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SUPERIOR COURT OF THE STATE OF CALIFORNIA
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| TUAN BUT; HUONG LEPlaintiffs,v.ERIE PRESS SYSTEMS, ET AL.Defendants. | ) ) ) ) ) ) ) ) ) )) | CASE NO: LC 083946Assigned for all purposes to: Hon. Richard B. Wolfe, Dept. QComplaint filed: 12/31/2008MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT CAPSTONE |

AND RELATED CROSS ACTIONS ) TURBINE CORPORATION

)

) DATE: February 8, 2010

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[FILED CONCURRENTLY WITH DECLARATION OF L. PETER PETROVSKY, P.E., PLAINTIFF'S SEPARATE STATEMENT, DECLARATION OF GARY N. STERN INCLUDING RE STATEMENT OF EVIDENCE]

TRIAL DATE: 3/15/2010

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MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Plaintiffs submit the following memorandum of points and authorities in opposition to the motion for summary judgment brought by Defendant Capstone Turbine Corporation (hereinafter "Capstone").

The sole grounds for Capstone's motion is its claim that Labor Code section 4558 (the so called "power press" exception to the exclusivity doctrine applicable to workers compensation claims) does not apply to Capstone in this case. In fact, each and every element of section 4558 is supported by the facts in this case. Plaintiffs are therefore entitled to proceed with their civil action against Capstone.

Plaintiffs' Opposition to Defendant's Motion is based upon this Memorandum of Points & Authorities, the concurrently filed Plaintiffs' Separate Statement, the Declaration of expert engineer L. Peter Petrovsky, P.E., the Declaration of Gary N. Stern supporting the exhibits attached hereto, and such other oral or documentary evidence as may be presented at the time of said hearing.

DATED: January 21, 2010 GORDON, EDELSTEIN, KREPACK,

GRANT, FELTON & GOLDSTEIN

By:

HOWARD D. KREPACK

GARY N. STERN

Attorneys for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S

MOTION FOR SUMMARY JUDGMENT

**MEMORANDUM OF POINTS AND AUTHORITIES**

I.

**INTRODUCTION**

Capstone claims that Plaintiffs have not met their burden of establishing that Labor Code section 4558 permits this action at law against Plaintiff Tuan Bui's employer, Capstone Turbine Corporation. Capstone is wrong.

Labor Code section 4558 is the "power press" exception to the usual rule that an employee's exclusive remedy against his employer with regard to an on the job injury is workers compensation. See Labor Code section 3602(a). Labor Code section 4558 sets out a number of elements that must exist in order for an employee to be able to bring an action at law against his employer in addition to his workers compensation remedies.

Those Capstone employees, including management personnel, who have been deposed, have essentially admitted the facts required for the application of section 4558. There are, at the very least, triable issues of material fact with regard to the elements of section 4558 that permit an action at law by an employee against his employer. The evidence supporting the application of section 4558 to Capstone comes not only from Capstone's employees, but from the evidence that has been

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obtained from Defendants Erie Press Systems and Solar Turbines, Inc. The history of the subject press in terms of how it came to be manufactured and used by Erie, Solar and then Capstone is relevant and will be discussed below.

II.

STATEMENT OF FACTS

On June 27, 2007, Plaintiff Tuan Bui was in the course and scope of his employment as a press operator on a power press owned since 2000 by Plaintiff's employer, Capstone Turbine Corporation. The incident took place at Capstone's manufacturing plant in Van Nuys. The subject power press is labeled as built by Erie Press Systems.

Capstone manufactures turbine engines. The Erie press is part of a process for fabrication of recuperator cores. These are devices used to preheat the gas that feeds a turbine to increase horsepower and decrease emissions. The subject power press operates by feeding a sheet of stainless steel three thousandths of an inch thick from a spool into the press. The press then crushes a pattern onto the folded steel. After the ram retracts, a trim guide automatically cuts a cell out of the sheet. The waste, or skeleton material, exits from the press through a slot and the completed cell goes into a collection bin.

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As press operator, Plaintiff Tuan Bui sits at the outboard or exit side of the press and guides the finished cell and scrap out of the press. The "point of operation" where Plaintiff was sitting on the date of accident was not properly guarded. There was a black gate approximately 11 inches from the trim die with a slot or gap that was 5 inches wide and about 19 inches tall, a more than sufficient gap to allow a hand to be pulled into the die. As set forth in Exhibit 15, the excerpts from the Cal-OSHA citation and investigation documents (p. 56), Plaintiff was grabbing "the scrap material coming out of the machine with both hands. His right hand was holding it on the bottom and his left hand on top...the material recoiled back into the die area, dragging his hand through the guard." [The Cal-OSHA records are admissible pursuant to Labor Code section 6304.5 and Elsner v. Uveges (2004) 34 Ca1.4th 915].

The following facts are not disputed: The subject Erie press is a power press as defined in Labor Code section 4558. Furthermore, had there been a safety compliant point of operation guard on the subject press at the site where Plaintiff was working, his hand could not have been pulled into the press where much of his right hand was traumatically amputated.

Perhaps nowhere does the evidence more clearly establish that section 4558 applies to Capstone in this case then the

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following questions and answers from Capstone's management representative Robert McKeirnan:

Q: Did you formulate the view in connection with your work at Capstone that the manufacturer of these presses specified to the user of these presses that a point of operation guard was essential for the safe operation of these press lines?

A: Yes.

Q: Did you formulate the view in your position with Capstone at the time that the manufacturer of these presses specified that the point of operation guard must be placed there by the user of the press lines?

A: Yes.

Q: ...Would you agree with me that Capstone removed what

was initially on the Erie press...serving as a point of

operation guard...?

A: Yes.

Q: And it would not have been removed by any person, firm

or entity other than Capstone, correct?

A: Correct.

Q: And to the best of your knowledge that kind of removal

would not happen without the authority of Capstone

management...?

A: Yes.

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Q: These presses are machines that form material, correct? A: Yes.

Q: ...these machines use a die that's designed for use in the manufacture of another product, correct?

A: Yes.

Q: If there's no point of operation guard there that is compliant with generally accepted engineering practices, that that exposed the employee to the risk of serious injury or death?

A: Yes.

Q: My understanding is that the manufacturer of this machine specified that a point of operation guard was required at the outboard side of this machine and that it be installed by the end user...You agree with that statement?

A: Yes.

Exhibit 11, McKeirnan deposition, 38:20-25, 39:1-18, 77:3-80:16.

III.

**SUMMARY JUDGMENT SHOULD BE DENIED WHERE**

**THERE IS A TRIABLE ISSUE OF FACT**

Summary judgment is only proper when there are no triable

issues of material fact. CCP section 437c. Summary judgment is

a drastic measure that deprives the losing party of a trial on

the merits and therefore it may not be invoked unless it is

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clear from the affidavits or declarations submitted that there are no triable issues of fact. Crescenta Valley Moose Lodge v. Bundt (1970) 8 Cal.App.3d 682.

The court strictly construes the papers of the moving party, and liberally construes the papers submitted by the opposing party. Chern v. Bank of America (1976) 15 Ca1.3d 866, 873. Any doubts as to whether summary judgment is proper should be resolved against the moving party. Buehler v. Oregon Washington Plywood Corp. (1976) 17 Ca1.3d 520, 526.

IV.

**TRIABLE ISSUES OF MATERIAL FACT EXIST AS TO**

**THE APPLICATION OF LABOR CODE SECTION 4558 TO CAPSTONE,
THUS SUPPORTING PLAINTIFF'S ACTION AT LAW AGAINST CAPSTONE**A. Overview of Labor Code section 4558:

Labor Code section 4558 is a statutory exception to the usual exclusive remedy doctrine of workers compensation law. The basic enabling provisions for an injured employee are found in subsections (b) and (c):

"(b) An employee...may bring an action at law for damages against the employer where the employee's injury...is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is

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specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death."

"(c) No liability shall arise under this section absent proof that the manufacturer designed, installed, required or otherwise provided by specification for the attachment of the guards and conveyed knowledge of the same to the employer. Proof of conveyance of this information to the employer by the manufacturer may come from any source."

Section 4558 defines many of the terms used in these enabling paragraphs. Section 4558(a) (4)defines "power press." In our case, there is no dispute that the subject Erie press is a (a)(4) type of power press.

"(a) (2): 'Failure to install' means omitting to attach a point of operation guard either provided or required by the manufacturer, when the attachment is required by the manufacturer and made known by him or her to the employer at the time of acquisition, installation or manufacturer required modification of the power press." (emphasis added)

"(a)(3): 'Manufacturer' means the designer, fabricator or assembler of a power press." (emphasis added)

"(a)(5): 'Removal' means physical removal of a point of operation guard which is either installed by the manufacturer or

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installed by the employer pursuant to the requirements or instructions of the manufacturer." (emphasis added).

"(a)(6): 'Specifically authorized' means an affirmative instruction issued by the employer prior to the time of the employee's physical injury or death, but shall not mean any subsequent acquiescence in, or ratification of, removal of a point of operation safety guard."

Capstone cites to Award Metals, Inc. v. Superior Court (1991) 228 Cal.App.3d 1128, then proceeds to misinterpret the Court's holding and reasoning. The Court's statement about narrowing the range of exceptions to the exclusivity of workers compensation did not suggest that the Court was narrowing the application of section 4558. The Court was generally referring to "exceptions", not section 4558 in particular. The holding in Award Metals actually affirmed the viability of the plaintiff's section 4558 claim in that case at the pleading stage. The Court also stated:

"The purpose of this section, as explained in Ceja v. J. R. Wood, Inc. (1987) 196 Cal.App.3d 1372, 1377, 'is to protect workers from employers who wilfully remove or fail to install appropriate guards on large power tools. Many of these power tools are run by large mechanical motors or hydraulically. (Cal. Admin. Code, tit. 8, § 4188.) These sorts of machines are

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difficult to stop while they are in their sequence of operation. Without guards, workers are susceptible to extremely serious injuries. For this reason, the Legislature passed section 4558, subdivision (b), which subjects employers to legal liability for removing guards from powerful machinery where the manufacturer has designed the machine to have a protective guard while in operation.'" 228 Cal.App.3d at 1133.

In this case, the subject power press was designed to have a protective guard while in operation. Capstone's McKeirnan has admitted this in his testimony quoted above.

B. Application of Section 4558 to the facts in this case

1) Both Erie Press Systems and Solar Turbines, Inc. are "manufacturers" of the subject power press (Plaintiffs' Disputed Fact number 2). In the case of Erie, their operations manual instructs and requires that the end user install a safety compliant point of operation guard (Plaintiffs' Disputed Fact number 3). In the case of Solar Turbines, it installed a safety compliant point of operation guard before it sold the subject press to Capstone. It then trained Capstone on the use and operation of the press shortly before the sale was consummated and the press delivered by Solar to Capstone. As part of that training, Solar told Capstone that the safety compliant guarding on the press was an essential feature of the press and must not

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be removed. The Solar installed guard was a required attachment and this fact was directly stated to Capstone (Plaintiffs' Disputed Fact number 4).

1. Capstone actually did install the Solar designed, safety compliant guard once it received the subject press from Solar and kept that proper guard on the press until 2002 (see Exhibit 10, deposition of former Capstone engineer Aleksandrovich, 18:11-20:3).
2. In 2004, a newly arrived Capstone plant manager noted that the point of operation guarding was something different and not what was on the press prior thereto. Capstone plant manager Alan Steven Meyer testified that the black gate that apparently served as a point of operation guard on the date of plaintiff's accident had been in that configuration since he started with Capstone in 2004. Capstone does not at any time in this case dispute that the black gate with a 5 inch gap was dangerous, defective, amounting to no point of operation guard at all and reflects the fact of a removal of what had been at that location on the press (outboard, exit side, where plaintiff was injured) when the press was acquired by Capstone in 2000. See Plaintiffs' Disputed Fact number 5 which cites the various deposition excerpts establishing this knowing removal. See also in particular Mr. McKeirnan's testimony quoted above in the

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Introduction. Disputed fact number 5 also refers to Ex. 15, the Cal-OSHA records, which state that Capstone was issued a citation for knowingly failing to have a compliant point of operation guard and that such failure was a substantial factor causing the accident and Plaintiff's injuries.

1. All present and former employees of Capstone deposed in this case have admitted that the removal of what former Capstone employee Aleksandrovich testified was a safe guard that was present on the press from its 2000 acquisition to 2002 (when Aleksandrovich left Capstone) could not have taken place at Capstone without Capstone management's specific affirmative authorization (Ex. 10, Aleksandrovich deposition, 63:6-13, Ex. 11, McKeirnan deposition, 77:3-80:16, Ex. 12, Meyer deposition, 46:18-47:23).
2. Finally, the Capstone employees have admitted that the Erie operations manual was provided with the press and at all times was accessible to Capstone during the years it used the press, up to and including the date of accident. Capstone witnesses have stated that Capstone knew it was responsible for placement of a safety compliant point of operation guard on the press. In fact, as much as 1 year before Plaintiff's accident, Capstone's own safety director raised concerns with Capstone engineer Simpson and plant manager Meyer about the lack of a

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compliant guard. They tinkered with alternatives, but in the end, the dangerous black gate with a too large opening remained on the machine at the time of Plaintiff's accident. Clearly, by its own admission, Capstone knew what was required for the subject machine, as instructed in the Erie manual, prior to Plaintiff's accident, yet failed to install such a proper, safety compliant point of operation guard (Ex. 14, Taff deposition, 15:21-16:1, 16:4-6, 18:21-19:5, 21:14-22:8, 22:15­23:3, 24:3-26:21, 29:19-21, 30:16-31:20, 35:7-11, 35:20-36:13, 37:1-9, 37:11-15, 52:6-54:12; Ex. 10, Aleksandrovich deposition, 37:15-38:5, 38:24-39:10, 42:24-43:24, 50:12-21; Ex. 11, McKeirnan deposition, 77:3-80:16).

C. Erie Required and Specified Guards and Conveyed This Information to Capstone Through its Operations Manual

Capstone cites Swanson v. Matthews Products Inc. (1985) 175 Cal.App.3d 901. The facts of that case are nothing like our case. In Swanson, the employer bought a 20-30 year old power press from what appears to be a used equipment dealer. There was no operations manual supplied with the press. The dealer apparently made a general comment to the employer about a need to bring the machine up to OSHA standards. That was the sum total of any communication by anyone to the employer about any aspect of the power press. The Court held that such limited

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communications and information obtained by the employer did not give rise to the application of Labor Code section 4558. A critical fact in Swanson was that the only communication placed into evidence was one from the used equipment dealer. No evidence was presented as to any information conveyed by the manufacturer. This lack of evidence was the primary basis for the Court's holding sustaining summary judgment for the defendant.

Our case involves communications by Erie and Solar with Capstone. The evidence is undisputed that the Erie operations manual was provided with the press to Capstone. The Erie operations manual (see the relevant pages attached hereto as Exhibit 3) contains many pages, taken as a whole that instruct and require point of operation guarding. The Erie manual does not just generally refer to OSHA, but explicitly cites to the actual point of operation guarding rules. The Erie manual does not just cite to OSHA, but also to ANSI and to generally accepted national safety standards. More explicitly (Ex. 3, page 46), Erie's manual instructs that protective guards are to be kept in place. The Erie manual, taken as a whole, and provided to Capstone (where it remains within easy access to anyone at Capstone who wants to read it) could not be clearer in terms of press manufacturer requirements and instructions

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conveyed to the end user (Capstone) as to point of operation guards.

It is also important to address the significant differences between how the employer in Swanson obtained its used press and the facts in our case. The practical reality in this case is that Capstone at all times was the only "customer." Between 1996 and 2000, Capstone had a deal with Solar whereby Solar manufactured recuperator cores for Capstone (Ex. 9,

Cedillo deposition, 16:10-16, 24:20-25:4, 26:23-27:2). In connection with that ongoing project, Solar and Erie collaborated to design a power press that would be part of that manufacturing process (see Exhibit 4; Kincaid deposition, 88:8­21, 89:3-15, 91:17-92:13, 95:5-13). Solar completed the design and manufacture of the press by adding the slot opening that would allow the machine to function (Ex. 9, 27:19-28:1, 30:20­31:1, 32:8-13). In 2000, Capstone decided to assume the recuperator core manufacturing process and thus bought the necessary machines from Solar, including the subject press (Ex. 9, 38:3-39:19; also McKeirnan deposition, Ex. 11, 17:23-18:12). In reality, the entire relationship between Erie and Solar with regard to the subject press was solely with regard to Capstone's product. The subject press was custom built and its only purpose was to make Capstone's recuperator cells (Ex. 9, Cedillo

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deposition, 67:5-13).

Capstone also does not fully address the testimony of Erie's witness, Mr. Kincaid. Mr. Kincaid testified that especially with a custom press such as the subject press, guards are an important topic as part of the Erie operations manual (Ex. 5, 79:2-80:3). Mr. Kincaid stated that the Erie manual makes it clear to the end user that Erie is not supplying the necessary guarding (making the product defective in design when it left Erie, a point to be raised in Plaintiffs' opposition to Erie's MSJ) and that the end user has to take care of "that requirement." This is stated in the operations manual that Erie expects will accompany the machine (Ex. 5, 80:12-81:19, 85:21-

86:10, 114:1-16, 117:15-118:3). In short, Mr. Kincaid, as Erie's designated person most qualified, testified that the Erie manual (obtained by Capstone, admits its employees) contains explicit instructions and requirements for point of operation guarding for the subject press.

The law is clear that the very types of guidelines, warnings, requirements and instructions contained in the Erie manual that went to Capstone with the subject press (see Ex. 3) constitute the type of information conveyance contemplated by section 4558. In Bingham v. CTS Corp. (1991) 231 Ca1.App.3d 56, the Court upheld the application of section 4558 where the

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subject press brake came to the employer with manufacturer manuals that included warnings about dangers of operating the machine without established safeguards and devices. The warnings, requirements and instructions described in Bingham are very much like what we see in the Erie manual pages attached as Ex. 3.

D. Solar was a "manufacturer" under Labor Code section 4558

Capstone cites two cases for the proposition that Solar is not a "manufacturer" in this case. Neither case has any fact comparable to our case. Furthermore, Capstone has ignored the facts in our case as to Solar's role pertaining to the subject press.

The Jones v. Keppeler (1991) 228 Cal.App.3d 705 case was an attempt by an employee to expand the word "manufacturer" to include anyone who at any time modifies any aspect of a power press. The Court rejected such an expansive definition of manufacturer. In Jones, Plaintiff was injured on a power press manufactured decades before. The manufacturer sold the press to an end user (Rohr) back in 1956 with a service manual, with foot controls, no hand controls and no point of operation guard. After 20 years of use, Rohr added a 2 hand control system to the press, manufactured by PSC. One year later, Rohr sold the

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machine to Plaintiff's employer. It provided the service manual that made reference to hand and foot controls but said nothing about a point of operation guard.

Plaintiff in Jones unsuccessfully argued that Rohr and PSC were manufacturers that had somehow conveyed guarding information to Plaintiff's employer. The Court stated that the mere modification or addition of a new type of control system to a 20 year old press did not make these companies manufacturers of the press. Accordingly, Jones did not satisfy the requirements of section 4558.

Solar Turbines is nothing like the press modifiers in the Jones case. As is demonstrated by the documents attached as Exhibit 4 and as stated by Erie's Kincaid and Solar's Cedillo, Solar and Erie collaborated on the design of the custom press that would be part of the manufacturing process for Capstone's product (Ex. 5, Kincaid deposition, 88:8-21, 89:3-15, 91:17­92:13, 95:5-13; Ex. 9, Cedilla deposition, 16:10-16, 24:20­25:4). Solar received the press from Erie in a form where it could not be practically used without additional work to be performed by Solar. So Solar designed and added a required slot opening, as part of a safety cage that served as a point of operation guard. The power press that went into production at Solar Turbines for 3 years before being sold to Capstone was the

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result of the design and manufacturing work by both Erie and Solar. It is also relevant to note that once Erie completed its part of the project regarding the building of the press, it had to be shipped to Solar's plant, where Solar assembled the press and then completed its design and manufacture with the slot opening and safety cage (Ex. 5, Kincaid deposition, 93:2-94:16).

With Solar established as a manufacturer, the application of section 4558 in terms of conveyance of instructions and requirements for a safety compliant point of operation guard becomes obvious. Solar's Mr. Cedillo testified that he trained the Capstone representatives as to the operation of the press and explicitly told them that the point of operation guard designed and installed by Solar, with a safety compliant 1 inch opening that would not allow a hand to enter the die area was essential to the press being sold to Capstone and must not be removed (Ex. 9, Cedillo deposition, 27:19-28:1, 37:1-3, 38:3­39:19, 83:23-84:9, 119:9-13, 127:21-128:2).

Nothing in Bryer v. Santa Cruz Pasta Factory (1995) 38 Cal.App.4th 1711 applies to our case. In that case, the employer purchased a second hand machine (presumably from a used equipment dealer). The employer never had contact with the machine manufacturer and never received the manufacturer's operations manual. The sole basis for the employee's claim that

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Labor Code section 4558 applied to her case was that the seller of the machine may have told the employer of a possible safety problem with the machine. The Court held that in the absence of any information from the manufacturer, section 4558 does not apply.

V.

CONCLUSION

What is undeniable in this case is that Solar's completion of the subject press involved the placement of a slot opening as part of a point of operation guard that had to be added to the Erie press to make it work. What Solar added was a safe and proper point of operation guard (Solar, as a press manufacturer, sold to Capstone a defective press for other reasons, not involving guarding, that will be the subject of Plaintiff's opposition to the Solar MSJ). When Solar sold the press to Capstone in 2000, the Erie manual went with it. Thus, through its manual, Erie conveyed to Capstone the requirement and instruction for a point of operation guard (Ex. 3).

At the same time, Solar conveyed to Capstone, through direct training and statements verified in this case by Solar's trainer, Mr. Cedillo (Ex. 9), that the specific point of operation guard Solar had installed on the press was essential to the press and must not be removed. Both companies, as

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designers and manufacturers of the press, thus conveyed to Capstone the requirement of a point of operation guard.

The proper guard in fact remained on the subject press from 2000-2002 (Ex. 10, testimony of Aleksandrovich). Capstone has produced no one who saw the press from 2002 to 2004. But its plant manager, Mr. Meyer, testified (Ex. 12) that when he first began his employment with Capstone in 2004, the Solar installed guard, in place at Capstone from 2000-2002, was not present (Ex. 12, 21:7-18, 26:6-14, 26:15-22, 46:18-47:23). In its place was the dangerous, defective black gate seen on the date of accident, which did not constitute a point of operation guard (Ex. 15, Cal-OSHA records; Ex. 14, Taff deposition, 35:20-36:13, 37:1-9).

For the reasons set forth herein, and in the concurrently filed opposition separate statement, expert declaration and exhibits, there exist triable issues of material fact concerning the application of Labor Code section 4558 to Capstone. Defendant Capstone's Motion should be denied.

DATED: January 22, 2010 GORDON, EDELSTEIN, KREPACK,

GRANT, FELTON & GOLDSTEIN

By:

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GARY N. STERN

Attorneys for Plaintiffs

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