duty to warn a sophisticated purchaser about dangers that caused injury to the purchaser's employee. In *Akin v. Ashland Chemical Co.* (10th Cir. 1998) 156 F.3d 1030, 1037, for example, the Tenth Circuit determined there was no need to warn a knowledgeable purchaser like the United States Air Force or its employees about the dangers of low-level chemical exposure. (See also *Mayberry v. Akron Rubber Machinery Corp.* (N.D. Okla. 1979) 483 F.Supp. 407, 413-14 [no duty for supplier of used component parts to warn the purchaser-manufacturer of the dangers inherent in the industrial rollers because "where the danger or potentiality of danger is known or should be known to the user, the duty (to warn) does not attach."].) Likewise, in *Strong, supra,* 667 F.2d at pp. 686-87, the Eighth Circuit affirmed a directed verdict, finding that the natural gas pipe manufacturer had no duty to warn a natural gas utility, or the utility's employee, of well-known gas line dangers. In the alternative, the court reasoned that "[e]ven if [the manufacturer] was under a duty to warn, its failure to do so could not have been the proximate cause of the accident" because the utility company and its employee were aware of the hazard. (*Id.* at p. 688.)

The *American Standard* court also cited favorably to intermediate appellate court decisions in California recognizing that the actual or reasonably anticipated knowledge of a sophisticated purchaser or

intermediary obviates the duty to warn the plaintiff end-user. In *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362, for example, the court of appeal held that the manufacturer of an intrauterine device was not liable, as a matter of law, to a patient who died after doctors implanted the manufacturer's product, stating: "We are aware of no authority which requires a manufacturer to warn of a risk which is readily known and apparent to the consumer, in this case the physician. Further, if the risk . . . is universally known in the medical profession, the failure to warn the physician of that risk cannot be the legal cause of the decedent's death." Whether the manufacturer's warnings to the doctor were adequate was irrelevant because it was undisputed that the risk of death from any untreated infection was a matter of general medical knowledge. (*Id.*)

In *Fierro v. International Harvester Co.* (1982) 127 Cal.App.3d 862, the plaintiff sued International, the company which had manufactured the truck her husband was driving in a work accident. (*Id.* at p. 865.) International manufactured skeleton trucks, which allowed purchasers to complete or add to the truck. (*Id.*) Luer purchased one of these trucks and installed a refrigeration unit on the chassis. (*Id.*) Five years later, the plaintiff's husband was driving the truck in the course and scope of his job with Luer when the truck overturned, spilled fuel, and caught fire. (*Id.*) The Court of Appeal affirmed the judgment in favor of defendant because the plaintiff had not

properly raised the "failure to warn" issue at trial. (*Id.* at p. 866.) However, "[i]n dictum, the Court of Appeal [in *Fierro*] explained that International, as the defendant manufacturer, need not warn the purchaser, Luer, because '[a] sophisticated organization like Luer does not have to be told that gasoline is volatile and that sparks from an electrical connection or friction can cause ignition.'" (*American Standard* at p. 68 citing to *Fierro*, supra, 127 Cal.App.3d at p. 866.)[3]

Many jurisdictions that, like California, have adopted the sophisticated user doctrine have extended the doctrine to sophisticated purchasers when the purchaser's employees or end-users are injured. (See, e.g., *Goodbar v. Whitehead Bros.* (W.D. Va. 1984) 591 F.Supp. 552, 559 aff'd sub nom. *Beale v. Hardy* (4th Cir. 1985) 769 F.2d 213 [under Virginia law, "there is no duty on product suppliers to warn employees of knowledgeable industrial purchasers

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[3] A district court, applying California law, subsequently read *Fierro* to indicate that the sophisticated user doctrine was taking hold in California, analogizing it to the defense of superseding causation. (*In re Related Asbestos Cases* (N.D. Cal. 1982) 543 F.Supp. 1142, 1151.) As a result, the district court denied a motion to strike a sophisticated user defense premised on the theory that "the Navy, as an employer, was as aware of the dangers of asbestos as were defendants and that the Navy nonetheless misused the products, thereby absolving the defendants of liability for failure to warn the Navy's employees of the products' dangers." (*Id.*; see also *In re Air Crash Disaster* (6th Cir. 1996) 86 F.3d 498, 522, superseded by statute on other grounds as explained in *Piamba Cortes v. American Airlines, Inc.* (11th Cir. 1999) 177 F.3d 1272, 1301 [applying California law: question was not whether end users, who were victims of the crash, were sophisticated, but rather whether purchaser Northwest Airlines was sophisticated; purchaser's sophistication absolved the plane's manufacturer of any duty to warn the end-users].)

as to product-related hazards."]; *Pike v. Trinity Industries, Inc.* (M.D. Fla. 2014) 34 F.Supp.3d 1193, 1194 [under Florida law, manufacturer of guardrail system had no duty to warn Florida Department of Transportation (FDOT) or its employees about hazards of improper maintenance of system because FDOT was a sophisticated user of guardrail systems.]; *Parker v. Allentown, Inc.* (D. Md. 2012) 891 F.Supp.2d 773, 795 [under Maryland law, "a supplier is not negligent when it relies on an intermediary 'already well aware of the danger' to relay any necessary warning."]; *Damond v. Avondale Industries, Inc.* (La. Ct. App. 1998) 718 So.2d 551, 553 writ denied, (La. 1999) 735 So.2d 637 [supplier of sand had no duty to warn plaintiff employee because plaintiff's employer was a "sophisticated user" who was presumed to know the dangers of the use of sand in sandblasting.].)[4]

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[4] Two California cases decided after *American Standard* rejected application of the sophisticated purchaser doctrine to asbestos, an inherently hazardous product. (*Stewart, supra,* 190 Cal.App.4th at pp. 27-29; *Pfeifer, supra,* 220 Cal.App.4th at p. 1290.) Both are distinguishable. One of those cases, *Stewart,* involved a sophisticated intermediary who lacked an independent duty to warn, as it was not the plaintiffs' employer. (*Stewart, supra,* 190 Cal.App.4th at p. 29.) The other, *Pfeifer,* held that in the context of suppliers of inherently hazardous goods, sophisticated employer intermediaries could not absolve the suppliers of a duty to warn "absent some basis to believe the ultimate users know or should know of the hazards." (*Pfeifer, supra,* 220 Cal.App.4th at p. 1280.) Here, the sophisticated purchaser is not only plaintiffs' employer; it is in a unique position to know about the hazards posed from working with metals like aluminum that are not inherently hazardous in themselves, but may pose dangers as a result of the process used by the intermediary foundry at which plaintiffs worked.

Indeed, nationwide, the sophisticated purchaser doctrine has gained particularly wide acceptance: over 30 states have adopted the defense. (See *In re Asbestos Litigation (Mergenthaler)* (Del. Super. Ct. 1986) 542 A.2d 1205, 1210-11 ("some version of a 'sophisticated purchaser' defense is the norm in most jurisdictions"); *Kennedy v. Mobay Corp.* (Md. App. 1990) 579 A.2d 1191, 1197 ("The legal premise underlying [the sophisticated purchaser] defense, and indeed the defense itself, seems to have gained fairly wide acceptance"), aff'd 601 A.2d 123 (Md. 1992)). While the exact formulation of the defense varies from state to state, it does not necessarily depend on an adequate warning being given by the manufacturer. Under either the common law/ purchaser perspective or the multifactor/Restatement view of the sophisticated purchaser doctrine, there is no duty to warn a purchaser who is already knowledgeable about a product hazard and can be expected to pass on that knowledge to the product user.

As one court has explained: "The sophisticated [purchaser] defense is implicated in the situation in which A supplies a chattel to B, B in turn allows C to be exposed to the chattel, C is injured by exposure to the chattel, and C claims that A should be liable to C for A's failure to warn C of the danger . . . .'[I]f the danger related to the particular product is clearly known to the purchaser/employer, then there will be no obligation to warn placed upon the supplier. Instead, it becomes the employer's responsibility to guard

against the known danger by either warning its employees or otherwise providing the necessary protection.'" (*O'Neal v. Celanese Corp.* (4th Cir. 1993) 10 F.3d 249, 251 citing to *Kennedy, supra,* 579 A.2d at p. 1196.)

A. The Common Law/Purchaser Perspective: The Intermediate Purchaser's Knowledge Categorically Defeats Any Duty to Warn the End User.

Approximately one-third of the jurisdictions that have adopted the sophisticated purchaser defense have taken a strict common law duty approach, which focuses exclusively on the intermediate purchaser's knowledge and absolves the seller of any duty to warn the ultimate product user so long as the purchaser is or should be aware of the product's hazards. Under this formulation of the sophisticated purchaser doctrine, an adequate warning by the manufacturer is not necessary for the defense to apply, so long as the intermediary had independent knowledge of the product's hazards. The relevant inquiry under this formulation of the defense is simple: If the purchaser-employer had knowledge or notice of the product's hazards, through either the supplier's warnings or independently-obtained information, the supplier has no duty to warn the purchaser's employees or customers and judgment will be entered as a matter of law in the supplier's favor.[5]

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[5] Cases reflecting the common law purchaser perspective approach include: *Mergenthaler*, 542 A.2d at pp. 1211-12 ("[w]hen the employer already knows or

should be aware of the dangers which the warning would cover, there [is] no duty to warn on the part of the supplier," unless "the supplier knows or has reason to suspect that the requisite warning will fail to reach the employees, the users of the product") (applying Delaware law); *Stiltjes v. Ridco Exterminating Co.* (Ga. Ct. App. 1986) 343 S.E.2d 715, 718-20 aff'd on other grounds (Ga. 1986) 347 S.E.2d 568 (supplier of pesticides to professional pesticide control operator entitled to summary judgment on failure to warn claim brought by tenant whose home the pesticide was applied in; supplier had no duty to warn since the pesticide operator was charged as a matter of law with knowledge of the dangers posed by use of the pesticide); *Cruz v. Texaco, Inc.* (S.D. Ill. 1984) 589 F.Supp. 777, 779-80 (seller of truck designed to transport heavy equipment had no duty to warn employee of truck company where employer was already aware of danger of driving the truck too fast, and employee operation of the truck involved specific, complex on-the-job training); *Mays v. Ciba-Geigy Corp.* (Kan. 1983) 661 P.2d 348, 364, 365 ("no warning is required to be given by the manufacturer to a purchaser who is well aware of the inherent dangers of the product, [and] there is no duty on the part of the manufacturer to warn an employee of that purchaser"); *McWaters v. Steel Service Co.* (6th Cir. 1979) 597 F.2d 79, 80 (per curiam) (upholding directed verdict in favor of steel rod manufacturer on strict liability failure to warn claim brought by employee of experienced bridge contractor, since the employer already knew the dangers posed by the rod and controlled the manner in which the rod would be used [applying Kentucky law]); *Davis v. Avondale Indus., Inc.* (5th Cir. 1992) 975 F.2d 169, 172, 174-75 (manufacturer has no duty to warn a sophisticated purchaser; defendant manufacturer was therefore entitled to a specific jury instruction that its duty to warn the plaintiff's employee "may be completely discharged by [the employer's] status as a sophisticated purchaser with a duty to warn its employees of the relevant hazard") (applying Louisiana law); *Scallan v. Duriron Co., Inc.* (5th Cir. 1994) 11 F.3d 1249, 1252 (summary judgment for defendant manufacturer where plaintiff's employer ranked "among the world leaders" in chemical processing); *Jacobson v. Colorado Fuel & Iron Corp.* (9th Cir. 1969) 409 F.2d 1263, 1271-72 (manufacturer of steel strand not required to warn that strand might snap during pre-stressing operation when victim's employer was already aware of the risk) (applying Montana law); *Marker v. Universal Oil Prods. Co.* (10th Cir. 1957) 250 F.2d 603, 606-07 (supplier of catalyst used in construction of petroleum refining vessel not required to warn victim's employer about danger of asphyxiation from carbon monoxide gas generated by the catalyst, since the employer already knew of the risk) (applying Oklahoma law); *Akin, supra,* 156 F.3d at p. 1037 (summary judgment in favor of defendant chemical manufacturers on failure to warn claim brought by Air Force officers: "[w]e read Oklahoma case law to impose no duty to warn a purchaser as knowledgeable as the United States Air Force of the potential dangers of low-level chemical exposure. . . . This is tantamount to the familiar 'sophisticated purchaser defense' . . . [which is the] exception [that] absolves suppliers of the duty to warn purchasers who are already aware or should be aware of the potential dangers").

B. The Multi-factor/Restatement View: Multi-factor Approach Defeating a Duty to Warn an End User If the Manufacturer Could Properly Rely on the Knowledgeable Purchaser to Warn.

Some of the states adopting the sophisticated purchaser doctrine opt for a multifactor approach embodied in the Restatement, under which a manufacturer has no duty to warn where it is objectively reasonable for the manufacturer to rely on the intermediary to convey necessary warnings to the product's ultimate users. Indeed, a number of states that pioneered the strict common law duty approach discussed above have since moved towards, and supplanted the common law approach with, the Restatement's multifactor approach.[6]

The Restatement Third of Torts (Products Liability) sets forth the most up-to-date formulation of the sophisticated purchaser doctrine and identifies three factors to be considered in determining

> whether one supplying a product for the use of others through an intermediary has a duty to warn the ultimate product user directly or may rely on the intermediary to relay warnings: the gravity of the risks posed by the product, the likelihood that the

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[6] See, e.g., *Frantz v. Brunswick Corp.* (S.D. Ala. 1994) 866 F.Supp. 527, 535 n.55 (analyzing manufacturer's duty to warn end-user under the "reasonableness" factors of the Restatement, instead of the strict duty analysis employed by an earlier Alabama court); *Carter v. E.I. DuPont de Nemours & Co., Inc.* (Ga. Ct. App. 1995) 456 S.E.2d 661, 663-64 (rejecting strict duty approach previously applied by Georgia courts in favor of Restatement multifactor approach); *Miller v. G & W Elec. Co.* (D. Kan. 1990) 734 F.Supp. 450, 454 (indicating that, since Kansas courts implicitly adopted the Restatement in applying common law duty approach, the appropriate analysis is now the Restatement multifactor approach).

> intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user.[7]

The required analysis is an objectively reasonable one that is not dependent upon evidence of actual, conscious reliance by the manufacturer on the intermediate purchaser. Nor is the test dependent upon what the intermediate purchaser in fact did with the product hazard information it possessed.[8]

An adequate warning from the manufacturer is not a prerequisite for this multifactor version of the sophisticated purchaser defense to apply.[9] As

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[7] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) § 2, cmt. i ; see also Ausness, *Learned Intermediaries and Sophisticated Users: Encouraging the Use of Intermediaries to Transmit Product Safety Information* (1996) 46 Syracuse L. Rev. 1185, 1205-07 (describing the Restatement's multifactor approach).

[8] Cf. *Manning v. Ashland Oil Co.* (7th Cir. 1983) 721 F.2d 192, 196 ("We are not concerned with the reasonable inferences that may be drawn from the circumstances of the actual internal operation of [the employer's] business, but rather, whether Ashland acted reasonably in light of what [a supplier like Ashland reasonably could know] about the party to whom it sold the lacquer thinner").

[9] See *Goodbar, supra,* 591 F.Supp. at p. 561 ("when the supplier has reason to believe that the purchaser of the product will recognize the dangers associated with the product, no warnings are mandated"; it then "becomes the employer's responsibility to guard against the known danger by either warning its employees or otherwise providing the necessary protection"); *Fisher v. Monsanto Co.* (W.D. Va. 1994) 863 F.Supp. 285, 288-89 (following *Goodbar* and granting summary judgment for defendant manufacturer on plaintiff-employee's negligent failure to warn claim; defendant could reasonably rely on employer, a sophisticated purchaser of defendant's products, to warn its employees because (1) the employer had considerable knowledge and expertise regarding the product, (2) defendant provided the product in bulk, so that any warnings placed by the manufacturer could not reach employees, and (3) the defendant was not in a position to constantly monitor the turnover in the employer's workforce); *Whitehead v. Dycho Co., Inc.* (Tenn. 1989) 775 S.W.2d 593, 600 (affirming summary judgment for bulk supplier of naphtha pursuant to the Restatement formulation of the sophisticated purchaser defense

we now explain, under either formulation of the doctrine, defendants had no duty to warn Mr. Ramos in this case.

III

This Court Should Expressly Adopt The Sophisticated Purchaser Doctrine and, on That Additional Basis, Uphold The Dismissal of Plaintiffs' Claims In This Case.

Here, plaintiff's employer Supreme Casting & Pattern, Inc. (Supreme) is a metal foundry in the business of manufacturing metal parts through a "foundry and fabrication process." (*Ramos v. Brenntag Specialties, Inc.* (2014) 224 Cal.App.4th 1239 [169 Cal.Rptr.3d 513, 519], reh'g denied (Apr. 15, 2014) review granted and opinion superseded sub nom. *Ramos v. Brenntag Specialties* (Cal. 2014) 174 Cal.Rptr.3d 81; see also AA 185 [Plaintiff's Second Amended Complaint ¶ 30].) A foundry is by definition "a workshop or factory for casting metal." (Oxford Dictionary (2015) Oxford University Press <http://www.oxforddictionaries.com/us/ definition/american_english/foundry>

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because the intermediary employer "was knowledgeable about the product in question and it was the only party in a position to issue an effective warning to the [p]laintiff. The [d]efendants had no reasonable access to plaintiff"); *Aetna Cas. & Sur. Co. v. Ralph Wilson Plastics Co.* (Mich. Ct. App. 1993) 509 N.W.2d 520, 523-24 (affirming grant of summary judgment in favor of defendant manufacturer under sophisticated user doctrine; "[c]ommercial enterprises that use materials in bulk must be regarded as sophisticated users, as a matter of law" because "[t]hose with a legal obligation to be informed concerning the hazards of materials used in manufacturing processes must be relied upon, as sophisticated users, to fulfill their legal obligations"); *Jodway v. Kennametal, Inc.* (Mich. Ct. App. 1994) 525 N.W.2d 883, 889 (following *Aetna*); *Kennedy*, 579 A.2d at 1200-02 (jury properly allowed to consider sophisticated purchaser doctrine where: (1) defendants had no ability to give direct warnings to purchaser's employees and (2) purchaser was aware of the hazards posed by defendants' products).

[accessed on March 11, 2015].) Aluminum and its alloys are popular materials for melting and casting to create metal parts. (Klamecki, *Solutions Manual to Accompany Materials and Process in Manufacturing* (2003) Nonferrous Metals and Alloys, p. 50.) Thus, melting aluminum in furnaces is an integral part of a foundry like Supreme's manufacturing process. (*Id.*)[10] Just as it would be futile to warn a consumer of an obvious danger and futile to warn an HVAC technician of the dangers of brazing air conditioner pipes, it would be futile to warn a foundry of the dangers of melting aluminum. Whether Supreme had actual knowledge about the dangers of melting aluminum is irrelevant because Supreme belongs to a class of purchasers – foundries – that should have knowledge of the dangers posed by its own manufacturing process. (See *American Standard*, *supra*, 43 Cal.4th at p. 74.)

Supreme also had an independent duty to warn its own employees about the dangers it knew or should have known posed by the process of melting aluminum. (See, e.g., *Bonner v. Workers' Comp. Appeals Bd.* (1990) 225 Cal.App.3d 1023, 1034 ["[A]n employer's statutory duty under the Labor Code is greater than a duty of care imposed pursuant to common law principles, as codified in Civil Code section 1714.4 . . . The duty to maintain a

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[10] Plaintiffs have not alleged any defect in the aluminum sold by Alcoa, and there is nothing inherently dangerous about aluminum in its raw form. As the Court of Appeal noted in its opinion, the aluminum became dangerous only when melted during the casting process. (*Ramos*, *supra*, 169 Cal.Rptr.3d at p. 527.)

safe workplace encompasses many responsibilities, including the duty to inspect the workplace, to discover and correct a dangerous condition, and to give an adequate warning of its existence."]; *Pigeon v. W.P. Fuller & Co.* (1909) 156 Cal. 691, 700-701 ["[W]here the duty to warn exists, it is a personal duty of the employer—one that cannot be delegated . . ."].) Defendants, such as Alcoa, are entitled to rely on the reasonable conduct of purchaser-employers who owe a duty of care to the plaintiff. (*Tucker v. Lombardo* (1956) 47 Cal.2d 457, 467; see also *Celli v. Sports Car Club of America, Inc.* (1972) 29 Cal.App.3d 511, 523 ["every person has a right to presume that every other person will perform his duty and obey the law]" . . .".) Indeed, "[m]odern life would be intolerable unless one were permitted to rely to a certain extent on others doing what they normally do, particularly if it is their duty to do so." (*Higgins v. E.I. DuPont de Nemours & Co., Inc.* (D. Md. 1987) 671 F.Supp. 1055, 1058.)

The policy reasons for applying the sophisticated purchaser doctrine are underscored in bulk supplier circumstances such as these. "The bulk supplier rarely has any control over the intermediary's personnel policies or day-to-day safety operations." (*Hoffman v. Houghton Chemical Corp.* (Mass. 2001) 751 N.E.2d 848, 857 [citations omitted]. Cf. *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 839 ["raw material suppliers are not liable to ultimate consumers when the goods or material they supply are not

inherently dangerous, they sell goods or material in bulk to a sophisticated buyer, the material is substantially changed during the manufacturing process and the supplier has a limited role in developing and designing the end product."].) "Thus, the bulk supplier simply is not in a position to constantly monitor the turnover of an employer's workforce or to provide the good housekeeping measures, training and warnings to [the intermediary's] workers on a continuous and systemic basis." (*Hoffman, supra*, 751 N.E.2d at p. 857 [citations and internal quotations omitted]; see also *Munoz v. Gulf Oil Co.* (Tex. App. 1987) 732 S.W.2d 62, 66, writ refused NRE (Sept. 16, 1987); see also *Hoffman, supra,* 751 N.E.2d at p. 856 ["Bulk products often are delivered in tank trucks, box cars, or large industrial drums, and stored in bulk by the intermediary, who generally repackages or reformulates the bulk product. Even if the product could be labeled by the supplier, any label warnings provided to the intermediary would be unlikely to reach the end user."].)

A bulk supplier therefore generally fulfills its duty to warn by advising the buyer of the dangers inherent in the product and its use. (*Munoz*, 732 S.W.2d at p. 66.) But where, as here, the intermediary employer/buyer is sophisticated, the supplier should have no duty to warn the intermediary. "In any situation in which there is a duty to warn, the warning is required in order to impart special knowledge. If that special knowledge already exists,

further information is not necessary." (*Id.*; see also *Jones v. Hittle Service, Inc.* (1976) 219 Kan. 627, 636-37 ["Warning is required to impart knowledge, and if that knowledge has already been acquired, it is not necessary."].) Here, the purchaser is sophisticated – a factory whose very business is melting and casting metal – and therefore the supplier should have no duty to warn either the purchaser or the purchaser's employees because the purchaser has or should have adequate independent knowledge of the hazards posed by the process of melting and casting metal.

CONCLUSION

For the foregoing reasons, and those expressed by defendant and respondent Alcoa, Inc. in the merits briefing, this Court should reverse the Court of Appeal and uphold the dismissal of plaintiffs' claims with prejudice.

March 19, 2015

Respectfully submitted,

SNELL & WILMER L.L.P.

By: _____
Mary-Christine Sungaila
Attorneys for *Amici Curiae*
International Association of Defense Counsel and Federation of Defense & Corporate Counsel

CERTIFICATE OF WORD COUNT

The undersigned certifies that pursuant to the word count feature of the word processing program used to prepare this brief, it contains 6,837 words, exclusive of the matters that may be omitted under rule 8.520(c)(3).

March 19, 2015

Respectfully submitted,

SNELL & WILMER L.L.P.

By: 

Mary-Christine Sungaila
Attorneys for *Amici Curiae*
International Association of Defense Counsel and Federation of Defense & Corporate Counsel

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Proof of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-7689.

On March 19, 2015, I served, in the manner indicated the foregoing document described as **Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of International Association of Defense Counsel and Federation of Defense & Corporate Counsel in Support of Defendants and Respondents** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

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Executed on March 19, 2015,, at Costa Mesa, California.

Sandy Cairelli

Service List

Raphael Metzger, Esq. Ken Holdren, Esq. Metzger Law Group 401 East Ocean Blvd., Suite 800 Long Beach, CA 90802-4966	Attorneys for Flavio Ramos and Modesta Ramos
Brian P. Barrow, Esq. Simon Greenstone Panatier Bartlett 301 East Ocean Boulevard, Suite 1950 Long Beach, CA 90802	Attorneys for Flavio Ramos
Robert Kum, Esq. Matthew Groseclose, Esq. Alison Anderson Williams-Andre Sedgwick LLP 801 S. Figueroa St., 18th Fl. Los Angeles, CA 90017	Attorneys for Brenntag Specialties, Inc. and Brenntag North America, Inc.
Devon E. Downs, Esq. Cesar A Alvarado, Esq. Eugene Charles Blackard, Jr., Esq. Archer Norris 2033 N. Main Street, Suite 300 Walnut Creek, CA 94596-3759	Attorneys for Valley Forge Insurance Company, Fireman's Fund Insurance Co., and American Insurance Co.
Clayton Taylor Lee, Esq. Kevin Lee Eng, Esq. George E. Nowotny, Esq. Lewis Brisbois Bisgaard & Smith LLP 221 N. Figueroa Street, Suite 1200 Los Angeles, CA 90012	Attorneys for Valley Forge Insurance Company, Fireman's Fund Insurance Co., and American Insurance Co.
Rosemary H Do, Esq. Ruth Segal, Esq. Lynberg & Watkins 888 S Figueroa St 16th FL Los Angeles, CA 90017-5449	Attorneys for Porter Warner Industries, LLC

Kevin Lee Place, Esq. Archer Norris 333 South Grand Ave., Suite 3680 Los Angeles, CA 90071	Attorneys for P-G Industries, Inc. and The Pryor-Giggey Company
Matthew Paul Nugent, Esq. Paul Gerhardt Zacher, Esq. Gordon & Rees LLP 101 W. Broadway, Suite 1600 San Diego, CA 92101	Attorneys for Alcoa, Inc. and Schorr Metals, Inc.
Michele Cherie Barnes, Esq. K&L Gates LLP 4 Embarcadero Ctr., Suite 1200 San Francisco, CA 94111	Attorneys for Alcoa, Inc.
Jason Roger Litt, Esq. Horvitz & Levy, LLP 15760 Ventura Boulevard, 18th Floor Encino, CA 91436	Attorneys for Alcoa, Inc.
Douglas W. Beck, Esq. Law Offices of Douglas W. Beck 21250 Hawthorne Blvd., Suite 500 Torrance, CA 90503	Attorneys for Schorr Metals, Inc.
Don Willenburg, Esq. Gordon & Rees, LLP 1111 Broadway, Suite 1700 Oakland, CA 94607-4023	Attorneys for Schorr Metals, Inc.
Thomas C. Hurrell, Esq. Melinda Lee Cantrall, Esq. Erica Bianco, Esq. Hurrell & Cantrall, LLP 700 S. Flower St., Suite 900 Los Angeles, CA 90017	Attorneys for United States Gypsum Company and Westside Building Materials Corporation

Jill A. Franklin, Esq. Yaron Felix Dunkel, Esq. Schaffer, Lax, McNaughton & Chen 515 S. Figueroa Street, Suite 1400 Los Angeles, CA 90017	Attorneys for Scott Sales Company
Sonja A. Inglin, Esq. Ryan David Fischbach, Esq. Baker & Hostetler 12100 Wilshire Blvd., 15th Floor Los Angeles, CA 90025-7120	Attorneys for RTA Sales PTY, Ltd.
David L. Winter, Esq. Bates Winter & Cameron, LLP 925 Highland Pointe Drive, Suite 380 Roseville, CA 95678	Attorneys for Southwire Company
Jennifer Erin Scott, Esq. Jones Day 555 S Flower Street, 50th Floor Los Angeles, CA 90071	Attorneys for Century Kentucky, Inc.
Laura E. Coombe, Esq. McGuireWoods LLP 1800 Century Park East, 8th Floor Los Angeles, CA 90067	Attorneys for Century Kentucky, Inc.
Diane P. Flannery, Esq. McGuireWoods LLP One James Center 901 East Cary Street Richmond, VA 23219	Attorneys for Century Kentucky, Inc.
Joan Shreffler Dinsmore, Esq. McGuireWoods LLP 434 Fayetteville Street, Suite 2600 Raleigh, NC 27601-1789	Attorneys for Century Kentucky, Inc.
Susan Lauren Caldwell, Esq. Koletsky Mancini etc. 3460 Wilshire Blvd., 8th Floor Los Angeles, CA 90010	Attorneys for TST, Inc.

Stephen C. Snider, Esq.
Kristina Lambert, Esq.
Snider, Diehl & Rasmussen
P O Box 650
1111 W. Tokay Street
Lodi, CA 95241

Attorneys for J.R. Simplot Company

Stephen C. Chuck, Esq.
Victoria Jane Tsoong, Esq.
Chuck Birkett Tsoong
790 E. Colorado Blvd. Suite 793
Pasadena, CA 91101

Attorneys for Resource Building Materials

Roger M. Mansukhani, Esq.
Brandon D. Saxon, Esq.
Gordon & Rees
101 W. Broadway, Suite 1600
San Diego, CA 92101

Attorneys for Laguna Clay Company

Clerk
Los Angeles County Superior Court
111 N. Hill Street, Dept. 34
Los Angeles CA 90012

Attn: Honorable Amy D. Hogue

Case No. BC449958

Clerk, Court of Appeal
Second Appellate District, Div. Four
300 S. Spring Street, North Tower
Los Angeles CA 90013

Case No. B248038