

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Jean H. Toal, Acting Circuit Court Judge

Appellate Case No. 2022-000368
Court of Appeals Opinion No. 2021-UP-422

APPENDIX
VOLUME II

Timothy W. Howe, Individually and as Personal Representative of
the Estate of Wayne Erwin Howe, Deceased, and Jeanette Howe, ... Respondents,

v.

Air & Liquid Systems Corp., Individually and as Successor-in-Interest to Buffalo Pumps, Inc; Airco, Inc.; Airgas USA, LLC, f/ka National Welding Supply, Inc.; Albany International Corp.; Asten-Johnson, Inc.; Aurora Pump Company; A.W. Chesterton Company; Beloit Corporation; Black Clawson Converting Machinery, LLC, Individually and as a Subsidiary of Davis-Standard LLC; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Productions, Inc., f/k/a Carolina Gasket and Rubber Company; CNA Holdings, Inc., f/k/a Hoechst Celanese Corporation; Celanese Corporation f/k/a Hoechst Celanese Corporation (Sued Individually and as Successor-in-Interest to Fiber Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Crane Co.; Crown Cork & Seal Company, Inc.; Daniel International Corporation; Davis-Standard Corporation, LLC; Dezurik, Inc. d/b/a Dezurik-Apco Williamette Eagle, Inc.; Fisher-Klosterman, Inc., as Successor-in-Interest to Buell Engineering Co.; Flowserve Corporation, Individually and as Successor-in-Interest to Durco Pumps; Fluor Enterprises, Inc., f/k/a Fluor Daniel, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Ingersoll-Rand Company; Linde, LLC f/k/a The Boc Group, Inc., f/k/a Airco,

Inc.; Marsulex Environmental Technologies Corporation,
Individually and as Successor-in-Interest to Buell Engineering Co.;
Marsulex Environmental Technologies, LLC, as Successor-in-
Interest to Buell Engineering Co.; Metropolitan Life Insurance
Company, a Wholly-Owned Subsidiary of MetLife Inc.; Peerless
Pump Company; Presnell Insulation, Inc.; Riley Power, Inc.,
Individually and as Successor-in-Interest to Babcock Borsig Power,
Inc., and Riley Stoker Corporation, Individually and as Successorin-
Interest to D.B. Riley; SCAPA Waycross, Inc.; Sepco
Corporation; SPX Cooling Technologies, Inc., f/k/a Marley
Cooling Technologies, Inc., f/k/a The Marley Cooling Tower Co.;
Sterling Fluid Systems (USA) LLC; Trane U.S., Inc., f/k/a
American Standard, Inc., f/k/a American Radiator & Standard
Manufacturing Company; Union Carbide Corporation; Uniroyal,
Inc., f/k/a United States Rubber Company, Inc.; United Conveyor
Corporation; Velan Valve Corp.; Viking Pump, Inc.; Warren
Pumps LLC; Yuba Heat Transfer Corporation; and Zurn Industries, ...Defendants,

Of which Cleaver Brooks, Inc. is the..... Petitioner.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2019-000164
Circuit Court Case No. 2015-CP-46-3456

RECORD ON APPEAL
(VOLUME I)

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MAY 30 2019

SC Court of Appeals

Timothy W. Howe, Individually and as Personal Representative of
the Estate of Wayne Erwin Howe, Deceased, and Jeannette Howe Respondents,

v.

Air & Liquid Systems Corp., Individually and as Successor-in-Interest to Buffalo Pumps, Inc; Airco, Inc.; Airgas USA, LLC, f/k/a National Welding Supply, Inc.; Albany International Corp.; Asten-Johnson, Inc.; Aurora Pump Company; A.W. Chesterton Company; Beloit Corporation; Black Clawson Converting Machinery, LLC, Individually and as a Subsidiary of Davis-Standard LLC; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Productions, Inc., f/k/a Carolina Gasket and Rubber Company; CNA Holdings, Inc., f/k/a Hoechst Celanese Corporation; Celanese Corporation f/k/a Hoechst Celanese Corporation (Sued Individually and as Successor-in-Interest to Fiber Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Crane Co.; Crown Cork & Seal Company, Inc.; Daniel International Corporation; Davis-Standard Corporation, LLC; Dezurik, Inc. d/b/a Dezurik-Apco Williamette Eagle, Inc.; Fisher-Klosterman, Inc., as Successor-in-Interest to Buell Engineering Co.; Flowserve Corporation, Individually and as Successor-in-Interest to Durco Pumps; Fluor Enterprises, Inc., f/k/a Fluor Daniel, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Ingersoll-Rand Company; Linde, LLC f/k/a The Boc Group, Inc., f/k/a Airco, Inc.; Marsulex Environmental Technologies Corporation,

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of whom

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
TIMOTHY W. HOWE,	)	
Individually and as Personal	)	C/A NO. 15-CP-46-03456
Representative of the Estate of	)	
WAYNE ERVIN HOWE, deceased,	)	
and JEANETTE HOWE,	)	
	)	
Plaintiffs,	)	ORDER GRANTING PLAINTIFFS'
	)	MOTION FOR SANCTIONS
v.	)	AGAINST CLEAVER-BROOKS,
	)	INC.
AIR & LIQUID SYSTEMS	)	
CORPORATION, et al.,	)	
	)	
Defendants.	)	
	)	

Plaintiffs Timothy W. Howe, Individually and as Personal Representative of the Estate of Wayne Ervin Howe, deceased, and Jeanette Howe moved for sanctions against Defendant Cleaver-Brooks, Inc. ("Cleaver-Brooks") for its abuse of the discovery and trial processes. For the reasons set forth herein, Plaintiff's motion for sanctions is GRANTED.

FINDINGS OF FACT

Cleaver-Brooks conceded in its brief before this Court that the "gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party." Response to Motion for Sanctions at 9 (citation omitted). Yet Cleaver-Brooks engaged in a course of withholding crucial documents until the night before its corporate representative was scheduled to testify and then ambushing Plaintiffs with testimony regarding those documents mid-way through trial. This issue of Cleaver-Brooks' failure to produce consequential documents permeated pretrial and trial procedure and was the subject of multiple motions and hearings. Cleaver-Brooks' argument that Plaintiffs have waived this issue (for which

Cleaver-Brooks cites no authority) is baseless. Likewise unfounded is Cleaver-Brooks' contention that this Court lacks jurisdiction to sanction Cleaver-Brooks' machinations. This is a simple issue: Cleaver-Brooks violated the discovery rules, at severe cost to Plaintiffs and waste of the resources of this Court and the jurors. This precisely the type of misconduct for which discovery sanctions are designed.

In its briefing before this Court, Cleaver-Brooks did not dispute this Court's observation that the "lynchpin" of this case at trial and during discovery was the location and number of Cleaver-Brooks boilers. Specifically, the issue was the presence, or absence, of Cleaver-Brooks boilers in the powerhouse at the Bowater plant where Howe worked. Throughout the entire course of discovery and throughout trial until the night before Cleaver-Brooks' corporate representative was designated to take the stand, Cleaver-Brooks hid critical evidence. Instead of producing all relevant evidence, as Plaintiffs repeatedly requested, Cleaver-Brooks produced misleading "commercial records" (the 25-page Bowater file) which indicated that more than one Cleaver-Brooks boiler was at Bowater. (Bates labeled BPM 000001-25.) The fact that Cleaver-Brooks' commercial records identified two Cleaver-Brooks boilers at Bowater is evidenced by Cleaver-Brooks' response to this Court as well as repeated assertions by its corporate representative, John Tornetta.

As Cleaver-Brooks admitted in its briefing, each boiler has a unique identifier called a unit number. Response to Motion for Sanctions at 2 ("Response"). Cleaver-Brooks has also repeatedly admitted as much in its testimony, including in this case. *See, e.g.*, Exhibit 8 to Motion for Sanctions ("Motion"), Dep. of John Tornetta, *Howe v. Air & Liquid Systems Corporation*, C/A No. 2015-CP-46-03456 (York County, S.C. Feb. 2, 2018), at 24:25–31:11 (explaining that he uses a boiler's unit number, which is on the index card, to get their commercial records); Ex. B to Reply

in Support of Fees and Costs (“Reply”), Dep. of John Tornetta, *Baccaglini and Zaino v. Cleaver-Brooks, Inc.* (N.Y. Supreme Court April 17, 2003), at 46:10-50:24 (explaining that each individual boiler has its own unit number); Ex. C to Reply, Trial Test. of John Tornetta, *Esposito v. A.O. Smith* (June 17, 2016), at 1530:21-26 (“we have index cards that indicate where we – not where we ship the boiler but where the boiler ended up, where we were told where a boiler ended up”); Ex. D to Reply, Trial Test. of John Tornetta, *Robaey v. Cleaver-Brooks Company* (N.Y. Supreme Court Dec. 12, 2016) at 1481:07-19; 1524:06-1525:04 (Cleaver-Brooks’ index card would show a unit number, or model number, for a particular boiler).

By Cleaver-Brooks’ own admission, the commercial file that Cleaver-Brooks produced to Plaintiffs as pertaining specifically to Bowater had two unit numbers—one ending in 43 and one ending in 44. This indicated that two Cleaver-Brooks boilers were at Bowater. Cleaver-Brooks tried to write off the fact that two units were identified in its Bowater commercial file as a “discrepancy.” Response at 4. On the contrary, the 25 pages which were produced by Cleaver-Brooks as the file for the Bowater site contained documents regarding a unit number 18343 (*e.g.*, Exhibit 4 to Motion at BPM000013, showing “unit number 18343” “ship to Bowater Carolina Corp, Catawba, South Carolina”), as well as documents regarding a unit number 18344 (*e.g.*, Exhibit 4 to Motion at BPM000016, showing “unit #0-18343” “ship to Bowater-Carolina Corp.”). Plaintiffs had no way to know that Cleaver-Brooks would claim mid-way through trial that the identification of one of the boilers was a typo. As Cleaver-Brooks’ own corporate representative admitted, the numbers 18344 and 18343 “are really different things.” Ex. E to Reply, Trial Trans. at 692:25-693:2. There was no discrepancy in the commercial records: all of the documents produced by Cleaver-Brooks up until it finally produced the midnight documents indicated unequivocally that there were two Cleaver-Brooks boilers at Bowater.

In conjunction with these documents produced at trial, Cleaver-Brooks' corporate representative offered new opinions that he had not held in either of his two depositions, including just days before trial. For example, he testified at trial that a consequential typo ran throughout the 25 pages that Cleaver-Brooks had produced in discovery. He offered multiple justifications for this erratum. Ultimately, however, such errors could have been discovered through earlier, timely production of the documents, and not ambush production in the middle of trial.

Based on the Bowater file, as well as the witness testimony, Plaintiffs made the perfectly reasonable decision to proceed to trial. Cleaver-Brooks maintains that it "cannot guess how opposing counsel will interpret—or in this case misinterpret—Cleaver-Brooks documents." Response at 11. Actually, Cleaver-Brooks could know how opposing counsel would interpret its documents because it had been telling Plaintiffs all along that unit numbers are discrete, unique identifying numbers for each boiler, like a social security card. *See* Tornetta trial and deposition testimony, *supra*. In Cleaver-Brooks' own words, "[e]ach Cleaver-Brooks boiler has a unique identification number called a unit number." Response at 2. Accordingly, Plaintiffs read Cleaver-Brooks' records exactly as they were designed to be read.

Mid-way through trial, Cleaver-Brooks for the first time produced evidence—the "midnight documents"—proving that one boiler that had been identified in the commercial records it had produced responsive to requests regarding Bowater in fact pertained to a boiler that was sent to Illinois, not Bowater. Accordingly, the midnight documents showed that only one Cleaver-Brooks boiler had been at Bowater, and that boiler had been in the administration building, not in the powerhouse. On cross-examination the next day, Cleaver-Brooks' corporate representative admitted that the records that Cleaver-Brooks had previously produced in response to discovery requests regarding Bowater did in fact contain unit numbers for two separate boilers. For the first

time at trial, Tornetta dismissed the boiler unit number 018344 as not being at Bowater, and having been listed in the Bowater commercial file due to a typo. Ex. A to Reply, Trial Trans. at 686:2-8.

Thus came Plaintiffs' second surprise at trial—despite two depositions, Tornetta for the first time testified at trial about the typo in the Bowater file, which was highly consequential to Plaintiffs' decision to go to trial. Thus, Cleaver-Brooks violated the rules of discovery once when it produced key documents at midnight mid-way through trial, and then again when Cleaver-Brooks offered new testimony that had not been provided in advance of trial despite two depositions of its corporate representative. Cleaver-Brooks hammered home on this testimony on its examination of Tornetta and again in its closing statement. *E.g.*, Trial Trans. at 1055:12-15 (“Mr. Tornetta told you last week and he told you again this week that Cleaver-Brooks never denied shipping *a* boiler to Bowater in 1957”).

Up until Tornetta's trial testimony, since these two boilers were identified in documents produced in response to requests pertaining to Bowater, it was reasonable for Plaintiffs to understand that two boilers had been at Bowater. The foundation for Cleaver-Brooks' response—that Plaintiffs were unreasonable in this understanding—is not borne out by the facts. Cleaver-Brooks attempts to skirt the issue by claiming that the midnight documents were never the subject of discovery requests in the first place. On the contrary, the index card pertaining to Bowater, which showed the unique identifier for the unit number of the boiler at Bowater, was always responsive to the requests. Were this not the case, Cleaver-Brooks would have had no reason to produce it mid-way through trial. That index card is as follows:

Name BOWATERS-CAROLINA CORPORATION
 Street Address _____
 City CATAWABA
 State SOUTH CAROLINA
 Model Number P-723-30S
 Unit Number O-18343
 S. O. Number P-1170

C 10-655A

Had Cleaver-Brooks pulled the index card in a timely fashion, it would have discovered that the commercial records it produced to Plaintiffs erroneously identified two boilers at Bowater, and not one. Indeed, this is precisely what Cleaver-Brooks' corporate representative discovered when he finally pulled the index card the night before he was scheduled to testify at trial. Cleaver-Brooks knew that its index cards were always the subject of discovery requests, yet simply failed to conduct its requisite due diligence in searching its files for responsive evidence until its corporate representative was about to testify at trial.

These documents are responsive to Plaintiffs' Standard Interrogatories and Request for Production of Documents, which specifically requested "documents which show sales" pertaining to products containing asbestos to job sites at which plaintiff was employed, which included Bowater. Ex. E to Reply, Plaintiff's Standard Interrogatories and Request for Production of Documents, *County of Greenville, In re: Asbestos Litigation Coordinated Docket*. Those discovery requests further order that "[t]hese Interrogatories shall be deemed continuing in the sense of Rule 26(e) of the South Carolina Rules of Civil Procedure so as to require supplemental answers a reasonable time prior to trial. . ." The documents are also subject to the document request attached

to the Rule 30(b)(6) notice to take the deposition of Cleaver-Brooks' corporate representative. Ex. F to Reply, Tornetta Deposition Notice at ¶ 5 (produce "purchase order records for all asbestos-containing products sold to any Premises at Issue between 1962 and 2008"). The documents were also subject to Plaintiffs' motion to compel, and Plaintiffs had asked for the documents, as this Court recognized at trial: "Oh, no question about that." Ex. A to Reply, Trial Trans. at 711:7-16.

Even if Cleaver-Brooks did not know about the index cards at the time of its first production, it admits that its corporate representative was well aware of the index cards, as evidenced by his depositions. Response at 4. It then concedes that the index card regarding the Bowater boiler was responsive to discovery requests (and thus should have been produced), arguing only that the index card for the Illinois boiler was not responsive. Response at 6. Cleaver-Brooks' corporate representative Tornetta admitted at trial that Plaintiffs had explicitly asked for those index cards during his deposition. Exhibit A to Reply, Trial Trans., at 121:12-122:11. Moreover, on January 22, 2018, Plaintiffs moved to compel documents that Cleaver-Brooks had not produced. Ex. 5 to Motion. On March 9, 2018, Plaintiffs filed a motion for sanctions because further production at that late date would cause prejudice. Ex. 11 to Motion, Hearing on Motion for Sanctions Against Cleaver-Brooks. In lieu of yet again requesting the documents, Plaintiffs asked the Court for a presumption that Cleaver-Brooks' boiler had been in the powerhouse, which request this Court took under advisement. *Id.* Cleaver-Brooks knew it had an obligation to produce the index cards in supplementation of its original discovery production. It simply chose not to.

By Cleaver-Brooks' admission, it was again reminded of its obligation to supplement its document production when, following Art Welker's February 20, 2018 deposition, Plaintiffs again asked Cleaver-Brooks to produce responsive documents. Response at 5. Cleaver-Brooks again chose not to fulfill its obligation, but instead waited until midnight on March 15, 2018, mid-way

through trial, to even check its records for responsive documents. Trial Trans. 685:12-695:8. Tornetta had claimed that the index cards have “all the same information” on them that is within the commercial records that Cleaver-Brooks had already produced, and he refused to “get involved in” trying to find evidence of where the boiler was actually located. Ex. 8 to Motion, at 50:16-20; 59:4-11. This was inaccurate information, stated by Cleaver Brook’s representative that was easily corrected if they had reviewed the requested records.

Attempting to detract from the wrong underlying Plaintiffs’ motion—Cleaver-Brooks’ failure to comply with discovery requests, despite repeated requests and this Court’s own admonition to do so—Cleaver-Brooks faults Plaintiffs for handling the midnight documents as they did. Cleaver-Brooks claims that “[a]t no point during their opening did Plaintiffs reference the core part of their theory of the case:” the existence of two-Cleaver-Brooks boilers at Bowater. Response at 5. On the contrary, Plaintiffs maintained that there were “specific boilers in this case sold by Cleaver-Brooks.” Trial Trans. at 50:12. Cleaver-Brooks’ counsel made the same claim, referring during opening statements to “Cleaver-Brooks boilers sold to the Bowater Paper Mill. . . .” *Id.* at 81:5.

In addition, Plaintiffs timely called to this Court’s attention the egregiously late production of these documents, requested their exclusion, and expressed an intent to seek sanctions. In response to Plaintiffs’ motion to exclude the midnight documents, the Court noted that Plaintiffs were under no obligation to reveal their trial strategy regarding the two boilers at Bowater earlier than they had:

What they say is they noticed that disparity and they are the kind of lawyers that do notice those kinds of things. I don't think they're obligated to tell y'all that. They had one little old something that they were going to hang their hat on to say, "Hey, there were two boilers here," and did a good job of elucidating that theory yesterday, and I think they were entitled to do that without violating the rules of having to disclose their theory, because you all had these records just like they did.

Trial Trans. at 717:25-718:9.

Cleaver-Brooks cites no legal authority for its claim that Plaintiffs erred in their handling of Cleaver-Brooks' wrongdoing. Moreover, it is Cleaver-Brooks' offense, and not Plaintiffs' response or Plaintiffs' trial strategy, that is the subject of the motion and for which Cleaver-Brooks must be sanctioned.

Cleaver-Brooks' production of erroneous evidence and failure to timely produce other evidence was extremely prejudicial to Plaintiffs' trial strategy and fundamentally changed the analysis of Plaintiffs' case, resulting in tremendous trial expenses and costs, the waste of judicial resources, and the squandering of citizens' time in serving on a jury. Cleaver-Brooks shrugs its shoulders and claims that it simply did not notice that two boilers were listed in the Bowater commercial file until prompted by Plaintiffs to double-check its records mid-way through trial. Response at 4. As a matter of policy, a party should not be rewarded for failing to examine its own files that it produces in discovery, making inaccurate claims about limited documents (namely that the index cards were the same as the commercial records) and then profit from that failure by misleading opposing counsel.

Once Cleaver-Brooks finally noticed the error in its file and produced the documents, Tornetta admitted that they had been sitting in his office all along and that Plaintiffs had asked him for them months ago during his depositions. Trial Trans. at 121:12-122:11. Cleaver-Brooks' lackadaisical attitude does not excuse the time and resources wasted at trial as a result of its mishandling of its own documents. This Court found that Cleaver-Brooks' behavior was "sloppy" and noted its corporate representative's "dereliction." Ex. 14 to Motion, Trial Transcript (Mar. 16, 2018), at 149:12-153:7. While errors happen, it is imperative that an error be both rectified in the moment and deter such errors from happening again in the future. Sanctions are warranted.

FINDINGS OF LAW

A. This Court May Exercise Its Discretion to Sanction Cleaver-Brooks.

“[T]he court in which the action is pending may make such orders in regard to the failure [to provide discovery] as are just. . . .” SCRCP 37(b)(2). This Court is therefore empowered to sanction Cleaver-Brooks.

Cleaver-Brooks complained that the judgment has not been entered timely. This is manifestly inaccurate, as shown by the governing rule:

- (a) Entry Upon Verdict or Decision. Subject to the provisions of Rule 54(b):
- (1) upon a general verdict of a jury, **or upon a decision by the court that a party shall recover only a sum certain or costs** or that all relief shall be denied, the clerk, **unless the court otherwise orders**, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court;
 - (2) **upon a decision by the court granting other relief**, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly prepare the form of the judgment, or direct counsel to promptly prepare the form of judgment, to which may be attached the decision, order or opinion of the court, and after review and approval by the court, the clerk shall promptly enter it.
- Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record. Entry of the judgment should not be delayed for the taxing of costs.

SCRCP 58 (emphasis added). The judgment is not necessarily automatically entered upon rendition of a verdict, but may be rendered upon a decision of the court granting other relief, such as costs, if “the court otherwise orders,” or “upon a decision by the court granting other relief.” *Id.* As announced at the hearing, the Court instructed the Clerk of Court in York County to not enter the judgment until this motion for sanctions could be heard and decided. Here, judgment will be rendered upon a decision of this Court granting sanctions against Cleaver-Brooks.

B. Cleaver-Brooks’ Argument that Documents Regarding Unit 18344 Were Not Responsive to the Discovery Requests Is Irrelevant.

Cleaver-Brooks argues that it did not have to produce its documents regarding its Illinois

boiler because they were not responsive to the discovery requests. Cleaver-Brooks misses the point. Plaintiffs' discovery requests pertained to documents relevant to Wayne Howe's worksites. Plaintiffs had no interest in accessing Cleaver-Brooks' files pertaining to irrelevant sites, nor could Plaintiffs have anticipated that Cleaver-Brooks would produce such documents. Cleaver-Brooks, by producing documents apparently relevant to a completely unrelated location, put that location at issue. Worse, Cleaver-Brooks confused the issue by producing those documents as "commercial records" of Bowater, where Howe had worked, and later playing "gotcha" to reveal midway through trial that the documents were unrelated to Bowater but were mere typos. All of this confusion on the part of Cleaver-Brooks was the result of its failure to review a mere 25 pages of its commercial records and its failure to carefully maintain those commercial records in the first place. Cleaver-Brooks' sloppiness does not excuse its failure to comply with the discovery rules.

Cleaver-Brooks admits that it was not until mid-way through trial, and only when triggered by testimony at trial, that its corporate representative finally examined the commercial records (only 25 pages) that Cleaver-Brooks had produced to Plaintiffs two months earlier and for the first time discovered Cleaver-Brooks' error. Under Rules 26 and 34, a party must produce relevant documents, not random documents like a file identifying a boiler irrelevant to the action at hand. This is particularly true where the other party has no way to know that there is any error in the file. Under Rule 30(b)(6), a corporate representative must have knowledge of all information on the noticed topics reasonably available to the corporation. Ex. 16 to Motion, *Ethox Chem., LLC v. Coca-Cola Co.*, No. 6:12-cv-1682-TMC, 2014 WL 2719214, at *2 (D.S.C. June 16, 2014). This Rule is not met when a corporate representative fails to examine the corporate documents until mid-way through trial. Cleaver-Brooks' production of documents was misleading, did not comply with the Rules, did not comply with the 30(b)(6) notice, and did not comply with the Asbestos

Trial Docket Amended General Scheduling Order.

C. Cleaver-Brooks Should Be Sanctioned for Its Abuse of the Discovery and Trial Processes.

1. Cleaver-Brooks cannot escape sanctions by questioning Plaintiffs' trial strategy.

Cleaver-Brooks argues that "Plaintiffs had every opportunity to take discovery to resolve any ambiguities regarding the unit numbers in the commercial records." Response at 10. This summarizes the problem: Plaintiffs had no inkling that there was any such ambiguity, particularly since Cleaver-Brooks had produced the Bowater-specific "commercial records" in response to discovery requests specific to Bowater. While faulting Plaintiffs for failing to recognize an ambiguity in its own file, Cleaver-Brooks simultaneously admits that it too failed to recognize such ambiguity, and did not do so until trial and then only in response to questioning by Plaintiffs. In fact, during opening statements, Cleaver-Brooks' own counsel referred to multiple "Cleaver-Brooks boilers sold to the Bowater Paper Mill. . . ." Ex. A to Reply, Trial Trans., at 81:5.

Cleaver-Brooks accuses Plaintiffs of misinterpreting Cleaver-Brooks' files, but its own representative admitted at trial that its files that it produced to Plaintiffs were erroneous. There was no misinterpretation, just reasonable interpretation of the files as produced.

In any event, Cleaver-Brooks cannot escape sanctions for its failure to abide by the discovery rules because it disagreed with Plaintiffs' trial strategy. Plaintiffs gave Cleaver-Brooks' representative every opportunity to explain its files during both of his depositions. Exhibit 8 to Motion, Dep. of John Tornetta (Feb. 2, 2018), at 9:17-21; 26:8-28:11; 45:2-5, 50:11-20; 53:7-12; 59:4-11; Exhibit 9 to Motion, Dep. of John Tornetta, Vol. II (Mar. 6, 2018), at 228:4-18. Plaintiffs raised their theory that there was more than one boiler at Bowater during opening statements. Trial Trans. at 50:12. Yet Cleaver-Brooks waited days later, until the eve of Tornetta's testimony, to

double-check its files. This is sanctionable conduct.

2. Plaintiffs did not waive the right to seek sanctions.

Cleaver-Brooks willfully misinterprets this Court's comments at trial regarding waiver. When Plaintiffs first apprised this Court of the problem regarding Cleaver-Brooks' belated production of the midnight documents, the Court suggested that Plaintiffs may have waived their objection to Cleaver-Brooks' use of the documents regarding the Cleaver-Brooks boiler in Illinois. Ex. A to Reply, Trial Trans. at 710:14-711:16. After confirming with Plaintiffs' counsel that the only document Plaintiffs had used in questioning Cleaver-Brooks' corporate representative was the index card for boiler 43, the boiler that Cleaver-Brooks agrees was at Bowater, it became apparent to this Court that there was no waiver. This Court later granted Plaintiffs' objection to use of the index card regarding the Illinois boiler and excluded this evidence, finding there was no waiver of the objection. Trial Trans. at 715:25-719:3. This Court further clarified that waiver pertained only to the index card regarding the Bowater boiler, which Plaintiffs had put into evidence: "I think the plaintiffs have waived the Bowater card because they displayed it to the jury so I think I'm allowed to put that into evidence and use it." *Id.* at 714:13-15.

This Court then agreed that Plaintiffs had not waived an ability to seek sanctions:

MS. DEAN: . . . Your Honor, Ms. McVey had made a request on Friday that these actions were somewhat a lynch pin of our case, fundamentally fact of how we approached this trial. We want to seek -- I just want to make sure that if we seek sanctions for costs or time after trial we haven't waived anything.

THE COURT: You have already completely talked about how fundamental it was to your case so forth and so on, that is very well protected in the record as I view it.

Ex. A to Reply, Trial Trans., at 864:8-16. Accordingly, this Court rejects Cleaver-Brooks' argument that Plaintiffs waived a motion for sanctions by questioning its corporate representative about the documents at trial.

This Court also rejects Cleaver-Brooks' argument that Plaintiffs waived a motion for sanctions by not requesting the midnight documents during discovery because Plaintiffs, in fact, requested the documents repeatedly. Cleaver-Brooks complains that "Plaintiffs never made any request – not on the record at the deposition, not by email or letter to counsel following the deposition – for that index card." Response at 13. Cleaver-Brooks chooses its words carefully, and misleadingly, because its corporate representative admitted that Plaintiffs had requested the index cards at his deposition, Trial Trans. at 121:12-122:11 – whether that request was on the record is of no moment.

Cleaver-Brooks offers no legal authority for its claim that Plaintiffs should have asked for any piece of evidence by name. As set forth above, the documents are responsive to Plaintiffs' master discovery. The documents are responsive to Plaintiffs' motion to compel. The documents were the subject of Plaintiffs' motion for sanctions. The documents were discussed during both of Tornetta's depositions, at which, Tornetta admitted, he was asked to produce the index cards. It is difficult to imagine how many other ways or times Plaintiffs could have requested the same evidence. Cleaver-Brooks simply chose not to produce the evidence, regardless of how many times and in how many ways Plaintiffs asked.

Cleaver-Brooks contends that Plaintiffs should have raised the issue of the midnight documents before the examination of Mr. Tornetta, moved to strike the testimony, or moved for a mistrial. Cleaver-Brooks cites no legal authority for its contention that Plaintiffs' method of handling Cleaver-Brooks' improprieties constituted a waiver; Cleaver-Brooks' position is contrary to this Court's findings. In fact, an objection may be lodged *before* a motion to strike or a motion for mistrial. *See, e.g., State v. Wilson*, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010). Even then, a motion to strike or a motion for mistrial is not required, except if the party whose

objection is sustained wishes to preserve the issue for appeal. *Id.*

Cleaver-Brooks complains that Plaintiffs elicited testimony from Tornetta on the issue of the midnight documents. Plaintiffs were certainly entitled to ask Cleaver-Brooks about the documents it had produced mid-way through trial, and there is no rule that required any sort of motion in advance. That testimony brought additional surprise, including (1) the fact that Tornetta believed the second unit number listed in the commercial files for Bowater was a typo, and (2) the second unit went to another location. Cleaver-Brooks admits that this testimony was not provided in advance of trial. This was trial by ambush.

The right for sanctions was preserved by Plaintiffs' objection to the documents and request during trial to move for sanctions at a later time. There was no waiver.

3. The jury verdict was based on the evidence that the only boiler at Bowater was in the administration room.

Without question, the jury understood that the key issue in the case was the number and location of boilers at Bowater. Cleaver-Brooks itself commenced its questioning of its corporate representative with questions about the number and location of its boilers:

Q So John, you've known me for a long time, I'm going to go right to the questions. **I want to start by asking for the answers to some of the very basic questions that are at issue in this case** and then I am going to go back and talk about the basis for your answers, okay?

A Okay.

Q Did Cleaver-Brooks ship a boiler to the Bowater Paper Mill in Catawba, South Carolina?

A Yes.

Q And when I use the word Bowater in my questions, I mean the Bowater Mill at Catawba.

A Okay.

Q Did that boiler that Cleaver-Brooks shipped to Bowater contain asbestos?

A At the time of manufacturing it, yes.

Q **How many boilers did Cleaver-Brooks ship to Bowater?**

A One.

Q What was the unit number of the boiler that Cleaver-Brooks shipped to Bowater? And you could just get the last two digits.

A I think the whole unit number, if I get it, correctly is 0-18343.

Q **Did Cleaver-Brooks ship a boiler to Bowater with the unit number 0-18344?**

A No.

Trial Trans. at 736:4- 737:5 (emphasis added). Although Cleaver-Brooks maintains that it did not ask Tornetta about the location of unit 18344, Resp. at 12, that is misleading, as it made clear to the jury that the location of the unit was *not* Bowater. *See, e.g.*, Trial Trans. at 737:3-5; 743:2-4.

It was evident to everyone at trial, not least the jurors, that the key issue was whether there was a Cleaver-Brooks boiler in the powerhouse. Indeed, Cleaver-Brooks made this the starting point of its closing argument. *See* Trial Trans. at 1054-55. Cleaver-Brooks' counsel reminded the jury that the evidence showed only one boiler at Bowater, pointing out, for example, that "Mr. Tornetta told you last week and he told you again this week that Cleaver-Brooks never denied shipping *a* boiler to Bowater in 1957," and "all of the asbestos containing components in the Cleaver-Brooks boiler shipped to Bowater were inside *that* boiler." *Id.* at 1055:12-15; 1055:19-21 (emphasis added). Contrary to Cleaver-Brooks' claim that it did not argue in closing that there was only one boiler, Cleaver-Brooks walked the jury through its supporting evidence, admonishing that "Mr. Tornetta said this 18344 boiler was never at Bowater," explaining away the unit number issue as "mistakes happen," and dismissing Plaintiffs' key witness on the exposure issue. Trial Trans. at 1059:5-1061:24.

4. Exclusion of evidence is not a sanction.

There is no issue of double punishment here. Although this Court excluded from evidence the midnight documents regarding the Illinois boiler, that did not cure Tornetta's surprise

testimony regarding the typo in the commercial files. The revelation of the typo—which came belatedly as a result of the last-minute production of the midnight documents—undermined Plaintiffs’ claim that there were two Cleaver-Brooks boilers at Bowater. It is for this conduct that Cleaver-Brooks has not been sanctioned. Cleaver-Brooks points out that “[d]iscovery sanctions are imposed ‘to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent.’” *Creighton v. Coligny Plaza Ltd. P’ship*, 334 S.C. 96, 123, 512 S.E.2d 510, 524 (Ct. App. 1998). Here, a discovery sanction is warranted both to penalize Cleaver-Brooks and because Cleaver-Brooks continues to hide such documents in other cases, such that deterrence is required.

Cleaver-Brooks overreaches by trying to equate this case with a Fifth Amendment case. Even if a double-punishment issue were at hand here, the United States Supreme Court has held that “Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.” *Dep’t of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 793 (1994) (quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)). Double jeopardy is not at issue.

5. Plaintiffs’ attorneys’ fees are reasonable.

The selection of a sanction for discovery violations is within the trial court’s discretion. *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990). Sanctions can range up to default or dismissal, and “[i]n determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice.” *Griffin Grading & Clearing, Inc. v. Tire Service Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999)

(citing *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974)). The sanction should be aimed at the specific conduct of the party sanctioned. *Id.* (citing *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990)).

Here, the Court cannot award such sanctions as striking pleadings or entering default judgment as verdict has been rendered. The most appropriate sanction in this case is an award of costs, expenses, and attorneys' fees, as well as a denial of Cleaver Brooks' application for costs.

A court may award reasonable expenses, including attorneys' fees, for a party's failure to make or cooperate in discovery, as occurred here. SCRCP 37(b); *see, e.g., Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014) (affirming award of attorneys' fees and costs as sanctions for refusal to comply with discovery rulings); *Arnal v. Arnal*, 363 S.C. 268, 297, 609 S.E.2d 821, 836 (Ct. App. 2005), *aff'd as modified*, 371 S.C. 10, 636 S.E.2d 864 (2006) (court imposed sanctions awarding attorneys' fees for discovery abuse); *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 644, 579 S.E.2d 151, 154 (Ct. App. 2003) (trial court granted attorneys' fees for failure to participate in discovery); *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 305, 529 S.E.2d 45, 56 (Ct. App. 2000) (trial court assessed attorneys' fees for discovery abuses); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999) (trial court awarded attorneys' fees for failure to comply with discovery order).

In addition, a court may award attorney's fees and costs, including time at trial, against an opponent whose conduct results in mistrial and multiplication of proceedings, as here. *Cf. In re Gould*, 77 F. App'x 155 (4th Cir. 2003); *Abner v. Kansas City S. Ry. Co.*, 541 F.3d 372, 380 (5th Cir. 2008); *Gierlinger v. Gleason*, 160 F.3d 858, 862 (2d. Cir.1998). In South Carolina award of attorneys' fees is treated as an issue in equity. *Kilcawley v. Kilcawley*, 312 S.C. 425, 427, 440 S.E.2d 892, 893 (Ct. App. 1994) (citing *Brown v. State Farm Mut. Ins. Co.*, 275 S.C. 276, 269

S.E.2d 769 (1980)). Here, equitable factors, including the policy concerns of punishment and deterrence, weigh in favor of imposing fees and costs.

The amount of attorneys' fees to be awarded is within the discretion of the trial judge. *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004). The six factors a court considers when determining attorneys' fees are (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Id.*

Cleaver-Brooks does not challenge that the requested attorneys' fees are appropriate based on the nature, extent, and difficulty of the case, and the professional standing of counsel. It claims, instead, that Plaintiffs offered "bare assertions" to support the hourly rates for their attorneys' fees. On the contrary, Plaintiffs explained that the prevailing market rate may be established through evidence of fees that counsel with similar qualifications have received in comparable cases. *See Spell v. McDaniel*, 824 F.2d 1380, 1402 (4th Cir. 1987). Plaintiffs attached an order in another case awarding attorneys' fees that are in line with those requested here. Exhibit 20 to Motion, Order, *Brian Parker, et al. v. ABC Debt Relief, Ltd. Co., et al.*, No. 3:10-cv-1332-P (N.D. Tx. Apr. 9, 2014). This Court has the discretion to ascertain reasonable expenses, including attorneys' fees, and the evidence would fully support this Court's award of the fees requested. *E.g., Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014).

Cleaver-Brooks also accuses Plaintiffs of not providing the affidavit of Ms. McVey or Mr. Howe. These affidavits were, in fact, provided the day after Plaintiffs' motion was filed. Exhibits 18 & 22 to Motion. Ms. McVey's affidavit shows that Plaintiffs have not requested special rates for out of state counsel – both Ms. McVey and Ms. Dean, senior and seasoned trial lawyers, are

requesting \$550/hour. Mr. Holder is requesting \$400/hour. Although Cleaver-Brooks claims that the rates for Ms. Dean and Mr. Holder are not rates that a South Carolina attorney would typically receive, it provides no evidence in support. This Court finds that a reasonable attorneys' fee for Ms. McVey and Ms. Dean is \$500/hour rather than the \$550/hour requested by Plaintiffs. This Court finds that a reasonable attorneys' fee for Mr. Holder is \$400/hour.

Cleaver-Brooks also complains that Ms. Dean and Mr. Holder worked the same number of hours in the preparation of trial. Plaintiffs have represented, however, that both attorneys were working together, nearly around the clock in preparation for trial, as did Ms. McVey. It thus comes as no surprise that their hours would mirror each other. Further, itemization of counsel's time is not necessary, as it was evidenced by the degree of preparation required by a trial of this length and scope as well as by counsel's performance at trial, none of which Cleaver-Brooks questions. Finally, Plaintiffs have only requested fees for time spent beginning on the Sunday before trial started when Cleaver Brooks was the only remaining Defendant, as well as the depositions of Mr. Tornetta the Cleaver Brooks representative. Thus, all time requested by Plaintiffs was due only to trying the case against Cleaver Brooks.

Plaintiffs provided evidence that all counsel, including Ms. McVey, were forced to lodge in York in light of its location. As for the number of staff required to try this case, even Cleaver-Brooks does not deny that this was a case of sizable scope, complicated legal and scientific issues, and significant economic interests. So, too, Cleaver-Brooks does not deny that its trial support staff and attorney presence was significant.

The Court finds that the attorneys' fees sought by Plaintiffs, as reduced for Ms. McVey and Ms. Dean, are reasonable and just under the *Jackson* factors and are supported by substantial record evidence.

Finally, the Court rejects Cleaver-Brooks' contention that Mr. Howe and Ms. Myers should not receive the few hundred dollars they are requesting for time lost at work to attend trial. When there has been an abuse of the discovery rules, "the court in which the action is pending may make such orders in regard to the failure as are just." SCRCP 37(b)(2). Lost wages are just and reasonable in this instance.

CONCLUSION

This Court hereby exercises its discretion and grants sanctions against Cleaver-Brooks in the amount of:

- (1) costs incurred by Timothy W. Howe in taking time off from work for trial in the amount of \$2,310 (7 days trial x 10 hrs/day x \$33/hr);
- (2) costs incurred by Wende Myers in taking time off from work for trial in the amount of \$571.84;
- (3) attorneys' fees incurred in trying this case by Jessica Dean of \$78,000;
- (4) attorneys' fees incurred in trying this case by Theile McVey of \$70,500;
- (5) attorneys' fees incurred in trying this case by Jonathan Holder of \$62,400; and
- (6) Plaintiffs' trial expenses in the amount of \$90,835.16.

As a final sanction, I also exercise my discretion to deny Cleaver-Brooks' cost application.

IT IS SO ORDERED.

Jean Hoefer Toal, Chief Justice of the South
Carolina Supreme Court, Retired, Acting as
Circuit Court Judge

October ____, 2018

Spartanburg, South Carolina.



York Common Pleas

Case Caption: Wayne Ervin Howe , plaintiff, et al VS Air & Liquid Systems Corp ,
defendant, et al
Case Number: 2015CP4603456
Type: Order/Sanctions

IT IS SO ORDERED.

s/ Jean H. Toal #2758

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
TIMOTHY W. HOWE,	)	
Individually and as Personal	)	C/A NO. 15-CP-46-03456
Representative of the Estate of	)	
WAYNE ERVIN HOWE , deceased,	)	
and JEANETTE HOWE ,	)	
	)	
Plaintiffs,	)	ORDER DENYING CLEAVER-
	)	BROOKS, INC.'S MOTION TO
v.	)	ALTER OR AMEND ORDER
	)	
AIR & LIQUID SYSTEMS	)	
CORPORATION , et al.,	)	
	)	
Defendants.	)	
	)	

Defendant Cleaver-Brooks, Inc. has moved to “alter or amend” the Court’s order of December 6, 2018, sanctioning Cleaver Brooks for abuse of the discovery and trial processes. For the reasons set forth herein, Cleaver-Brooks’s motion is DENIED.

Toward the end of trial, on March 21, 2018, this Court directed Plaintiffs to move for sanctions against Cleaver-Brooks within 10 days, with full briefing 30 days thereafter. On April 30, 2018, Plaintiffs filed a Motion for Sanctions with Statements of Fees and Costs against Cleaver-Brooks, Inc., which was fully supported by the attached evidence and affidavits of counsel. Cleaver-Brooks had ample time to respond. On December 7, 2018, this Court granted that motion.

“Rule 59(e) motions can be successful in only three situations: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” *Zinkand v. Brown*, 478 F.3d 634, 637 (4th Cir. 2007) (internal citations omitted). Cleaver-Brooks has presented none of these grounds.

Cleaver-Brooks identifies no change in controlling law, clear error of law, or alleged manifest injustice. We are therefore left to determine whether Cleaver-Brooks has met its burden to identify new evidence not available at trial. The arguments—including the evidence—presented in Cleaver-Brooks’ motion to alter or amend the order granting sanctions were available to the parties before this Court issued its Order. For example, Cleaver-Brooks commences its motion by contending that this Court lacked jurisdiction to consider the motion for sanctions, but this issue was thoroughly briefed by both parties and addressed by this Court in issuing its Order. As with its other arguments, Cleaver-Brooks presents no new law or fact upon which this Court should reconsider its ruling.

Cleaver-Brooks cites no legal authority or factual evidence in support of the majority of its arguments. For those arguments that it attempts to buttress with evidence or filings of record, it cites evidence that was undisputedly before this Court before its December 7, 2018 Order and the parties’ briefing on the same. *See, e.g.*, Cleaver-Brooks’ Motion at ¶ 2 (citing evidence dated February 21, 2018 to March 8, 2018). This does not present grounds to alter or amend the Order.

Where Cleaver-Brooks does attempt to present new argument, again, it lacks ground in new law or evidence, and lacks logic. For example, Cleaver-Brooks suggests that Plaintiffs would have owed an obligation under Rule 11, SCRCF, and under Rules 3.1 and 3.3 of the South Carolina Rules of Professional Conduct to immediately cease trial once Cleaver-Brooks finally produced its records mid-way through trial. Cleaver-Brooks’ Motion at ¶ 6. Cleaver-Brooks ignores the reality of Plaintiffs learning this information near the end of their case-in-chief, approximately midnight before the testimony of Cleaver-Brooks’ corporate representative who had twice testified inconsistent with the “midnight” documents during his two prior depositions, and after months of evaluating this case consistent with Cleaver-Brooks’ own interpretation of its own records, which

Cleaver-Brooks itself discovered (near the end of Plaintiffs' case-in-chief) to be in error. As a result of Cleaver-Brooks' failure to produce these long-requested documents sooner, Plaintiffs lacked ample time to evaluate them in the midst of trial and make a decision to cease the same upon receiving the documents. This Court, having sat through the trial and observed the parties' conduct, was fully aware of these issues and considered them in rendering its Order granting sanctions against Cleaver-Brooks. Again, Cleaver-Brooks presents no cogent grounds to alter or amend the judgment.

As another example, Cleaver-Brooks complains that no special interrogatory bolstered this Court's statement that the jury understood what the key issue was in this case. *See* Motion to Alter or Amend at ¶ 8. Cleaver-Brooks offers no legal authority for its claim that an interrogatory is required to support this Court's observation, and as a general matter the trial court is in the best position to assess the jury's attention to evidence and actions in the courtroom. *See, e.g., State v. Anderson*, 322 S.C. 89, 93, 470 S.E.2d 103, 105 (1996) (trial judge was in the best position to assess jury's attention to outburst in courtroom).

Cleaver-Brooks also questions the amount of this Court's award. Plaintiffs sought \$95,435.16 in expenses. This Court awarded \$90,835.16. Order at 21. Curiously, Cleaver-Brooks complains that this Court awarded an amount lesser than was requested by Plaintiffs. *See, e.g.,* Cleaver-Brooks' Motion at ¶ 13. This Court reached this award by reducing the hourly amount awarded to two of Plaintiffs' counsel. Order at 19-20. The amount of attorneys' fees to be awarded is within the discretion of the trial judge. *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004). The parties thoroughly briefed the relevant factors and this Court considered all of the relevant factors in exercising its discretion to set the fees awarded. Cleaver-Brooks offers no legal authority for its claim that this Court should further explain its

decision to reduce the award of attorneys' fees requested by Plaintiffs' attorneys. This claim, too, is without merit.

Along these lines, Cleaver-Brooks complains that this Court should not have awarded a total of \$2,881.84 to Timothy W. Howe and Wende Myers for appearing for a trial that likely would not have proceeded but for Cleaver-Brooks' sanctionable conduct. The selection of a sanction for discovery violations is within the trial court's discretion. *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990); SCRCP 37(b)(2) (when there has been an abuse of the discovery rules, "the court in which the action is pending may make such orders in regard to the failure as are just"). Lost wages are just and reasonable in this instance. This Court properly exercised its discretion in awarding these plaintiffs the few hundred dollars they requested for time lost at work to attend trial.

Cleaver-Brooks's other arguments have already been addressed in full by this Court, and it offers no intervening change in controlling law or new evidence not available at trial that warrants this Court's reconsideration. For the foregoing reasons, as well as those set forth in this Court's December 6, 2018 Order, this Court DENIES Cleaver-Brooks, Inc.'s Motion to Alter or Amend Order.

Additionally, because this concludes the final remaining motion before the Court, the Clerk of Court is hereby directed to enter the jury's verdict as the final judgement in this case.

AND IT IS SO ORDERED.

Jean Hoefer Toal, Chief Justice of the South
Carolina Supreme Court, Retired, Acting as
Circuit Court Judge

January ____, 2019



York Common Pleas

Case Caption: Wayne Ervin Howe , plaintiff, et al VS Air & Liquid Systems Corp ,
defendant, et al
Case Number: 2015CP4603456
Type: Order/Other

IT IS SO ORDERED.

s/ Jean H. Toal #2758

Electronically signed on 2019-01-04 15:50:28 page 5 of 5

STATE OF SOUTH CAROLINA.

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

FOR THE SIXTEENTH JUDICIAL CIRCUIT

**Timothy W. Howe, Individually and as
Personal Representative of the Estate
of Wayne Erwin Howe, deceased, and
Jeanette Howe,**

Civil Action No.: 2015-CP-46-03456

Plaintiffs,

**ORDER REGARDING
CLEAVER BROOKS, INC.
DISCOVERY MOTIONS**

 $\dot{y}_i$

Air & Liquid Systems, et al.,

Defendants.

A hearing was held in Columbia, South Carolina on January 24, 2018. Counsel for Cleaver Brooks represented that an order was not needed because it would produce requested documents on January 24, 2018 and produce a corporate representative witnesses prepared to discuss what was known or reasonably available to the company on February 2, 2018. Failure to comply with these representations will result in sanctions.

AND IT IS SO ORDERED.

Jean Hoefler Toal, Chief Justice of
the South Carolina Supreme Court, Retired,
Acting as Circuit Court Judge

February 23, 2018

Columbia, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Wayne Ervin Howe, an individual and Jeanette
Howe, his spouse,

Plaintiff(s)

vs.

Air & Liquid Systems Corp., individually and as
successor-in-interest to Buffalo Pumps, Inc., et al,

Defendant(s)

Submitted By: Mona L. Wallace, Esq.

Address: 525 N. Main Street, Salisbury, NC, 28144

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015 -CP-46 - 3456

SC Bar #: 15844

Telephone #: 704-633-5244

Fax #: 704-633-9434

Other:

E-mail: mwallace@wallacegraham.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Conversion (310)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Motor Vehicle Accident (320)	☐ Condemnation (410)
☐ General (130)	☐ Medical Malpractice (220)	☐ Premises Liability (330)	☐ Foreclosure (420)
☐ Breach of Contract (140)	Previous Notice of Intent Case #	☐ Products Liability (340)	☐ Mechanic's Lien (430)
☐ Fraud/Bad Faith (150)	20__-NI-__	☒ Personal Injury (350)	☐ Partition (440)
☐ Failure to Deliver/ Warranty (160)	☐ Notice/ File Med Mal (230)	☐ Wrongful Death (360)	☐ Possession (450)
☐ Employment Discrim (170)	☐ Other (299)	☐ Assault/Battery (370)	☐ Building Code Violation (460)
☐ Employment (180)		☐ Slander/Libel (380)	☐ Other (499)
☐ Other (199)		☐ Other (399)	
Inmate Petitions	Administrative Law/Relief	Judgments/Settlements	Appeals
☐ PCR (500)	☐ Reinstate Drv. License (800)	☐ Death Settlement (700)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Judicial Review (810)	☐ Foreign Judgment (710)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Relief (820)	☐ Magistrate's Judgment (720)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Permanent Injunction (830)	☐ Minor Settlement (730)	☐ Municipal (930)
	☐ Forfeiture-Petition (840)	☐ Transcript Judgment (740)	☐ Probate Court (940)
	☐ Forfeiture-Consent Order (850)	☐ Lis Pendens (750)	☐ SCDOT (950)
	☐ Other (899)	☐ Transfer of Structured Settlement Payment Rights Application (760)	☐ Worker's Comp (960)
Special/Complex /Other		☐ Confession of Judgment (770)	☐ Zoning Board (970)
☐ Environmental (600)	☐ Pharmaceuticals (630)	☐ Petition for Workers Compensation Settlement Approval (780)	☐ Public Service Comm. (990)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)	☐ Other (799)	☐ Employment Security Comm (991)
☐ Medical (620)	☐ Out-of State Depositions (650)		
☐ Other (699)	☐ Motion to Quash Subpoena in an Out-of-County Action (660)		
☐ Sexual Predator (510)	☐ Pre-Suit Discovery (670)		

Submitting Party Signature:

Mona Lisa Wallace

Rec. 33

Date:

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) C/A No. 2015 CP46-3456

Wayne Ervin Howe, an individual and
Jeanette Howe, his spouse,

Plaintiffs,

v.

Air & Liquid Systems Corp.,
individually and as successor-in-
interest to Buffalo Pumps, Inc.;

Albany International Corp.;

Asten-Johnson, Inc.;

Aurora Pump Company;

A.W. Chesterton Company;

Borg Warner Morse TEC, Inc., as
successor to Borg-Warner
Corporation;

CBS Corporation, A Delaware
Corporation f/k/a Viacom, Inc.,
Successor By Merger To CBS
Corporation, A Pennsylvania
Corporation, f/k/a Westinghouse
Electric Corporation;

CGR Products, Inc. f/k/a Carolina
Gasket and Rubber Company;

CNA Holdings, Inc., f/k/a Hoechst
Celanese Corporation;

Celanese Corporation f/k/a Hoechst
Celanese Corporation (sued
individually and as successor in-
interest-to Fiber Industries, Inc.);

Cleaver Brooks, Inc.;

Covil Corporation;

Crane Co.;

Crown Cork & Seal Company, Inc.;

Daniel International Corporation;

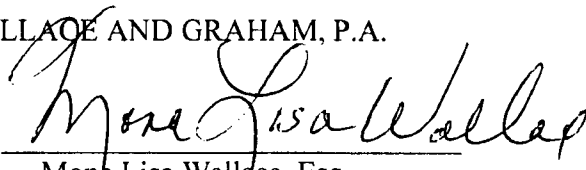
Asbestos Lawsuit
Jury Demand on all Issues

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of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Respectfully submitted, this the 6 day of November 2015.

WALLACE AND GRAHAM, P.A.

By: 

Mona Lisa Wallace, Esq.

SC Bar No. 15844

525 North Main Street

Salisbury, NC 28144

(704) 633-5244

E-mail: mwallace@wallacegraham.com

Attorneys for the Plaintiffs

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
COUNTY OF YORK) C/A No. 2015CP46-3456

WAYNE ERVIN HOWE, AN)
INDIVIDUAL AND JEANETTE)
HOWE, HIS SPOUSE,)

PLAINTIFFS,)

V.)

AIR & LIQUID SYSTEMS CORP.,)
INDIVIDUALLY AND AS)
SUCCESSOR-IN-INTEREST TO)
BUFFALO PUMPS, INC.;)

ALBANY INTERNATIONAL)
CORP.;)

ASTEN-JOHNSON, INC.;)

AURORA PUMP COMPANY;)

A.W. CHESTERTON COMPANY;)

BORG WARNER MORSE TEC,)
INC., AS SUCCESSOR TO)
BORG-WARNER)
CORPORATION;)

CBS CORPORATION, A)
DELAWARE CORPORATION)
F/K/A VIACOM, INC.,)
SUCCESSOR BY MERGER TO)
CBS CORPORATION, A)
PENNSYLVANIA)
CORPORATION, F/K/A)
WESTINGHOUSE ELECTRIC)
CORPORATION;)

ASBESTOS LAWSUIT
JURY DEMAND ON ALL ISSUES

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)
 GENERAL ELECTRIC)
 COMPANY;)
)
 THE GORMAN-RUPP COMPANY;)
)
 GOULDS PUMPS,)
 INCORPORATED;)
)
 INGERSOLL-RAND COMPANY;)
)
 METROPOLITAN LIFE)
 INSURANCE COMPANY, A)
 WHOLLY-OWNED)
 SUBSIDIARY OF METLIFE)
 INC.;)
)
 PEERLESS PUMP COMPANY;)
)
 PRESNELL INSULATION, INC.;)
)
 RILEY POWER, INC.,)
 INDIVIDUALLY AND AS)
 SUCCESSOR-IN-INTEREST TO)
 BABCOCK BORSIG POWER,)
 INC., AND RILEY STOKER)
 CORPORATION,)
 INDIVIDUALLY AND AS)
 SUCCESSOR-IN-INTEREST TO)
 D.B. RILEY;)
)
 SEPCO CORPORATION;)
)
 STERLING FLUID SYSTEMS)
 (USA) LLC;)
)
 TRANE U.S., INC., F/K/A)
 AMERICAN STANDARD, INC.,)
 F/K/A AMERICAN RADIATOR)
 & STANDARD)
 MANUFACTURING)
 COMPANY;)
)

UNIROYAL, INC., F/K/A UNITED)
STATES RUBBER COMPANY,)
INC.;)
UNITED CONVEYOR)
CORPORATION;)
VELAN VALVE CORP.;)
VIKING PUMP, INC.;)
WARREN PUMPS LLC; AND)
ZURN INDUSTRIES,)
DEFENDANTS.)

2015CP46-3456

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SOUTH CAROLINA

COMPLAINT

NOW COME the Plaintiffs, WAYNE ERVIN HOWE and JEANETTE HOWE, citizens and residents of the State of South Carolina, through their counsel and sues the Defendants and alleges as follows. This is an action seeking relief due to Defendants' negligent, willful, wanton, and reckless conduct proximately causing the injury to the Plaintiff, Wayne Ervin Howe. Mr. Howe was diagnosed with the asbestos-related cancer, mesothelioma. As alleged below, during the pertinent times, Mr. Howe worked on a frequent, regular and proximate basis with and near others working with asbestos-containing products, materials and equipment for which the named Defendants are liable and responsible. The Plaintiff was exposed to respirable asbestos fibers which ultimately caused his disease of mesothelioma. Plaintiffs further allege:

BACKGROUND FACTS

A. PLAINTIFFS.

1. Plaintiffs are citizens and residents of the State of South Carolina.
2. The Plaintiff, Wayne Ervin Howe, is a citizen and resident of York County, South Carolina.
3. The Plaintiff, Jeanette Howe, is a citizen and resident of York County, South Carolina and is lawfully married as wife to her husband, Plaintiff Wayne Ervin Howe.

B. DEFENDANTS.

4. The Defendant, **Air & Liquid Systems Corp.**, individually and as successor-in-interest to Buffalo Pumps, Inc., is a corporation organized and existing under the laws of the State of Pennsylvania with a principal place of business in Pennsylvania, and can be served with process at its office at 874 Oliver Street, North Tanawanda NY 14120-3298 or through its registered agent located at CT Corporation, 116 Pine St, Suite 320, Harrisburg, PA 17101.
5. The Defendant, **Albany International Corp.**, is the successor in interest to Mount Vernon Group d/b/a Mount Vernon Dryer Fabrics and the successor in interest to Geschmay Corporation. Upon information and belief, Albany International Corp. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located in Rochester, New Hampshire, and can be served with process at its office at 975 Old Norcross Road, Suite A, Lawrenceville, Georgia 30045, or through its South Carolina registered agent, CT Corporation System, 2 Office Park Court, Columbia SC 29223, or at its office at 216 Airport Drive, Rochester, NH 03867.
6. The Defendant, **Asten-Johnson, Inc.**, is a corporation organized and existing under the laws of the State of Delaware with a principal place of business in Charleston, South Carolina and can be served with process at its office at 4399 Corporate Road, Charleston, SC 29405 or through its office located at 400 Asten Road, Clinton, SC 29325 or through its registered agent, CT Corporation System, 75 Beattie Place, Greenville, SC 29601.

7. The Defendant, **Aurora Pump Company**, is a corporation organized and existing under the laws of the State of Minnesota with a principal place of business in Illinois, and can be served with process at its office at c/o Pentair, 800 Airport Road, North Aurora, IL 60542 or through its office located at c/o Lynette Jones, 13515 Ballantyne Corp. Pl., Charlotte NC 28277.

8. The Defendant, **A.W. Chesterton Company**, is a corporation organized and existing under the laws of the State of Massachusetts with a principal place of business in Massachusetts, and can be served with process through its registered agent, CT Corporation System, 2 Office Park Court, Suite 103, Columbia, SC 29223

9. The Defendant, **Borg Warner Morse TEC, Inc.**, successor to Borg-Warner Corporation, is a corporation organized and existing under the laws of the State of Delaware, and can be served with process at its office at 3850 Hamlin Road, Auburn Mills, MI 48326, or through its registered agent, CT Corporation System, 4701 Cox Road, Suite 285, Glen Allen, VA 23060.

10. The Defendant, **CBS Corporation**, a Delaware Corporation f/k/a Viacom, Inc., Successor By Merger To CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation, is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in the State of Pennsylvania, and can be served with process c/o registered agent, CT Corporation System, 75 Beattie Place, Two Insignia Financial Plaza, Greenville, SC 29601, or through its registered agent office at c/o Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington DE 19808.

11. The Defendant **CGR Products, Inc.** f/k/a Carolina Gasket and Rubber Company, Inc., is a corporation organized and existing under the laws of the State of North Carolina with a principal place of business in North Carolina, and can be served with process at its registered agent office at 100 North Greene Street, Suite 600, Greensboro, NC 27401 or through its office located at 4655 US Highway 29 North, Greensboro, NC 27405.

12. The Defendant, **CNA Holdings, Inc.**, f/k/a Hoechst Celanese Corporation, is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in the State of Texas, and can be served with process at Registered Agent, CT Corporation System, 2 Office Park Court, Suite 103, Columbia, SC 29223.

13. The Defendant, **Celanese Corporation** f/k/a Hoechst Celanese Corporation (sued individually and as successor in-interest to Fiber Industries, Inc.), is a corporation incorporated under the laws of the State of Delaware,

having its principal place of business in the State of Texas, and can be served with process at Registered Agent, The Corporation Trust Company, 1209 Orange Street, Wilmington, DE 19801.

14. The Defendant, **Cleaver Brooks, Inc.**, individually and as successor-in-interest to Aquachem, is a corporation incorporated under the laws of the State of Delaware, having its principal place of business located in the State of Georgia, and can be served with process at Registered Agent, Corporation Service Company, 1703 Laurel Street, Columbia, SC 29201.

15. The Defendant, **Covil Corporation**, is a corporation incorporated under the laws of the State of South Carolina, having its principal place of business in the State of South Carolina, and can be served with process at Covil Corporation c/o Jim Covil, 5 Woodfern Circle, Greenville, SC 29615 or at Registered Agent, Greenville Process Service, Greengate Office Park, 25 Woods Lake Road, Suite 216, Greenville, SC 29607.

16. The Defendant, **Crane Co.** is a corporation organized and existing under the laws of the State of Delaware with a principal place of business in Connecticut and can be served with process through its registered agent office located at The Corporation Trust Company, 1209 Orange Street, Wilmington DE 19801, or its registered office of CT Corporation System, 111 Eighth Avenue, NY, NY 10011.

17. The Defendant, **Crown Cork & Seal Company, Inc.**, is a corporation organized and existing under the laws of the State of Pennsylvania with a principal place of business in Pennsylvania, and can be served with process at its office at 1 Crown Way, Philadelphia PA 19154.

18. The Defendant **Daniel International Corporation** is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in South Carolina, and can be served with process at its office at 100 Fluor Daniel Drive, Greenville SC 29607, or through its South Carolina registered agent, John R. Reynolds, 100 Fluor Daniel Drive, Greenville SC 29607.

19. The Defendant **Fluor Enterprises, Inc.**, f/k/a Fluor Daniel, Inc., f/k/a Daniel Construction Company, Inc. is a corporation organized and existing under the laws of the State of California, and can be served with process at its office at 3 Polaris Way, Aliso Viejo, CA 92698, or through its South Carolina registered agent, Corporation Service Company, 1703 Laurel Street, Columbia SC 29201.

20. The Defendant **Fluor Daniel Services Corporation** is a corporation organized and existing under the laws of the State of Delaware and can be served with process at its office at 100 Fluor Daniels Drive, Greenville SC 29607, or through its South Carolina registered agent, Corporation Service Company, 1703 Laurel Street, Columbia SC 29201.

21. The Defendant, **Foster Wheeler Energy Corporation**, is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in New Jersey, and can be served with process through its Registered Agent, CT Corporation System, 2 Office Park Court, Suite 103, Columbia SC 29223, or at its office located at Perryville Corporate Park, Route 78, Clinton NJ 08809.

22. The Defendant, **General Electric Company**, is a corporation incorporated under the laws of the State of New York, having its principal place of business located in the State of Connecticut, and can be served with process Registered Agent, CT Corporation System, 2 Office Park Court, Suite 103, Columbia SC 29223.

23. The Defendant, **The Gorman-Rupp Company** a/k/a The Gorman-Rupp International Company, is a corporation incorporated under the laws of the State of Ohio, having its principal place of business located in Ohio, and can be served with process at through its Ohio Registered Agent, Corporation Services Company, 50 West Broad Street, Suite 1800, Columbus Ohio 43215, or through the corporate office address of 180 Hines Avenue, Bellville OH 44813, or its corporate address at 600 South Airport Road, Mansfield OH 44901.

24. The Defendant, **Goulds Pumps, Incorporated**, is a corporation organized and existing under the laws of the State of Delaware and can be served with process through its office located at 240 Fall Street, Seneca Falls, NY 13148, or through its registered agent, c/o CT Corporation System, 2 Office Park Court, Suite 103 Columbia, SC 29223.

25. The Defendant, **Ingersoll-Rand Company** is a New Jersey company with its principal place of business in Davidson, North Carolina and can be served with process through its South Carolina registered agent office located at CT Corporation System, 2 Office Park Court, Columbia SC 29223 or its corporate office at 800-E Beaty Street, Davidson, NC 28036.

26. The Defendant **Metropolitan Life Insurance Company**, a wholly-owned subsidiary of MetLife, Inc., is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York, and can be served with process at its office at 200 Park

Ave., New York, NY 10166, or at its office at One Madison Avenue, New York NY 10010, or at c/o United Corporate Services, Inc., 160 Cassell Road #144, Harleysville, PA 19438-2009.

27. The Defendant, **Peerless Pump Company** aka Peerless Industries Inc., is a corporation organized and existing under the laws of the State of Indiana and can be served with process through its office located at c/o ALCO Products, 1515 Market Street, Philadelphia PA 19102, or at its office at 2005 Dr. Martin Luther King Jr. Street, Indianapolis, IN 46202, or at SFS (USA) Holding Inc. d/b/a Peerless Pump Company, c/o CT Corporation System, 150 Fayetteville St., Box 1011, Raleigh, NC 27601.

28. The Defendant, **Presnell Insulation, Inc.**, is a corporation incorporated under the laws of the State of North Carolina, having its principal place of business located in North Carolina, and can be served with process at Registered Agent, Jackson T. Presnell 3717 Flowerfield Rd., Charlotte, NC 28210.

29. The Defendant, **Riley Power, Inc.**, individually and as successor-in-interest to Babcock Borsig Power, Inc., and Riley Stoker Corporation, individually and as successor-in-interest to D.B. Riley, is a corporation incorporated under the laws of the State of Massachusetts, having its principal place of business located in the State of Massachusetts, and can be served with process c/o Registered Agent, CT Corporation System, 2 Office Park Court, Suite 103, Columbia, SC, 29223.

30. The Defendant, **SEPCO Corporation**, is a corporation organized and existing under the laws of the State of California, and can be served with process through its registered agent located at CT Corporation System, 818 West Seventh Street, Suite 930, Los Angeles CA 90017.

31. The Defendant, **Sterling Fluid Systems (USA) LLC** is a Delaware company and can be served with process through its registered agent office located at c/o The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801.

32. The Defendant, **Trane U.S. Inc.**, f/k/a American Standard, Inc., f/k/a American Radiator & Standard Manufacturing Company, is a corporation incorporated under the laws of the State of Delaware, having its principal place of business located in Wisconsin, and can be served with process at Registered Agent, CT Corporation System, 2 Office Park Court, Suite 103, Columbia SC 29223.

33. The Defendant **Uniroyal, Inc.**, f/k/a United States Rubber Company, Inc. is a corporation organized and existing under the laws of the State of New Jersey with its principal place of business in Connecticut, and can be served with process at its office at c/o Uniroyal Holding, Inc., 70 Great Hill Road, Naugatuck CT 06770, or at P.O. Box 19001, Greenville, SC 29602-9001.

34. The Defendant, **United Conveyor Corporation**, is a corporation incorporated under the laws of the State of Illinois, having its principal place of business located in Illinois, and can be served with process at United Conveyor Corporation Corporate Headquarters, 2100 Norman Drive W., Waukegan, IL 60085 or at Registered Agent, Prentice Hall Corporation, 2019 Park Street, Columbia, SC 29201, or through its registered agent located at Illinois Corporation Service, 801 Adlai Stevenson Drive, Springfield, IL 62703-4261.

35. The Defendant, **Velan Valve Corp.**, is a corporation organized and existing under the laws of the State of Delaware and can be served with process at its office at 94 Avenue C, Williston VT 05495-9732 or through its South Carolina registered agent, Corporation Service Company, 1703 Laurel Street, Columbia SC 29201.

36. The Defendant, **Viking Pump, Inc.**, is a corporation organized and existing under the laws of the State of Delaware and can be served with process through its registered agent office located at The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801.

37. The Defendant, **Warren Pumps LLC** is a limited liability company organized and existing under the laws of the State of Delaware and can be served with process through its registered agent office located at The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801 or its registered agent at CT Corporation System, 155 Federal Street, Suite 700, Boston MA 02110.

38. The Defendant, **Zurn Industries**, is a corporation organized and existing under the laws of the State of Delaware and can be served with process through its registered agent, CT Corporation System, 2 Office Park Court, Suite 103, Columbia, SC, 29223.

C. JURISDICTION AND VENUE.

39. Defendants are corporations who are amenable to jurisdiction in the Courts of South Carolina by virtue of their contacts with the State of South Carolina or systematic business in South Carolina which subjects them to jurisdiction pursuant to the South Carolina Long-Arm Statute.

40. Venue is proper in York County, South Carolina.

41. The Court has jurisdiction over the subject matter of this action.

D. FACTS REGARDING ASBESTOS EXPOSURE AND INJURY.

42. During the pertinent times, Defendant Metropolitan Life Insurance Company, owed a duty to Plaintiffs as a result of the facts alleged in the Fourth Cause of Action, below. The allegations below with regard to the remaining, asbestos product manufacturing, selling, distributing and utilizing Defendants refer to each other Defendant listed in the caption (or its applicable predecessors in interest).

43. During the pertinent times, Defendants mined, manufactured, processed, imported, converted, compounded, used, installed or retailed substantial amounts of asbestos and asbestos-containing materials which were sold, distributed or used in South Carolina; or are otherwise liable in connection with asbestos and asbestos-containing products as alleged below.

44. The risks involved with the products and materials at issue in this matter pertaining to asbestos dangers did not amount to an open and obvious risk or a risk that was a matter of common knowledge.

45. Plaintiff Wayne Ervin Howe was born on August 5, 1945.

46. Plaintiff during the pertinent times worked as a pipefitter, manual laborer, general construction worker, and steel worker.

47. Plaintiff during the pertinent times further engaged in work activities pertaining to pump and valve work, cutting siding, mechanic and welding work, building and maintaining precipitators, and millwright work.

48. Plaintiff during the pertinent times worked at various jobsites including, without limitation, one or more facilities of Hoechst Celanese aka

Fiber Industries, including in Rock Hill, South Carolina; and the Bowater facility in Rock Hill, South Carolina.

49. Plaintiff, for a long period of time, frequently, regularly and proximately worked with and was exposed to the asbestos and asbestos-related materials mined, manufactured, processed, imported, converted, compounded, or sold by the asbestos product manufacturing and selling Defendants, or with regard to which Defendants otherwise had responsibility, with some or most of the exposure being within the State of South Carolina.

50. Plaintiff, Wayne Ervin Howe, was exposed to asbestos dust and fibers from products, services, and goods manufactured, distributed, or sold by the asbestos product manufacturing and selling Defendants for use at Plaintiff's jobsites which he came in contact with on the premises of multiple companies.

51. As a result of the improper conduct of the Defendants, Plaintiff Wayne Ervin Howe developed the asbestos cancer known as Mesothelioma.

52. The asbestos product manufacturing and selling Defendants owned, operated, or supplied asbestos containing materials or services to worksites in South Carolina, at which Plaintiff Wayne Ervin Howe, worked, or entered for purposes of work, and in which Plaintiff was exposed to asbestos dust from asbestos containing materials.

53. Defendants knew, or should have known, at all times relevant hereto that exposure to asbestos dust and fibers were a known risk factor in the development of potentially fatal lung disease including malignant mesothelioma.

54. Plaintiff Wayne Ervin Howe was diagnosed in May 2015 with malignant mesothelioma, a fatal disease caused solely by exposure to asbestos fibers and dust. This exposure occurred as a result of his exposure to asbestos dust and fibers that he came in contact with on various jobsites in South Carolina.

55. At all times mentioned herein, Defendants acted through their duly authorized agents, servants, and employees who were at all times relevant herein acting within the scope and course of their employment. At the time of its manufacture the manufacturers acted unreasonably in designing or formulating the relevant products, and this conduct was a proximate cause of the harm for which damages are sought.

56. Mesothelioma is a progressive, insidious disease and Plaintiff's asbestos dust and fiber exposure including in South Carolina to the Defendants' products or on the Defendants' premises and for which Defendants are otherwise liable contributed to the Plaintiff's contraction of his disease.

57. Plaintiff's diagnosed disease of mesothelioma was caused by breathing asbestos dust and fibers from asbestos-containing products or asbestos containing materials at Defendants' premises or with regard to which the Defendants manufactured or sold.

58. Plaintiffs have obtained and attached as **Exhibit A** hereto, a report by a physician who is appropriately board-certified, in compliance with S.C. Code §§ 44-135-50(A)(1), 44-135-70 and 44-135-80.

59. As a result of the development of mesothelioma caused by breathing asbestos dust and fibers from Defendants' asbestos-containing products, and exposures due to Defendants' negligent acts and omissions, listed herein and that will be further identified in this suit, Plaintiff has suffered and sustained very serious life-threatening injuries, specifically mesothelioma, requiring extensive and painful medical treatment.

60. Plaintiff has suffered great pain and mental anguish as a direct result of the aforesaid injuries.

61. The illness and disability of Plaintiff was the direct and proximate result of the negligence, recklessness and willfulness of the Defendants, in that each produced, sold and otherwise put into the stream of interstate commerce, or otherwise were responsible for asbestos and asbestos-related materials which the Defendants knew or should have known were deleterious, poisonous and highly harmful.

62. Plaintiff's injuries and illnesses are permanent in nature and he will be forced to suffer same for the remainder of his life. Plaintiff's enjoyment of life has been greatly impaired and, further, that his expected life span has been greatly shortened.

63. Plaintiff alleges that as a result of the aforesaid illnesses, he has been forced to incur large amounts of medical expenses by way of doctor and drug bills and verily believes that he will be forced to incur additional expenses in an effort to treat his illnesses as aforesaid, all to Plaintiff's damage, compensatory and punitive in amounts to be determined by the trier of fact.

64. As a direct and proximate result of the Defendants' conduct as alleged above, the Plaintiff has suffered a dramatic reduction of his life expectancy, incurred great mental and physical pain and suffering, sustained lost wages and lost earning capacity, incurred medical expenses, and his enjoyment of life has been greatly impaired, which damages are continuing in nature.

E. CAUSES OF ACTION.

FIRST CAUSE OF ACTION

Negligent Failure to Warn and Defective Product Design

65. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs as though fully set forth herein, and further allege as shown below with regard to the Defendants.

66. Defendants (or their predecessors in interest or parties with whom they acted in concert), and each of them, are or at times relevant hereto, were miners, manufacturers, processors, importers, converters, compounders and/or retailers of asbestos and asbestos-containing materials or otherwise profited from asbestos related services. In the case of Defendant Metropolitan Life Insurance Company, it owed a duty to Plaintiffs and is liable as alleged in the fourth cause of Action below.

67. Defendants, acting through their agents, servants, and/or employees have caused certain asbestos and asbestos-containing materials to be placed in the stream of interstate commerce with the result that said asbestos and asbestos-containing materials came into use and released fiber by or in the vicinity of the Plaintiff Wayne Ervin Howe, or were otherwise negligent.

68. The asbestos manufacturing and selling Defendants negligently produced, sold, supplied or otherwise put into the stream of commerce asbestos and asbestos-containing products or machinery requiring the use of asbestos and/or asbestos-containing products.

69. During the course and scope of his employment at the named facilities or with the named manufacturers and their products, Plaintiff Wayne Ervin Howe was exposed to Defendants' asbestos dust and fibers and asbestos-containing materials or was otherwise injured due to asbestos exposure for which Defendants are responsible.

70. Defendants owned, operated, or manufactured materials used at and supplied worksites in South Carolina, at which Plaintiff worked, or entered for purposes of work, and from which he was subsequently exposed to asbestos containing materials including asbestos dust and asbestos fibers. Defendants knew, or should have known, at all times relevant hereto that exposure to asbestos fiber and dust was a known risk factor in the development of potentially fatal lung disease including malignant mesothelioma.

71. Defendants knew, or should have known, that Plaintiff Wayne Ervin Howe, or others similarly situated, would come in contact with the asbestos containing products for which Defendant may be liable. As a designer, developer, manufacturer, distributor, supplier, installer or seller of the above-described asbestos and asbestos-containing products, Defendants each owed a duty to foreseeable users, handlers and bystanders to such use of said products to use ordinary care in designing, manufacturing, marketing, supplying and selling said products in such a manner as to render them safe for their intended and foreseeable uses.

72. Defendants knew, or should have known, that Plaintiff Wayne Ervin Howe, or others similarly situated, would be in danger of developing fatal asbestos diseases such as the asbestos cancer known as mesothelioma as a result of such exposure.

73. The dangers of breathing asbestos dust and fibers were first published in the medical literature in the 1890s. By the late 1950s, there were hundreds of medical articles highlighting the dangers of being around asbestos dust. Defendants knew or should have known that the asbestos fibers contained in the relevant products had a toxic, poisonous, and highly deleterious effect upon the health of persons inhaling, ingesting or otherwise absorbing them.

74. Defendants have known or should have known since the early 1900s of scientific literature that clearly indicated that workers could carry home on their work clothes industrial dust and fiber, such as asbestos, thereby exposing their family members to the hazards of asbestos. By the 1960s, studies were being published on the occurrence of asbestos disease, including mesothelioma, in family members of workers exposed to asbestos.

75. The illness and disability of the Plaintiff are the direct and proximate result of the negligence, recklessness and willfulness of the Defendants, jointly and severally, in that they produced, sold and otherwise put into the stream of interstate commerce, asbestos and asbestos-containing materials which the Defendants, and each of them, knew were deleterious, poisonous and highly harmful to Plaintiff's body, lungs, respiratory system, skin and health.

76. Defendants owed a duty of care toward the Plaintiff. Defendants breached that duty by their negligent acts and omission.

77. Defendants knew, or, in the exercise of ordinary care, should have known, that the asbestos and asbestos-containing materials were deleterious, poisonous and highly harmful to Plaintiff's body, lungs, respiratory system, skin and health. At the time the products left the control of the manufacturers, the manufacturers unreasonably failed to adopt a safer, practical, feasible, and otherwise reasonable alternative design or formulation that could then have been reasonably adopted and that would have prevented or substantially reduced the risk of harm without substantially impairing the usefulness, practicality, or desirability of the products.

78. Defendants acted negligently, recklessly and willfully in that the Defendants failed to advise Plaintiff of the dangerous characteristics of their asbestos and asbestos-containing products.

79. Defendants acted negligently, recklessly and willfully in that the Defendants failed or omitted to provide the Plaintiff with the knowledge as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliance, if, in truth, they were in any way able to mitigate the dust to protect himself and his family from being poisoned and disabled by exposure to such deleterious and harmful asbestos-containing materials.

80. Defendants acted negligently, recklessly and willfully in that the Defendants failed and omitted to place any warnings or sufficient warnings on their containers or premises of said asbestos and asbestos materials to warn the handlers thereof of the dangers to their health in coming in contact with said asbestos and asbestos materials.

81. Defendants acted negligently, recklessly and willfully in that the Defendants failed and omitted to take reasonable precautions or to exercise reasonable care to publish, adopt and enforce a safety plan and a safe method of handling and installing said asbestos and asbestos materials.

82. Defendants acted negligently, recklessly and willfully in that the Defendants inadequately warned, if, in fact, they warned at all, persons such as Plaintiff of the dangers to their health in coming in contact with and breathing said asbestos and asbestos-containing materials, even after they knew of the dangers and cancer-causing effects, and up until the present time.

83. Defendants acted negligently, recklessly and willfully in that the Defendants did not recommend methods to improve the work environment.

84. Defendants acted negligently, recklessly and willfully in that the Defendants did not use, implement or develop alternative products that were available.

85. Defendants acted negligently, recklessly and willfully in that the Defendants continued to use a known cancer-causing product, to wit: asbestos.

86. Defendants acted negligently, recklessly and willfully in that the Defendants included asbestos in relevant products, and used asbestos even though it was foreseeable that persons such as Plaintiff would inhale, ingest or otherwise absorb asbestos.

87. Defendants acted negligently, recklessly and willfully in that the Defendants included asbestos in relevant products, and used asbestos when the Defendants knew or should have known that asbestos would have a toxic, poisonous and highly deleterious effect upon the health of persons inhaling, ingesting or otherwise absorbing them such as Plaintiff.

88. Defendants acted negligently, recklessly and willfully in that the Defendants included asbestos in products and using asbestos when adequate substitutes for asbestos were available.

89. Defendants acted negligently, recklessly and willfully in that the Defendants failed to adequately warn persons working with and around the products of the dangers of inhaling, ingesting or otherwise absorbing the asbestos fibers.

90. Defendants acted negligently, recklessly and willfully in that the Defendants failed to provide any or adequate instructions concerning the safe methods of working with and around the products, including specific instructions on how to avoid inhaling, ingesting or otherwise absorbing the asbestos fibers and how to properly and safely remove the asbestos dust from their clothes, possessions, and vehicles to avoid further exposure.

91. Defendants acted negligently, recklessly and willfully in that the Defendants failed to conduct tests on the asbestos-containing products manufactured, sold, delivered or installed by the Defendants in order to determine the hazards to which persons such as Plaintiff might be exposed while working with or around them.

92. Defendants acted negligently, recklessly and willfully in that the Defendants despite knowledge of the unreasonable dangers, designed, manufacturing and selling equipment, machinery, technologies and systems

that included asbestos-containing components and required and/or specified the use of asbestos-containing replacement components.

93. Defendants acted negligently, recklessly and willfully in that the Defendants failed to comply with governmental regulations designed to reduce exposure to asbestos.

94. At all times relevant, it was feasible for Defendants to have warned Plaintiffs, tested their asbestos products, designed safer asbestos products and/or substituted asbestos-free products.

95. In the alternative, subsequent to the time the Defendants caused the asbestos products to be sold and distributed, the Defendants knew, or in the exercise of ordinary care, should have known, that asbestos is deleterious, carcinogenic, and harmful to persons using buildings, equipment, or on jobsites, but nevertheless, the Defendants negligently and recklessly failed and refused to warn and advise the Plaintiff of the dangerous characteristics thereof, and the dangers to the health and welfare of persons coming in contact with and breathing products. Despite possessed with information uniquely available to them relating to the dangerous effects to the person of continued asbestos exposure, the Defendants did not provide that information to the Plaintiff.

96. The Defendants had a post-sale duty to warn, which duty was breached and, as a result, Plaintiff suffered injury and damages as hereinafter described. In addition or in the alternative, after the products left the control of the manufacturers and sellers, the manufacturers and sellers became aware of or in the exercise of ordinary care should have known that the product posed a substantial risk of harm to a reasonably foreseeable user or consumer and failed to take reasonable steps to give adequate warning or instruction or to take other reasonable action under the circumstances.

97. Plaintiff has suffered continuing and lingering injury to himself due to the Defendants' asbestos fibers which he inhaled while doing performing assignments on various jobsites. Said fibers, once inhaled, caused repeated and continuing injury to Plaintiff.

98. As a direct and proximate result of one or more of the foregoing acts and/or omissions on the part of the Defendants, Plaintiff sustained exposure to and inhaled, ingested or otherwise absorbed asbestos fibers causing mesothelioma, and has suffered injury and is entitled to damages in an amount to be proven at trial.

SECOND CAUSE OF ACTION

Implied Warranty of Merchantability

99. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs as though fully set forth herein, and further allege as shown below with regard to the Defendants.

100. The Defendants, and each of them, impliedly warranted that their relevant products, equipment and asbestos materials were of good and merchantable quality and fit for their intended use.

101. The implied warranty made by the Defendants, and each of them, that the asbestos and asbestos-containing materials were of good and merchantable quality and for the particular intended use was breached and that certain harmful, poisonous and deleterious matter was given off into the atmosphere wherein the Plaintiff carried out his duties working with asbestos and asbestos-containing materials.

102. As a direct and proximate result of the breach of the implied warranty of good and merchantable quality, Plaintiff developed mesothelioma and/or other industrial dust diseases caused by breathing the asbestos dust and fibers from Defendants' asbestos-containing products.

THIRD CAUSE OF ACTION

Strict Liability

103. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs as though fully set forth herein, and further allege as shown below with regard to the Defendants.

104. During the pertinent times, Plaintiff was injured by his exposure to asbestos fibers associated with the products and equipment manufactured and sold by the Defendants.

105. Defendants' relevant products and equipment was at the time of the harmful asbestos exposure in materially the same condition or in a deteriorated condition it was reasonably foreseeable to become when it left the hands of the Defendants.

106. Plaintiff's injury herein occurred because the products and the equipment of the Defendants were in a defective condition unreasonably dangerous to the user.

107. At the time the Defendants, and each of them sold and/or delivered the aforesaid asbestos and asbestos-containing products and at the time said products were used by or around Plaintiff or by others in his vicinity in the manner and environment intended, they were in a defective condition and were unreasonably dangerous and unfit for their intended use in that they were deleterious, poisonous and highly harmful to Plaintiff. The above was the proximate cause of the severe damages sustained by the Plaintiff as herein set forth.

FOURTH CAUSE OF ACTION

Conspiracy, Concert of Action – Defendant

Metropolitan Life Insurance Company

108. Plaintiff incorporates by reference the allegations contained in the above paragraphs as though fully set forth herein, and further allege as shown below with regard to the Defendants.

109. Beginning in the late 1920's, conspirators including Defendant Metropolitan Life Insurance Company ("Met Life"), as well as Johns-Manville, Raybestos-Manhattan and others, undertook a duty to conduct research on asbestos-related health problems and to inform the public about any health risks that could be associated therewith. In or about 1929, Met Life, through its agents and employees acting within the scope of their agency and employment, including but not limited to Dr. Anthony J. Lanza ("Lanza"), began an investigation of asbestos-related health hazards. In 1935, this study was altered by Lanza, with the full knowledge of Met Life, at the request of and in concert with the asbestos industry in order to wrongly influence the United States Public Health Service, the United States medical community and various state legislatures.

110. Thereafter, Defendant Met Life through the acts and omissions of its employees, most notably Lanza, undertook a series of activities with various members of the asbestos industry including but not limited to Johns-Manville, Raybestos-Manhattan/ Raymark Industries, Inc., United States Gypsum, American Brake Blok/Abex, and others to suppress and misrepresent the

dangers of exposure to asbestos dust to employees of Met Life's insureds and the general public and the medical community.

111. The conspirators through their agent, Lanza of Met Life, made a concerted effort to discredit and to terminate the experiments of certain scientists who were developing data of profound importance for the area of public health in relation to the cancer hazard which existed for workers and bystanders in the asbestos industry.

112. As a direct and proximate result of Met Life's intentional publication of deceptive and misleading medical data and information, and other conspiratorial acts and omissions, Defendant caused asbestos to be used in the occupational settings from which Plaintiff breathed asbestos dust which resulted in Plaintiff's injuries. Defendant Met Life, through its agents and employees and officers, aided and abetted and gave substantial assistance to Johns-Manville and Raybestos-Manhattan in their tortious selling of asbestos products and voluntarily undertook a duty to warn the United States Public Health Service, the medical community, and others about the danger of asbestos and consciously and negligently misrepresented the dangers of asbestos to the United States Public Health Service, the medical community, and others, all to the ultimate harm of Plaintiff herein.

113. Defendant Met Life rendered substantial aid and assistance to the manufacturers of asbestos-containing products to which Plaintiff was exposed, and such assistance by Met Life aided and abetted the negligence and the marketing of unreasonably dangerous asbestos-containing products by such manufacturers which proximately caused Plaintiff's illness.

114. In both conducting tests and in publishing their alleged results, Met Life failed to exercise reasonable care to conduct or publish complete, adequate and accurate tests of the health effects of asbestos. Met Life also caused to be published intentionally false, misleading, inaccurate and deceptive information about the health effects of asbestos exposure.

115. Plaintiff unwittingly and justifiably relied upon the thoroughness of Met Life's tests and information dissemination, the results of which Met Life published in leading medical journals.

116. As a direct and proximate contributing result of Met Life's failures to conduct or accurately publish adequate tests or disseminate accurate and truthful information, after undertaking to do so; (i) the risk of harm to Plaintiff from asbestos exposure was increased, and (ii) Plaintiff suffered the injuries described herein.

117. In failing to test fully and adequately for the adverse health effects from exposure to asbestos; in delaying the publication of such results; and in falsely editing such results as were obtained; in suppressing relevant medical inquiry and knowledge about those hazards to promote the sale and distribution of asbestos as a harmless product; and in collaborating with the other co-conspirators materially to understate the hazards of asbestos exposure, all for its own profit and gain, Met Life acted recklessly, wantonly, and in calculated disregard for the welfare of the general public, including Plaintiff.

118. Additionally and alternatively, as a direct and proximate result of Met Life's actions and omissions, Plaintiff was caused to remain ignorant of all the dangers of asbestos resulting in Plaintiff's, his employers, and the general public to be unaware of the true and full dangers of asbestos, depriving Plaintiff of the opportunity to decide for himself whether he wanted to take the risk of being exposed to asbestos, denied Plaintiff the opportunity to take precautions against the dangers of asbestos and proximately caused Plaintiff's damages herein.

119. During the relevant time period the Plaintiff was exposed to and did inhale and/or ingest asbestos dust, fibers, and particles, which dust, fibers, and particles came from the asbestos or asbestos-containing products which were mined, milled, manufactured, fabricated, supplied, and/or sold by the Johns Manville and/or Raybestos/Raymark.

120. Defendant, Met Life, together with Manville, Raymark and other persons and entities, known and unknown at times relevant hereto, engages in a conspiracy or concert of action to inflict injury on the Plaintiff, and to withhold, alter, suppress and misrepresent information about the health effects of asbestos exposure. One or more of said conspirators did cause tortious injury to the Plaintiff in the course of or as a consequence of the conspiracy or concert of action. At least the following enumerated acts were undertaken by the conspirators in the course of and in furtherance of the conspiracy or concert of action:

121. In 1932, Met Life, through Lanza and others, assisted Manville with medical examinations of over 1,000 employees of Manville's factory in Manville, New Jersey. The report of this study shows that a large percentage of the employees suffered from asbestosis including employees not directly involved in the manufacturing process. This 1932 medical survey was not published in the medical literature and, therefore, was unavailable to scientists studying the issue of asbestos-related disease. Further collaboration between Manville and Met Life continued the cover-up.

122. Beginning in approximately 1934, Manville, through its agents, Vandiver Brown and Attorney J.C. Hobart, suggested to Lanza, Associate Director of Met Life, which was then insurer of Manville and Raymark, that Lanza publish a study on asbestosis in which Lanza would affirmatively misrepresent material facts about the health consequences of asbestos exposure. This was accomplished through intentional deletion of Lanza's description of asbestosis as 'fatal' and through other selective editing that affirmatively misrepresent asbestosis as a disease process less serious than it actually is and was known to be. As a result, Lanza's study was published in the medical literature in this misleading fashion in 1935.

123. The conspirators were motivated, in part, to effectuate this fraudulent misrepresentation and fraudulent nondisclosure by the desire to influence proposed legislation to regulate asbestos exposure and to provide a defense in lawsuits involving Manville, Raymark, and Met Life as insurer. Furthermore, upon information and belief, it is alleged that Met Life, at all times relevant hereto, had substantial monetary investments in Manville and Raymark, among other asbestos product manufacturers and distributors.

124. In 1936, the conspirators or some of them entered into an agreement with the Saranac Laboratories. Under this agreement, these conspirators acquired the power to decide what information Saranac could publish about asbestos disease and to control in what form such publications would occur. This agreement gave these conspirators power to affirmatively misrepresent the results of the work at Saranac, and also gave these conspirators power to material facts included in any study. On numerous occasions thereafter, the conspirators exercised their power to prevent Saranac scientists from disclosing material scientific data, resulting in numerous misstatements of fact being made at scientific meetings.

125. By November 1948, or earlier, Manville, Met Life (acting through Lanza), Raymark, and others decided to exert their influence to materially alter and misrepresent material facts about the substance of research started by Dr. Leroy Gardner at the Saranac Laboratories beginning in 1936. Dr. Gardner's research involved carcinogenicity of asbestos in mice and also included an evaluation of the health effects of asbestos on humans with a critical review of the then-existing standards of dust exposure for asbestos and asbestos products.

126. At a meeting on November 11, 1948, these conspirators and others intentionally and affirmatively determined that Dr. Gardner's work should be edited to specifically delete material facts about the cancer-causing propensities of asbestos and the health effects of asbestos on humans and they determined that only an edited version would be published. These conspirators

thereby fraudulently misrepresented the risks of asbestos exposure to the public, in general, and to the class of persons exposed to asbestos, including the Plaintiff.

127. As a direct result of influence exerted by the above described conspirators, Dr. Arthur Vorwald published Dr. Gardner's edited work in the Journal of Industrial Hygiene, AMA Archives of Industrial Hygiene and Occupational Health in 1951 in a form that stressed those portions of Dr. Gardner's work that the conspirators wished stressed, but which omitted references to human asbestosis and cancer, thereby fraudulently and affirmatively misrepresenting the extent of the risks. The conspirators affirmatively and deliberately disseminated this misleading Vorwald publication to universities, libraries, government officials, agencies and others.

128. Such action constituted a material affirmative misrepresentation of the material facts involved in Dr. Gardner's work and resulted in creating an appearance that inhalation of asbestos was a less serious health concern than Dr. Gardner's unedited work indicated.

129. For many decades, Met Life, individually, jointly and in conspiracy with Manville and Raymark, have been in possession of medical and scientific data, literature, and test reports which clearly indicated that the inhalation of asbestos dust and fibers resulting from the ordinary foreseeable use of said asbestos-containing products and/or machinery requiring or calling for the use of asbestos or asbestos-containing products were unreasonably dangerous, hazardous, deleterious to human health, carcinogenic, and potentially deadly.

130. Despite the medical and scientific data, literature and test reports possessed by and available to Met Life, individually and in conspiracy with Manville and Raymark, Fraudulently, willfully and maliciously withheld, concealed and suppressed said medical and scientific data, literature and test reports regarding the risks of asbestosis, cancer, mesothelioma, and other illnesses and diseases from Plaintiff who using and being exposed to Manville or Raymark asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products; caused to be released, published and disseminated medical and scientific data, literature and test reports containing information and statements regarding the risks of asbestosis, cancer, mesothelioma and other illnesses and diseases, which Metropolitan, Manville and Raymark knew were either incorrect, incomplete, outdated and misleading; distorted the results of medical examinations conducted upon workers who were using asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products and being exposed to the inhalation of asbestos dust and

fibers by falsely stating and/or concealing the nature and extent of the harm which workers suffered; and failed to adequately warn the Plaintiff of the dangers to which he was exposed when they knew of the dangers.

131. By the false and fraudulent representations, omissions, failures, and concealments set forth above, Met Life, Manville and Raymark, individually, jointly, and in conspiracy with each other, intended to induce the Plaintiff to rely upon said false and fraudulent representations, omissions, failures, and concealments, to continue to expose themselves to the dangers inherent in the use of and exposure to their asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products. Said misrepresentations were false, incomplete, and misleading and constitute negligent misrepresentations as defined by Sections 311 and 522 of the Restatement (Second) of Torts.

132. Plaintiff reasonably and in good faith relied upon the false and fraudulent representations, omissions, failures, and concealments made by Met Life, Manville, and Raymark regarding the nature of their asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products.

133. As a direct and proximate result of the conspiracy and concert of action between Met Life, Manville and Raymark, the Plaintiff has been deprived of the opportunity of informed free choice and connection with the use of and exposure to Manville and Raymark's asbestos and asbestos-containing products, and therefore continued to work with and be exposed to the co-conspirator corporation's asbestos and asbestos-containing products and as a result, came in contact with asbestos dust or fibers contracted asbestos-related diseases and other conditions, and/or aggravated pre-existing conditions, as a result of which the Plaintiff has been damaged.

FIFTH CAUSE OF ACTION

Punitive Damages

134. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs as though fully set forth herein, and further allege as shown below with regard to the Defendants.

135. During the pertinent times, Defendants had actual knowledge of the dangers to individuals similarly situated to the Plaintiff of asbestos exposure, nevertheless, Defendants deliberately, intentionally and purposefully

withheld such information, thus denying Plaintiff of the knowledge with which to take necessary safety precautions.

136. During the pertinent times, Defendants had actual knowledge of the dangers to individuals similarly situated to the Plaintiff of asbestos exposure, nevertheless, Defendants willfully engaged in failing to warn users of the need for monitoring due to asbestos exposure.

137. During the pertinent times, Defendants had actual knowledge of the dangers to individuals similarly situated to the Plaintiff of asbestos exposure, nevertheless, Defendants willfully failed to issue recall-type letters or notices to users.

138. During the pertinent times, Defendants had actual knowledge of the dangers to individuals similarly situated to the Plaintiff of asbestos exposure, nevertheless, Defendants willfully rejected the advice of corporate officials and others to warn of the hazards of their products; such rejection being motivated by the possibility of adverse effects on profits.

139. During the pertinent times, Defendants had actual knowledge of the dangers to individuals similarly situated to the Plaintiff of asbestos exposure, nevertheless, Defendants willfully delayed the use of asbestos warnings and diluted the content of such warnings for asbestos-related products.

140. During the pertinent times, Defendants had actual knowledge of the dangers to individuals similarly situated to the Plaintiff of asbestos exposure, nevertheless, Defendants willfully failed to advise Plaintiff and other foreseeable end users of medical findings known to Defendants concerning the dangers of asbestos exposure.

141. During the pertinent times, Defendants had actual knowledge of the dangers to individuals similarly situated to the Plaintiff of asbestos exposure, nevertheless, Defendants willfully suppressed the dissemination of information to Plaintiff and other foreseeable end users concerning the hazards of asbestos exposure.

142. The foregoing deliberate, intentional and purposeful acts of the Defendants were the direct and proximate cause of Plaintiff's injuries and damages hereinafter described, and the Plaintiff is therefore, entitled to compensation and punitive damages.

SIXTH CAUSE OF ACTION

Loss of Consortium

143. The factual and jurisdictional allegations of the above Paragraphs are realleged and incorporated herein as if restated verbatim, and further allege as shown below with regard to the Defendants.

144. Plaintiff Jeanette Howe is the spouse of Wayne Ervin Howe.

145. Due to the wrongful and tortuous acts of Defendant, Plaintiff Jeanette Howe has suffered pecuniary loss due to the loss of services of her husband, Wayne Ervin Howe.

146. Plaintiff Jeanette Howe has suffered and will continue to suffer in the future, damages including loss of affection, society, comfort, support, consortium, companionship and the protection of her husband.

147. Defendant's wrongful conduct, alleged above, was a direct and proximate cause of the damages suffered by Plaintiff Jeanette Howe.

148. Plaintiff Jeanette Howe demands judgment against Defendant for compensatory damages for a fair and reasonable amount as determined by the jury and for such other and further relief, both at law and in equity, as the Court may deem just and proper.

PETITION FOR EXPEDITED TRIAL

149. Pursuant to S.C. Code § 44-135-80(B), Plaintiff hereby petitions the Court requesting that a trial date be set on an expedited basis. Plaintiff shows that there is good cause for such an expedited trial setting in that the Plaintiff while grievously ill, is living and wishes to have his claims promptly adjudicated. Further, Defendants will not be prejudiced by such an expedited trial setting.

PETITION FOR EXPEDITED DEPOSITION

150. Pursuant to S.C. R. Civ. P. 30(a)(1), Plaintiff hereby petitions the Court requesting that his deposition be conducted on an expedited basis.

PRAYER FOR RELIEF

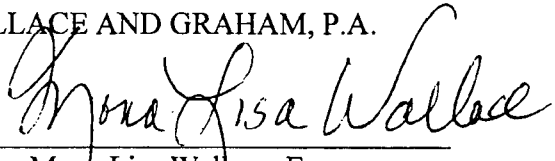
WHEREFORE, the Plaintiffs prays to ask that this Court:

- A. Award the Plaintiffs actual and compensatory damages, in an amount to be determined at trial, for the wrongful, negligent, reckless and willful acts of the Defendants;
- B. Award the Plaintiffs pre-judgment and post-judgment interest to the extent allowable by law;
- C. Award the Plaintiffs punitive damages to the extent allowable by law;
- D. Award the Plaintiffs' attorney fees and costs to the extent allowable by law; and
- E. For such other and further relief as may be just and proper.

A JURY IS RESPECTFULLY DEMANDED TO TRY THESE ISSUES.

Respectfully submitted, this the 6th day of November 2015.

WALLACE AND GRAHAM, P.A.

By: 

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SC Bar No. 15844
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Salisbury, NC 28144
(704) 633-5244
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Attorneys for the Plaintiffs

Exhibit A



DREXEL UNIVERSITY
School of
Public Health

*Department of Environmental &
Occupational Health*

Arthur L. Frank, MD, PhD
Professor, Chair Emeritus

November 4, 2015

William M. Graham, Esq.
Wallace and Graham, P.A.
Attorneys At Law
525 North Main Street
Salisbury, NC 28144

Re: Wayne Ervin Howe
DOB: 8/5/45

Dear Mr. Graham:

I am in receipt of medical records in the case of Mr. Howe and have been asked by you to review them and render my judgment regarding any evidence of an asbestos-related disease.

I am currently employed as Professor of Public Health at the Drexel University School of Public Health in Philadelphia. I received my medical degree from the Mt. Sinai School of Medicine in 1972 and during this time and thereafter I worked with Dr. Irving Selikoff regarding health issues related to exposure to asbestos. From 1973 to 1975 I served at the Lung Cancer Branch at the National Cancer Institute of the National Institutes of Health in Bethesda, Maryland and was a Commissioned Officer in the United States Public Health Service. I then returned to Mt. Sinai and completed two residencies, one in internal medicine and the other in occupational medicine. I became board certified in internal medicine in 1978 and in occupational medicine in 1979. I also have a PhD degree in biomedical sciences from the City University of New York having studied the effects of asbestos on respiratory tissue. From 1977 to 1983 I served on the faculty at Mt. Sinai.

From 1983 until 1994 I was Chair of the Department of Preventative Medicine and Environmental Health at the University of Kentucky, College of Medicine where I was a professor, and I was also a professor of toxicology. In 1994 I became Vice President for Medical Education at the University of Texas Health Center at Tyler and was also a Professor of Occupational and Environmental Medicine. In 2002 I became the Chair of the Department of Environmental and Occupational Health at Drexel University's School of Public Health in Philadelphia. I also served as a Professor of Medicine in the Division of Pulmonary Medicine at Drexel.

Over the years I have held a number of positions with the United States Government including service on the Board of Health as a scientific counselor for NIOSH, the National Institute for Occupational Safety and Health. I have chaired the grant review panel for NIOSH. I have done consulting work for NIOSH, OSHA, and the EPA. I currently serve on the Air Pollution Control Board for the City of Philadelphia.

Re: Wayne Ervin Howe
November 4, 2015
Page 2

I have also consulted with governments around the world including in China, Thailand, India, Brazil, Israel, and Egypt, among others regarding asbestos-related issues. In 1983 I was elected to the Collegium Ramazzini which is an international organization of physicians and scientists devoted to occupational and environmental health issues. Election to this group is limited to 180 active members. I have been active in the organization including service on the Executive Board. Currently, my time is divided between teaching, research, and service. I teach in our introductory course in environmental and occupational health, a course in occupational cancers, and give lectures in the area of occupational toxicology.

In reviewing the medical records of Mr. Howe I note that his treating doctors were aware of his prior exposures to asbestos. In March 2015 Mr. Howe presented with pain in his left chest and an X-ray revealed a large circumscribed mass along the left lateral chest wall. In May radiological testing made note of calcified pleural plaquing. When tissue was taken from his chest he was found to have a pleural-based malignancy that had spread. The surgical pathology report of May 2015 revealed that Mr. Howe developed a malignant pleural mesothelioma. This was then confirmed at Duke University by Dr. Sporn in September 2015.

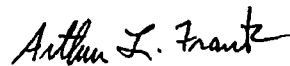
Having reviewed the deposition of Mr. Howe I learned of the details of Mr. Howe's exposure to asbestos. For example, he worked for some 15 years as a pipefitter. He also did work as a millwright, with additional exposures to asbestos. He was also known to do mechanical work on vehicles which included brake work. Through his testimony I also learned that he worked with asbestos-containing gaskets, siding, and other materials.

Based upon my review of the materials sent me, it is my opinion and diagnosis, to a reasonable degree of medical certainty, that Mr. Howe developed two asbestos-related conditions. First I believe he developed asbestos-related pleural disease, called by some asbestosis, given the finding of calcified pleural plaques. Secondly, and more importantly, Mr. Howe developed a malignant pleural mesothelioma as a result of his exposures to asbestos. The cumulative exposures he had to asbestos, from any and all products, containing any and all fiber types, would have led to his developing these conditions. Furthermore, based upon my review of the materials sent me it is my opinion, to a reasonable degree of medical certainty, that Mr. Howe's exposure to asbestos was a proximate cause of the diagnosed mesothelioma, and that Mr. Howe's illness is not more probably the result of other causes.

The hazards of asbestos have been known for more than a century, and the need to protect individuals was written about some 80 years ago.

Should you have any questions about this matter please feel free to contact me.

Sincerely yours,



Arthur L. Frank, MD, PhD
Professor of Public Health

ALF/kmw

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

Wayne Ervin Howe, an individual,)
and Jeanette Howe, his spouse,)
)
Plaintiffs,)

v.)

Air & Liquid Systems Corp., et al.,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL CIRCUIT

Civil Action No. 2015-CP-46-03456

**ANSWER OF
DEFENDANT CLEAVER-BROOKS, INC.
TO PLAINTIFFS' COMPLAINT**

(Jury Trial Demanded)

FILED-TECHNICAL
2015 DEC 30 AM 11:16
CLERK OF COURT
SOUTH CAROLINA
YORK COUNTY, SC

Defendant Cleaver-Brooks, Inc. (hereinafter referred to as "Cleaver-Brooks"),
answers the Plaintiffs' Complaint as follows:

FOR A FIRST DEFENSE TO ALL CAUSES OF ACTION

1. This Court lacks jurisdiction over Cleaver-Brooks and the Plaintiffs' Complaint should, therefore, be dismissed pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure.

FOR A SECOND DEFENSE TO ALL CAUSES OF ACTION

2. Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action against Cleaver-Brooks and should, therefore, be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE TO ALL CAUSES OF ACTION

3. Cleaver-Brooks denies each and every allegation of the Plaintiffs' Complaint which is not hereinafter specifically admitted, modified or explained.

ANSWERING "COMPLAINT"

4. The unnumbered, initial paragraph of Plaintiffs' Complaint makes no actionable reference or allegation as to Cleaver-Brooks. Should a response to this paragraph be required of Cleaver-Brooks, the allegations therein are denied.

ANSWERING "BACKGROUND FACTS"

5. Upon information and belief, Cleaver-Brooks admits the allegations contained in Paragraph 1, 2 and 3 of the Plaintiffs' Complaint.

6. Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of Plaintiffs' Complaint make no actionable reference or allegation as to Cleaver-Brooks. Should a response to these paragraphs be required of Cleaver-Brooks, the allegations therein are denied.

7. Answering Paragraph 14, Cleaver-Brooks admits only that it is incorporated under the laws of a State other than South Carolina. Cleaver-Brooks denies the remaining allegations of Paragraph 14 of the Plaintiffs' Complaint.

8. Paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38 of Plaintiffs' Complaint make no actionable reference or allegation as to Cleaver-Brooks. Should a response to these paragraphs be required of Cleaver-Brooks, the allegations therein are denied.

9. Paragraphs 39, 40, 41 and 42 make no actionable reference or allegation as to Cleaver-Brooks and contain conclusions of law to which no response is required from Cleaver-Brooks. Should a response to these paragraphs be required of Cleaver-Brooks, the allegations therein are denied.

10. Cleaver-Brooks denies the allegations contained in Paragraphs 43 and 44 of the Plaintiffs' Complaint.

11. Upon information and belief, Cleaver-Brooks admits the allegations contained in Paragraph 45 of the Plaintiffs' Complaint.

12. Cleaver-Brooks is without sufficient information to determine the truth of the allegations contained in Paragraphs 46, 47 and 48 of the Plaintiffs' Complaint and, therefore, denies the same.

13. Cleaver-Brooks denies the allegations contained in Paragraphs 49, 50, 51, 52, 53, 54, 55, 56 and 57 of the Plaintiffs' Complaint.

14. Paragraph 58 of the Plaintiffs' Complaint makes no actionable reference or allegation as to Cleaver-Brooks. Should a response to this paragraph be required of Cleaver-Brooks, the allegations therein are denied.

15. Cleaver-Brooks denies the allegations contained in Paragraphs 59, 60, 61, 62, 63 and 64 of the Plaintiffs' Complaint.

ANSWERING THE FIRST CAUSE OF ACTION
(Negligent Failure to Warn and Defective Product Design)

16. In response to Paragraph 65, Cleaver-Brooks repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 64 of the Plaintiffs' Complaint.

17. Cleaver-Brooks denies the allegations contained in Paragraphs 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97 and 98 of the Plaintiffs' Complaint and specifically denies that any post-sale duty to warn was owed, breached or that any alleged breach of a post-sale duty to warn resulted in any injury or damage to the Plaintiffs.

ANSWERING THE SECOND CAUSE OF ACTION
(Implied Warranty of Merchantability)

18. In response to the allegations of Paragraph 99, Cleaver-Brooks repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 98 of the Plaintiffs' Complaint.

19. Cleaver-Brooks denies the allegations contained in Paragraphs 100, 101 and 102 of the Plaintiffs' Complaint and specifically denies that any implied warranty was made, breached or that any alleged breach of implied warranty resulted in any injury or damage to the Plaintiffs.

ANSWERING THE THIRD CAUSE OF ACTION
(Strict Liability)

20. In response to the allegations of Paragraph 103 of the Plaintiffs' Complaint, Cleaver-Brooks repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 102 of the Plaintiffs' Complaint.

21. Cleaver-Brooks denies the allegations contained in Paragraphs 104, 105, 106 and 107 of the Plaintiffs' Complaint.

ANSWERING THE FOURTH CAUSE OF ACTION
(Conspiracy, Concert of Action – Defendant Metropolitan Life Insurance Company)

22. In response to the allegations of Paragraph 108 of the Plaintiffs' Complaint, Cleaver-Brooks repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 107 of the Plaintiffs' Complaint.

23. Paragraphs 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132 and 133 make no actionable

reference or allegation as to Cleaver-Brooks. Should a response to these paragraphs be required of Cleaver-Brooks, the allegations therein are denied.

ANSWERING THE FIFTH CAUSE OF ACTION
(Punitive Damages)

24. In response to the allegations of Paragraph 134 of the Plaintiffs' Complaint, Cleaver-Brooks repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 133 of the Plaintiffs' Complaint.

25. Cleaver-Brooks denies the allegations contained in Paragraphs 135, 136, 137, 138, 139, 140, 141 and 142 of the Plaintiffs' Complaint.

ANSWERING THE SIXTH CAUSE OF ACTION
(Loss of Consortium)

26. In response to Paragraph 143 of the Plaintiffs' Complaint, Cleaver-Brooks repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 142 of the Plaintiffs' Complaint.

27. Upon information and belief, Cleaver-Brooks admits the allegations contained in Paragraph 144 of the Plaintiffs' Complaint.

28. Cleaver-Brooks denies the allegations contained in Paragraphs 145, 146, 147 and 148 of the Plaintiffs' Complaint.

ANSWERING THE PETITION FOR EXPEDITED TRIAL

29. Paragraph 149 of Plaintiffs' Complaint makes no actionable reference or allegation as to Cleaver-Brooks. The information presently known to Cleaver-Brooks is insufficient pursuant to S.C. Code Ann. § 44-135-80(B). Should a response be required from Cleaver-Brooks, the allegations therein are denied.

ANSWERING THE PETITION FOR EXPEDITED DEPOSITION

30. Paragraph 150 of Plaintiffs' Complaint makes no actionable reference or allegation as to Cleaver-Brooks. The information presently known to Cleaver-Brooks is insufficient pursuant to S.C. Code Ann. § 44-135-80(B) and SCRCP 30(a)(1). Should a response be required from Cleaver-Brooks, the allegations therein are denied.

ANSWERING THE "PRAYER FOR RELIEF"

31. Cleaver-Brooks denies the Prayer for Relief and all subparagraphs therein. Specifically, Cleaver-Brooks denies that there is any legal basis for the Plaintiff's recovery of attorneys' fees herein.

FOR A FIRST AFFIRMATIVE DEFENSE

32. Plaintiffs' Complaint fails to state a cause of action against Cleaver-Brooks upon which relief may be granted and should therefore be dismissed.

FOR A SECOND AFFIRMATIVE DEFENSE

33. Plaintiffs' claims are barred, in whole or in part, by the Statute of Limitations and the Doctrine of Laches.

FOR A THIRD AFFIRMATIVE DEFENSE

34. Plaintiffs' claims are barred, in whole or in part, by the Statute of Repose.

FOR A FOURTH AFFIRMATIVE DEFENSE

35. Plaintiffs' claims are barred by the operation of the Doctrine of Estoppel.

FOR A FIFTH AFFIRMATIVE DEFENSE

36. Plaintiffs' claims are barred by the operation of the Doctrine of Waiver.

FOR A SIXTH AFFIRMATIVE DEFENSE

37. Cleaver-Brooks was not negligent, did not furnish an unreasonably dangerous product, and did not make or breach any express or implied warranties.

FOR A SEVENTH AFFIRMATIVE DEFENSE

38. In the alternative, Plaintiffs' claims for breach of warranty are barred by Plaintiffs' failure to give prompt notice of any breach of warranty as is required by the Uniform Commercial Code.

FOR AN EIGHTH AFFIRMATIVE DEFENSE

39. Plaintiffs' claims are barred, in whole or in part, by Plaintiffs' comparative and/or contributory negligence, gross negligence and/or assumption of risk.

FOR A NINTH AFFIRMATIVE DEFENSE

40. No products of Cleaver-Brooks, allegedly containing asbestos, were ever sold to Plaintiffs' and/or Wayne Ervin Howe ("Howe") employers nor were Plaintiffs and/or Howe ever exposed to any products allegedly containing asbestos, and allegedly manufactured or distributed by Cleaver-Brooks. In the alternative, if it be proven at trial that any products, attributable to Cleaver-Brooks, were furnished to Plaintiffs' and/or Howe's employers and that Plaintiffs and/or Howe were exposed to said products, all of which is expressly denied, then any products attributable to Cleaver-Brooks, which may have been furnished to Plaintiffs' and/or Howe's employers and to which Plaintiffs and/or Howe may have been exposed, were furnished in strict conformity with the specifications furnished by the United States Government and/or Plaintiffs' and/or Howe's employers.

FOR A TENTH AFFIRMATIVE DEFENSE

41. Plaintiffs' and/or Howe's employers had knowledge, equal or superior to Cleaver-Brooks, with respect to possible health hazards associated with Plaintiffs' and/or Howe's employment and, therefore, if there was any duty to warn Plaintiffs and/or Howe or provide protection to Plaintiffs and/or Howe, which is expressly denied, it was the duty of said employers and not of Cleaver-Brooks and any breach of that duty was an intervening and/or superseding cause of Plaintiffs' alleged injuries.

FOR AN ELEVENTH AFFIRMATIVE DEFENSE

42. Cleaver-Brooks denies that Plaintiffs suffered an asbestos-related injury. In the alternative, if Plaintiffs should prove that they suffered an asbestos-related injury, such asbestos-related injury resulted from Plaintiffs' and/or Howe's exposure to asbestos-containing products manufactured, sold, supplied, or distributed by those Defendants, or other present or former producers, distributors or suppliers of asbestos containing products who filed for protection from creditors under federal Bankruptcy Laws.

FOR A TWELFTH AFFIRMATIVE DEFENSE

43. Plaintiffs receipt of benefits or entitlement to benefits under the Workers' Compensation Act, Social Security Administration, long and/or short term disability, or other similar compensatory systems or settlements, entitles Cleaver-Brooks to a reduction, set-off and/or credit against any Judgment that might be entered against it in this action.

FOR A THIRTEENTH AFFIRMATIVE DEFENSE

44. Plaintiffs, Plaintiffs' and/or Howe's employers or parties other than Cleaver-Brooks, altered or modified any product manufactured by Cleaver-Brooks to which Plaintiffs and/or Howe were allegedly exposed and damages thereby and such alteration or modification occurred after said product left the control of Cleaver-Brooks.

FOR A FOURTEENTH AFFIRMATIVE DEFENSE

45. Plaintiffs or Plaintiffs' and/or Howe's employers knew of, discovered or should have known or discovered any alleged defect or dangerous condition of any product allegedly manufactured or distributed by Cleaver-Brooks, or of a circumstance inconsistent with the safe use of said product and then unreasonably and voluntarily exposed Plaintiffs to the alleged defect or dangerous condition.

FOR A FIFTEENTH AFFIRMATIVE DEFENSE

46. Cleaver-Brooks acted reasonably in the design and formulation of its products.

FOR A SIXTEENTH AFFIRMATIVE DEFENSE

47. At all times material hereto, the state of the medical and industrial art was such that there was no generally accepted or recognized knowledge of any unavoidably unsafe, inherently dangerous, or hazardous character or nature of asbestos-containing products used in the manner and for the purpose described by Plaintiffs. Therefore, Cleaver-Brooks was under no duty to know of such character or nature or to warn Plaintiffs or others similarly situated

FOR A SEVENTEENTH AFFIRMATIVE DEFENSE

48. Plaintiffs' alleged injuries and illnesses, the existence of which is expressly denied, were caused or contributed to by the neglect, misuse, fault and want of due care, or other intervening and/or superseding acts or omissions, by Plaintiffs or by others over whose actions, omissions and breach of duties, Cleaver-Brooks had no control and/or for whose actions, omissions or breach of duties, Cleaver-Brooks is not liable.

FOR AN EIGHTEENTH AFFIRMATIVE DEFENSE

49. Even if Plaintiffs were exposed to or came into contact with any product of Cleaver-Brooks, which is expressly denied, such contact or exposure was not the cause of Plaintiffs' alleged injuries and illnesses and was not sufficiently significant to have been a cause of Plaintiffs' alleged illnesses. Further, as such, Cleaver-Brooks is not liable for indemnity or contribution to any party in this cause.

FOR A NINETEENTH AFFIRMATIVE DEFENSE

50. If Plaintiffs sustained any injuries as a result of the use of or exposure to any product manufactured or sold by Cleaver-Brooks, which is expressly denied, such injuries were proximately caused by the acts or omissions of Plaintiffs' and/or Howe's employers, who were sophisticated purchasers and consumers who failed to take adequate precautions, failed to provide Plaintiffs and/or Howe with a safe work place, and failed to warn Plaintiffs and/or Howe of any health hazards that may have been associated with exposure to or contact with any such products.

FOR A TWENTIETH AFFIRMATIVE DEFENSE

51. Plaintiffs' and/or Howe's employers knew or should have known of any health hazards associated with any Cleaver-Brooks products, allegedly containing asbestos, which is expressly denied, at the time such products were purchased by Plaintiffs' and/or Howe's employers. The failure of Plaintiffs' and/or Howe's employers to act in a prudent fashion constitutes negligence which proximately caused, substantially or solely contributed to Plaintiffs' alleged injuries and damages and Plaintiffs' and/or Howe's employers are solely liable to Plaintiffs for any injuries and damages Plaintiffs may have sustained.

FOR A TWENTY-FIRST AFFIRMATIVE DEFENSE

52. In the event Plaintiffs have already, or in the future, entered into any settlement or compromise with, or execute any release of, any present or future Defendant, Third-Party Defendant or any non-party, for any of Plaintiffs' alleged injuries and damages, Cleaver-Brooks is entitled to a credit or set-off of: (a) the amount of consideration to be received by Plaintiffs in such settlement or for such release; and (b) the proportionate or pro rata share of liability of the settling or released party or non-party.

FOR A TWENTY-SECOND AFFIRMATIVE DEFENSE

53. Plaintiffs' claims are barred, with regard to Cleaver-Brooks, by Plaintiffs' lack of privity with Cleaver-Brooks.

FOR A TWENTY-THIRD AFFIRMATIVE DEFENSE

54. Plaintiffs' claims against Cleaver-Brooks are preempted by the regulations of the Occupational Safety and Health Administration or other applicable federal laws.

FOR A TWENTY-FOURTH AFFIRMATIVE DEFENSE

55. Plaintiffs' claims in the Complaint, and each count thereof, that seek exemplary or punitive damages violate Cleaver-Brooks' right to substantive due process as provided in the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 19 and other applicable provisions of the Constitution of the State of South Carolina, and any other state's law which may be applicable.

FOR A TWENTY-FIFTH AFFIRMATIVE DEFENSE

56. Multiple awards of punitive damages against Cleaver-Brooks would violate Article 1, Section 19 of the Constitution of the State of South Carolina, the prohibition against being twice placed in jeopardy for the same offense embodied in the Fifth and Fourteenth Amendments to the United States Constitution, the common law of the State of South Carolina, and any other state's law which may be applicable.

FOR A TWENTY-SIXTH AFFIRMATIVE DEFENSE

57. Plaintiffs should have taken action to minimize or eliminate their damages, if any, and therefore Plaintiffs are precluded from any recovery or, in the alternative, any recovery must be reduced by the operation of the Doctrines of Avoidable Consequences and Mitigation of Damages.

FOR A TWENTY-SEVENTH AFFIRMATIVE DEFENSE

58. Cleaver-Brooks did not authorize, approve or ratify the acts or omissions attributed to it or any other party in this cause.

FOR A TWENTY-EIGHTH AFFIRMATIVE DEFENSE

59. Plaintiffs' alleged injuries and damages, if any, were proximately caused by or contributed to by exposure or inhalation of noxious and deleterious fumes and

residues from industrial products or byproducts prevalent on the job sites, by the cumulative effects of exposure to all types of environmental and industrial pollutants of air and water, or by substances, products or other causes not attributable to or connected with Cleaver-Brooks.

FOR A TWENTY-NINTH AFFIRMATIVE DEFENSE

60. Plaintiffs' Complaint fails to name both necessary and indispensable parties to whose absence complete relief cannot be accorded among those already parties. Therefore, this action must be dismissed, or alternatively, the action should be stayed pending other appropriate relief by the Court.

FOR A THIRTIETH AFFIRMATIVE DEFENSE

61. Plaintiffs' Complaint should be dismissed for its failure to comply with the requirements of Section 44-135-10, *et seq.* of the South Carolina Code, also known as the "Asbestos and Silica Claims Procedure Act of 2006," as the Plaintiffs have failed to make the prima facie showing required by the Act.

FOR A THIRTY-FIRST AFFIRMATIVE DEFENSE

62. Plaintiffs do not have standing to bring this claim pursuant to Section 15-5-150 S.C. Code Ann., also referred to as South Carolina's Door Closing Statute.

FOR A THIRTY-SECOND AFFIRMATIVE DEFENSE

63. Cleaver-Brooks asserts that an award of damages, if any, is subject to and limited by the applicable provisions of S.C. Code Ann § 15-38-10, *et seq.*

FOR A THIRTY-THIRD AFFIRMATIVE DEFENSE

64. Cleaver-Brooks pleads the limitations on damage awards pursuant to S.C. Code Ann. § 15-32-510, *et seq.* and requests bifurcation in accordance with these statutes.

FOR A THIRTY-FOURTH AFFIRMATIVE DEFENSE

65. Punitive damages are inappropriate since Cleaver-Brooks did not engage in any malicious, reckless, wrongful or intentional conduct upon which an award of punitive damages could be based.

FOR A THIRTY-FIFTH AFFIRMATIVE DEFENSE

66. Any award of punitive damages should not exceed the greater of three (3) times the amount of compensatory damages pursuant to S. C. Code Ann. § 15-32-530.

Defendant Cleaver-Brooks, Inc. prays that Plaintiffs take nothing in this cause and that it recover its costs incurred herein. Cleaver-Brooks, Inc. prays for such other and further relief, both general and special, legal or equitable, to which it may be justly entitled.

RICHARDSON PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400

By: _____

Steven J. Pugh
Joseph E. Thoensen

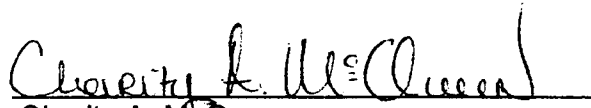
ATTORNEYS FOR DEFENDANT
CLEAVER-BROOKS, INC.

December 28, 2015

CERTIFICATE OF SERVICE

I, Charity A. McQueen, an employee of Richardson Plowden & Robinson, P.A., do hereby certify that a copy of the **ANSWER OF DEFENDANT CLEAVER-BROOKS, INC. TO PLAINTIFFS' COMPLAINT** in the above-referenced matter has been served upon the following counsel of record, through e-mail and/or the United States Mail, Postage Prepaid, First Class, addressed as follows:

Mona Lisa Wallace, Esquire
525 North Main Street
Salisbury, North Carolina 28144
mwallace@wallacegraham.com
dfrancis@wallacegraham.com


Charity A. McQueen

December 28, 2015

FILED - RECEIVED
72
2015 DEC 30 AM 11:15
DAVID HAMILTON
C.C.P. & U.S.
YORK COUNTY, SC

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

C/A No. 2015-CP-46-3456

TIMOTHY W. HOWE, Individually and as
Personal Representative of the Estate of **WAYNE**
ERWIN HOWE, Deceased, and **JEANETTE**
HOWE,

Plaintiffs,

V.

AIR & LIQUID SYSTEMS CORP.,
INDIVIDUALLY AND AS SUCCESSOR-IN-
INTEREST TO BUFFALO PUMPS, INC.;

AIRCO, INC.;

AIRGAS USA, LLC F/K/A NATIONAL
WELDING SUPPLY, INC.

ALBANY INTERNATIONAL CORP.;

ASTEN-JOHNSON, INC.;

AURORA PUMP COMPANY;

A.W. CHESTERTON COMPANY;

BELOIT CORPORATION;

BLACK CLAWSON CONVERTING
MACHINERY LLC, INDIVIDUALLY AND AS A
SUBSIDIARY OF DAVIS-STANDARD LLC;

CBS CORPORATION, A DELAWARE
CORPORATION F/K/A VIACOM, INC.,
SUCCESSOR BY MERGER TO CBS
CORPORATION, A PENNSYLVANIA
CORPORATION, F/K/A WESTINGHOUSE
ELECTRIC CORPORATION;

CGR PRODUCTS, INC. F/K/A CAROLINA
GASKET AND RUBBER COMPANY;

CNA HOLDINGS, INC., F/K/A HOECHST
CELANESE CORPORATION;

CELANESE CORPORATION F/K/A HOECHST
CELANESE CORPORATION (SUED
INDIVIDUALLY AND AS SUCCESSOR IN-
INTEREST-TO FIBER INDUSTRIES, INC.);

CLEAVER BROOKS, INC.;

COVIL CORPORATION;

CRANE CO.;

CROWN CORK & SEAL COMPANY, INC.;

DANIEL INTERNATIONAL CORPORATION;

Former Pipefitter, Manual Laborer,
General Construction Worker, Steel
Worker, Welder, Millwright, and
Maintenance Worker

(York County, South Carolina)
Mesothelioma

**Asbestos Lawsuit
Wrongful Death and Survival
Action
JURY DEMAND ON ALL ISSUES**

DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

2016 SEP 23 PM 12:00

FILED-RECEIVED

DAVIS-STANDARD CORPORATION, LLC;)
DEZURIK, INC. D/B/A DEZURIK-APCO)
 WILLIAMETTE EAGLE, INC.;)
FISHER-KLOSTERMAN, INC., AS)
 SUCCESSOR-IN-INTEREST TO BUELL)
 ENGINEERING CO.;)
FLOWSERVE CORPORATION)
 INDIVIDUALLY AND AS SUCCESSOR-IN-)
 INTEREST TO DURCO PUMPS;)
FLUOR ENTERPRISES, INC., F/K/A FLUOR)
 DANIEL, INC.,)
FLUOR DANIEL SERVICES CORPORATION;)
FOSTER WHEELER ENERGY)
CORPORATION;)
GENERAL ELECTRIC COMPANY;)
THE GORMAN-RUPP COMPANY;)
GOULDS PUMPS, INCORPORATED;)
INGERSOLL-RAND COMPANY;)
LINDE, LLC F/K/A THE BOC GROUP, INC.,)
 F/K/A AIRCO, INC.;)
MARSULEX ENVIRONMENTAL)
TECHNOLOGIES CORPORATION,)
 INDIVIDUALLY AND AS SUCCESSOR-IN-)
 INTEREST TO BUELL ENGINEERING CO.;)
MARSULEX ENVIRONMENTAL)
TECHNOLOGIES, LLC, AS SUCCESSOR-IN-)
 INTEREST TO BUELL ENGINEERING CO.;)
METROPOLITAN LIFE INSURANCE)
COMPANY, A WHOLLY-OWNED SUBSIDIARY)
 OF METLIFE INC.;)
PEERLESS PUMP COMPANY;)
PRESNELL INSULATION, INC.;)
RILEY POWER, INC., INDIVIDUALLY AND AS)
 SUCCESSOR-IN-INTEREST TO BABCOCK)
 BORSIG POWER, INC., AND RILEY STOKER)
 CORPORATION, INDIVIDUALLY AND AS)
 SUCCESSOR-IN-INTEREST TO D.B. RILEY;)
SCAPA WAYCROSS, INC.;)
SEPCO CORPORATION;)
SPX COOLING TECHNOLOGIES, INC., F/K/A)
 MARLEY COOLING TECHNOLOGIES, INC.,)
 F/K/A THE MARLEY COOLING TOWER CO.;)
STERLING FLUID SYSTEMS (USA) LLC;)
TRANE U.S., INC., F/K/A AMERICAN)
 STANDARD, INC., F/K/A AMERICAN)
 RADIATOR & STANDARD)

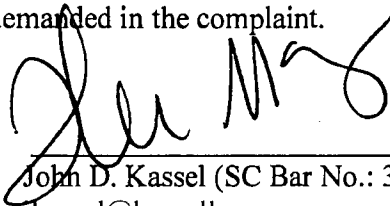
MANUFACTURING COMPANY;
UNION CARBIDE CORPORATION;
UNIROYAL, INC., F/K/A UNITED STATES
RUBBER COMPANY, INC.;
UNITED CONVEYOR CORPORATION;
VELAN VALVE CORP.;
VIKING PUMP, INC.;
WARREN PUMPS LLC;
YUBA HEAT TRANSFER CORPORATION;
ZURN INDUSTRIES,

DEFENDANTS.

FIRST AMENDED SUMMONS

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.



John D. Kassel (SC Bar No.: 3286)

jkassel@kassellaw.com

Theile B. McVey (SC Bar No.: 16682)

tmcvey@kassellaw.com

KASSEL MCVEY, ATTORNEYS AT LAW

1330 Laurel Street

Post Office Box 1476

Columbia, South Carolina 29202

803-256-4242

803-256-1952 (Facsimile)

Other email: emoultrie@kassellaw.com

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ATTORNEYS FOR PLAINTIFFS

September 21, 2016

Spartanburg, South Carolina.

IN THE COURT OF COMMON PLEAS

C/A No. 2015-CP-46-3456

) Former Pipefitter, Manual Laborer,
) General Construction Worker, Steel
) Worker, Welder, Millwright, and
) Maintenance Worker

(York County, South Carolina)
Mesothelioma

1

**Asbestos Lawsuit
Wrongful Death and Survival
Action
JURY DEMAND ON ALL ISSUES**

DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

FILED-RECEIVED
2016 SEP 23 PM12:00

DAVIS-STANDARD CORPORATION, LLC;)
DEZURIK, INC. D/B/A DEZURIK-APCO)
WILLIAMETTE EAGLE, INC.;)
FISHER-KLOSTERMAN, INC., AS)
SUCCESSOR-IN-INTEREST TO BUELL)
ENGINEERING CO.;)
FLOWSERVE CORPORATION)
INDIVIDUALLY AND AS SUCCESSOR-IN-)
INTEREST TO DURCO PUMPS;)
FLUOR ENTERPRISES, INC., F/K/A FLUOR)
DANIEL, INC.,)
FLUOR DANIEL SERVICES CORPORATION;)
FOSTER WHEELER ENERGY)
CORPORATION;)
GENERAL ELECTRIC COMPANY;)
THE GORMAN-RUPP COMPANY;)
GOULDS PUMPS, INCORPORATED;)
INGERSOLL-RAND COMPANY;)
LINDE, LLC F/K/A THE BOC GROUP, INC.,)
F/K/A AIRCO, INC.;)
MARSULEX ENVIRONMENTAL)
TECHNOLOGIES CORPORATION,)
INDIVIDUALLY AND AS SUCCESSOR-IN-)
INTEREST TO BUELL ENGINEERING CO.;)
MARSULEX ENVIRONMENTAL)
TECHNOLOGIES, LLC, AS SUCCESSOR-IN-)
INTEREST TO BUELL ENGINEERING CO.;)
METROPOLITAN LIFE INSURANCE)
COMPANY, A WHOLLY-OWNED SUBSIDIARY)
OF METLIFE INC.;)
PEERLESS PUMP COMPANY;)
PRESNELL INSULATION, INC.;)
RILEY POWER, INC., INDIVIDUALLY AND AS)
SUCCESSOR-IN-INTEREST TO BABCOCK)
BORSIG POWER, INC., AND RILEY STOKER)
CORPORATION, INDIVIDUALLY AND AS)
SUCCESSOR-IN-INTEREST TO D.B. RILEY;)
SCAPA WAYCROSS, INC.;)
SEPCO CORPORATION;)
SPX COOLING TECHNOLOGIES, INC., F/K/A)
MARLEY COOLING TECHNOLOGIES, INC.,)
F/K/A THE MARLEY COOLING TOWER CO.;)
STERLING FLUID SYSTEMS (USA) LLC;)
TRANE U.S., INC., F/K/A AMERICAN)
STANDARD, INC., F/K/A AMERICAN)
RADIATOR & STANDARD)

MANUFACTURING COMPANY;
UNION CARBIDE CORPORATION;
UNIROYAL, INC., F/K/A UNITED STATES
RUBBER COMPANY, INC.;
UNITED CONVEYOR CORPORATION;
VELAN VALVE CORP.;
VIKING PUMP, INC.;
WARREN PUMPS LLC;
YUBA HEAT TRANSFER CORPORATION;
ZURN INDUSTRIES,

DEFENDANTS.

FIRST AMENDED COMPLAINT

NOW COME the Plaintiffs, Timothy W. Howe, Individually and as Personal Representative of the Estate of Wayne Ervin Howe, deceased, and Jeanette Howe, citizens and residents of the State of South Carolina, through their counsel and sues the Defendants and alleges as follows:

PARTIES AND JURISDICTION

1. Plaintiffs are citizens and residents of the State of South Carolina.
2. The decedent died on March 7, 2016, in York County, Hospice and Community care, Rock Hill, SC 29732. The cause of death was Malignant Mesothelioma. The decedent had been diagnosed with Mesothelioma on or about May 19, 2015.
3. Decedent Wayne Ervin Howe, deceased, was a citizen and resident of the State of South Carolina. Timothy W. Howe, Personal Representative, is the son Wayne Ervin Howe and a citizen of South Carolina.
4. The Defendant, **Air & Liquid Systems Corp.**, individually and as successor-in-interest to Buffalo Pumps, Inc., is a corporation organized and existing under the laws of the State of Pennsylvania with a principal place of business in Pennsylvania, and can be served with process at its office at 874 Oliver Street, North Tanawanda NY 14120-3298 or through its registered agent located at CT Corporation, 116 Pine St, Suite 320, Harrisburg, PA 17101.
5. The Defendant, **Airco, Inc.**, is a corporation organized and existing under the laws of the State of Delaware with a principal place of business in New Jersey, and can be served with process at its office at 575 Mountain Avenue, Murray Hill, NJ 07974 or through its registered agent the North Carolina Secretary of State located at 2 South Salisbury Street, Raleigh, NC 27601.
6. The Defendant, **Airgas USA, LLC**, formerly known as National Welding Supply Inc., is a limited liability company organized and existing under the laws of the State of Delaware with a principal place of business in Pennsylvania, and can be served with process at

its office at 259 North Radnor-Chester Road, Radnor, PA 19087 or through its registered agent CT Corporation System located at 150 Fayetteville Street, Box 1011, Raleigh, NC 27601.

7. The Defendant, **Albany International Corp.**, is the successor in interest to Mount Vernon Group d/b/a Mount Vernon Dryer Fabrics and the successor in interest to Geschmay Corporation. Upon information and belief, Albany International Corp. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located in Rochester, New Hampshire, and can be served with process at its office at 975 Old Norcross Road, Suite A, Lawrenceville, Georgia 30045, or through its South Carolina registered agent, CT Corporation System, 2 Office Park Court, Columbia SC 29223, or at its office at 216 Airport Drive, Rochester, NH 03867.

8. The Defendant, **Asten-Johnson, Inc.**, is a corporation organized and existing under the laws of the State of Delaware with a principal place of business in Charleston, South Carolina and can be served with process at its office at 4399 Corporate Road, Charleston, SC 29405 or through its office located at 400 Asten Road, Clinton, SC 29325 or through its registered agent, CT Corporation System, 75 Beattie Place, Greenville, SC 29601.

9. The Defendant, **Aurora Pump Company**, is a corporation organized and existing under the laws of the State of Minnesota with a principal place of business in Illinois, and can be served with process at its office at c/o Pentair, 800 Airport Road, North Aurora, IL 60542 or through its office located at c/o Lynette Jones, 13515 Ballantyne Corp. Pl., Charlotte NC 28277.

10. The Defendant, **A.W. Chesterton Company**, is a corporation organized and existing under the laws of the State of Massachusetts with a principal place of business in Massachusetts, and can be served with process through its registered agent, CT Corporation System, 2 Office Park Court, Suite 103, Columbia, SC 29223

11. The Defendant, **Beloit Corporation**, is a corporation organized and existing under the laws of the State of Delaware with a principal place of business in Springfield, and can be served with process through its registered agent, Lexis Documents Services, 801 Adlai Stevenson Drive, Springfield, 62703.

12. The Defendant, **Black Clawson Converting Machinery LLC**, is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in the State of Pennsylvania, and can be served with process c/o registered agent, CT Corporation System, can be served through its registered agent office at c/o Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington DE 19808.

13. The Defendant, **CBS Corporation**, a Delaware Corporation f/k/a Viacom, Inc., Successor By Merger To CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation, is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in the State of Pennsylvania, and can be served with process c/o registered agent, CT Corporation System, 75 Beattie Place, Two Insignia Financial Plaza, Greenville, SC 29601, or through its registered agent office at c/o Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington DE 19808.

14. The Defendant, **CGR Products, Inc.** f/k/a Carolina Gasket and Rubber Company, Inc., is a corporation organized and existing under the laws of the State of North Carolina with a principal place of business in North Carolina, and can be served with process at its registered agent office at 100 North Greene Street, Suite 600, Greensboro, NC 27401 or through its office located at 4655 US Highway 29 North, Greensboro, NC 27405.

15. The Defendant, **CNA Holdings, Inc.**, f/k/a Hoechst Celanese Corporation, is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in the State of Texas, and can be served with process at Registered Agent, CT Corporation System, 2 Office Park Court, Suite 103, Columbia, SC 29223.

16. The Defendant, **Celanese Corporation** f/k/a Hoechst Celanese Corporation (sued individually and as successor in-interest to Fiber Industries, Inc.), is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in the State of Texas, and can be served with process at Registered Agent, The Corporation Trust Company, 1209 Orange Street, Wilmington, DE 19801.

17. The Defendant, **Cleaver Brooks, Inc.**, individually and as successor-in-interest to Aquachem, is a corporation incorporated under the laws of the State of Delaware, having its principal place of business located in the State of Georgia, and can be served with process at Registered Agent, Corporation Service Company, 1703 Laurel Street, Columbia, SC 29201.

18. The Defendant, **Covil Corporation**, is a corporation incorporated under the laws of the State of South Carolina, having its principal place of business in the State of South Carolina, and can be served with process at Covil Corporation c/o Jim Covil, 5 Woodfern Circle, Greenville, SC 29615 or at Registered Agent, Greenville Process Service, Greengate Office Park, 25 Woods Lake Road, Suite 216, Greenville, SC 29607.

19. The Defendant, **Crane Co.** is a corporation organized and existing under the laws of the State of Delaware with a principal place of business in Connecticut and can be served with process through its registered agent office located at The Corporation Trust Company, 1209 Orange Street, Wilmington DE 19801, or its registered office of CT Corporation System, 111 Eighth Avenue, NY, NY 10011.

20. The Defendant, **Crown Cork & Seal Company, Inc.**, is a corporation organized and existing under the laws of the State of Pennsylvania with a principal place of business in Pennsylvania, and can be served with process at its office at 1 Crown Way, Philadelphia PA 19154.

21. The Defendant, **Daniel International Corporation**, is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in South Carolina, and can be served with process at its office at 100 Fluor Daniel Drive, Greenville SC 29607, or through its South Carolina registered agent, John R. Reynolds, 100 Fluor Daniel Drive, Greenville SC 29607.

22. The Defendant, **Davis-Standard Corporation, LLC**, is a corporation organized and existing under the laws of the State of Delaware with a principal place of business in

Delaware, and can be served with process through its registered agent office located at Corporation Service Company, 2711 Centerville Rd. Suite 400, Wilmington, DE 19808.

23. The Defendant, **Dezurik, Inc.**, was and is a company incorporated under the laws of the State of Delaware with its principal place of business in Sartell, MN, it can be served through its registered agent, Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801.

24. The Defendant, **Fisher-Klosterman, Inc.**, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Kentucky, and may be served with process at its office at 10000 Shelbyville Road, Suite 101, Louisville, KY 40223, or through its registered agent, Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801.

25. The Defendant, **Flowserve Corporation**, is a corporation incorporated under the laws of the State of New York with its principle place of business in New York, and can be served with process at its Registered Agent CT Corporation System, C.T. Corporation System, 120 South Central Avenue Clayton, Missouri 63105.

26. The Defendant, **Fluor Enterprises, Inc.**, f/k/a Fluor Daniel, Inc., is a corporation organized and existing under the laws of the State of California, and can be served with process at its office at 3 Polaris Way, Aliso Viejo, CA 92698, or through its South Carolina registered agent, Corporation Service Company, 1703 Laurel Street, Columbia SC 29201.

27. The Defendant, **Fluor Daniel Services Corporation**, is a corporation organized and existing under the laws of the State of Delaware and can be served with process at its office at 100 Fluor Daniels Drive, Greenville SC 29607, or through its South Carolina registered agent, Corporation Service Company, 1703 Laurel Street, Columbia SC 29201.

28. The Defendant, **Foster Wheeler Energy Corporation**, is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in New Jersey, and can be served with process through its Registered Agent, CT Corporation System, 2 Office Park Court, Suite 103, Columbia SC 29223, or at its office located at Perryville Corporate Park, Route 78, Clinton NJ 08809.

29. The Defendant, **General Electric Company**, is a corporation incorporated under the laws of the State of New York, having its principal place of business located in the State of Connecticut, and can be served with process Registered Agent, CT Corporation System, 2 Office Park Court, Suite 103, Columbia SC 29223.

30. The Defendant, **The Gorman-Rupp Company** a/k/a The Gorman-Rupp International Company, is a corporation incorporated under the laws of the State of Ohio, having its principal place of business located in Ohio, and can be served with process at through its Ohio Registered Agent, Corporation Services Company, 50 West Broad Street, Suite 1800, Columbus Ohio 43215, or through the corporate office address of 180 Hines Avenue, Bellville OH 44813, or its corporate address at 600 South Airport Road, Mansfield OH 44901.

31. The Defendant, **Goulds Pumps, Incorporated**, is a corporation organized and existing under the laws of the State of Delaware and can be served with process through its office located at 240 Fall Street, Seneca Falls, NY 131148, or through its registered agent, c/o CT Corporation System, 2 Office Park Court, Suite 103 Columbia, SC 29223.

32. The Defendant, **Ingersoll-Rand Company** is a New Jersey company with its principal place of business in Davidson, North Carolina and can be served with process through its South Carolina registered agent office located at CT Corporation System, 2 Office Park Court, Columbia SC 29223 or its corporate office at 800-E Beaty Street, Davidson, NC 28036.

33. The Defendant, **Linde, LLC**, is a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business in New Jersey, and can be served with process at its office at 575 Mountain Avenue, Murray Hill, NJ 07974 or through its registered agent Corporation Service Company at 327 Hillsborough Street, Raleigh, NC 27603.

34. The Defendant, **Marsulex Environmental Technologies Corporation**, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Pennsylvania and can be served with process at its office at 200 North 7th Street, Lebanon, PA 17406 or through its registered agent Corporation Service Company at 2595 Interstate Drive, Suite 103, Harrisburg, PA 17110.

35. The Defendant, **Marsulex Environmental Technologies, LLC**, is a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business in Pennsylvania and can be served with process at its office at 200 North 7th Street, Lebanon, PA 17406 or through its registered agent Corporation Service Company at 2595 Interstate Drive, Suite 103, Harrisburg, PA 17110.

36. The Defendant, **Metropolitan Life Insurance Company**, a wholly-owned subsidiary of MetLife, Inc., is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York, and can be served with process at its office at 200 Park Ave., New York, NY 10166, or at its office at One Madison Avenue, New York NY 10010, or at c/o United Corporate Services, Inc., 160 Cassell Road #144, Harleysville, PA 19438-2009.

37. The Defendant, **Peerless Pump Company** aka Peerless Industries Inc., is a corporation organized and existing under the laws of the State of Indiana and can be served with process through its office located at c/o ALCO Products, 1515 Market Street, Philadelphia PA 19102, or at its office at 2005 Dr. Martin Luther King Jr. Street, Indianapolis, IN 46202, or at SFS (USA) Holding Inc. d/b/a Peerless Pump Company, c/o CT Corporation System, 150 Fayetteville St., Box 1011, Raleigh, NC 27601.

38. The Defendant, **Presnell Insulation, Inc.**, is a corporation incorporated under the laws of the State of North Carolina, having its principal place of business located in North Carolina, and can be served with process at Registered Agent, Jackson T. Presnell 3717 Flowerfield Rd., Charlotte, NC 28210.

39. The Defendant, **Riley Power, Inc.**, individually and as successor-in-interest to Babcock Borsig Power, Inc., and Riley Stoker Corporation, individually and as successor-in-interest to D.B. Riley, is a corporation incorporated under the laws of the State of Massachusetts, having its principal place of business located in the State of Massachusetts, and can be served with process c/o Registered Agent, CT Corporation System, 2 Office Park Court, Suite 103, Columbia, SC, 29223.

40. The Defendant, **Scapa Waycross, Inc.**, is a corporation organized and existing under the laws of the State of Philadelphia, and can be served with the process through its registered agent located at CT Corporation System, 1201 Peachtree Street NE, Fulton, Atlanta, GA, 30361, USA.

41. The Defendant, **SEPCO Corporation**, is a corporation organized and existing under the laws of the State of California, and can be served with process through its registered agent located at CT Corporation System, 818 West Seventh Street, Suite 930, Los Angeles CA 90017.

42. The Defendant, **SPX COOLING TECHNOLOGIES, INC.** f/k/a Marley Cooling Technologies, Inc., f/k/a The Marley Cooling Tower Company, is a company incorporated under the laws of the State of Delaware, having its principal place of business located in Wisconsin, and can be served with process at Registered Agent, CT Corporation System, 2 Office Park Court, Suite 103, Columbia SC 29223.

43. The Defendant, **Sterling Fluid Systems (USA) LLC** is a Delaware company and can be served with process through its registered agent office located at c/o The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801.

44. The Defendant, **Trane U.S. Inc.**, f/k/a American Standard, Inc., f/k/a American Radiator & Standard Manufacturing Company, is a corporation incorporated under the laws of the State of Delaware, having its principal place of business located in Wisconsin, and can be served with process at Registered Agent, CT Corporation System, 2 Office Park Court, Suite 103, Columbia SC 29223.

45. The Defendant, **Union Carbide Corporation**, is a corporation incorporated under the laws of the State of Missouri and can be served with process at its Registered Agent CT Corporation System, 120 South Central Avenue, Clayton, Missouri 63105.

46. The Defendant, **Uniroyal, Inc.**, f/k/a United States Rubber Company, Inc. is a corporation organized and existing under the laws of the State of New Jersey with its principal place of business in Connecticut, and can be served with process at its office at c/o Uniroyal Holding, Inc., 70 Great Hill Road, Naugatuck CT 06770, or at P.O. Box 19001, Greenville, SC 29602-9001.

47. The Defendant, **United Conveyor Corporation**, is a corporation incorporated under the laws of the State of Illinois, having its principal place of business located in Illinois, and can be served with process at United Conveyor Corporation Corporate Headquarters, 2100 Norman Drive W., Waukegan, IL 60085 or at Registered Agent, Prentice Hall Corporation, 2019

Park Street, Columbia, SC 29201, or through its registered agent located at Illinois Corporation Service, 801 Adlai Stevenson Drive, Springfield, IL 62703-4261.

48. The Defendant, **Velan Valve Corp.**, is a corporation organized and existing under the laws of the State of Delaware and can be served with process at its office at 94 Avenue C, Williston VT 05495-9732 or through its South Carolina registered agent, Corporation Service Company, 1703 Laurel Street, Columbia SC 29201.

49. The Defendant, **Viking Pump, Inc.**, is a corporation organized and existing under the laws of the State of Delaware and can be served with process through its registered agent office located at The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801.

50. The Defendant, **Warren Pumps LLC** is a limited liability company organized and existing under the laws of the State of Delaware and can be served with process through its registered agent office located at The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801 or its registered agent at CT Corporation System, 155 Federal Street, Suite 700, Boston MA 02110.

51. The Defendant, **Yuba Heat Transfer Corporation**, is a limited liability company organized and existing under the laws of the State of Delaware and can be served with process through its registered agent office located at The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801.

52. The Defendant, **Zurn Industries**, is a corporation organized and existing under the laws of the State of Delaware and can be served with process through its registered agent, CT Corporation System, 2 Office Park Court, Suite 103, Columbia, SC, 29223.

53. The acts and omissions of the Defendants named herein occurred at various worksites including those located in South Carolina.

54. Defendants are corporations who are amenable to jurisdiction in the Courts of South Carolina by virtue of their contacts with the State of South Carolina or systematic business in South Carolina which subjects them to jurisdiction pursuant to the South Carolina Long-Arm Statute.

55. Venue is proper in York County, South Carolina.

56. The Court has jurisdiction over the subject matter of this action.

BACKGROUND FACTS

57. The Decedent, Wayne Ervin Howe, was born August 5, 1945, and was diagnosed with malignant mesothelioma on May 19, 2015.

58. Decedent during the pertinent times worked as a pipefitter, manual laborer, general construction worker, and steel worker who for a long period of time, frequently, regularly and proximately worked with and was exposed to the asbestos and asbestos-related materials mined, manufactured, processed, imported, converted, compounded, or sold by the asbestos product manufacturing and selling Defendants, or with regard to which Defendants otherwise had responsibility, with some of the exposure being within the State of South Carolina.

59. Decedent during the pertinent times engaged in work activities pertaining to pumps, valves, precipitators, mechanic work, welding, replacing siding, and millwright work.

60. Decedent during the pertinent times engaged in work at various jobsites including, without limitation, one or more facilities of Hoechst Celanese also known as Fiber Industries including Rock Hill, South Carolina and Narrows, Virginia; American Enka in Enka, North Carolina; and the Bowater facility in Rock Hill, South Carolina.

61. Decedent during the pertinent times was regularly, frequently, and proximately exposed to asbestos dust and fibers from products, services, and goods manufactured, distributed, or sold by the asbestos product manufacturing and selling Defendants for use at Decedent's jobsites which he came in contact with on the premises of multiple companies.

62. As a result of the improper conduct of the Defendants, Decedent Wayne Ervin Howe developed the asbestos cancer known as Mesothelioma.

63. The asbestos product manufacturing and selling Defendants owned, operated, or supplied asbestos containing materials or services to Decedent's worksites including those throughout South Carolina, at which Decedent Wayne Ervin Howe, worked, or entered for purposes of work, and in which Decedent was exposed to asbestos dust from asbestos containing materials.

64. Defendants knew, or should have known, at all times relevant hereto that exposure to asbestos dust and fibers were a known risk factor in the development of potentially fatal lung disease including malignant mesothelioma.

65. The risks involved with the products and materials at issue in this matter pertaining to asbestos dangers did not amount to an open and obvious risk or a risk that was a matter of common knowledge.

66. Decedent Wayne Ervin Howe was diagnosed in May 2015 with malignant mesothelioma, a fatal disease caused solely by exposure to asbestos fibers and dust. This exposure occurred as a result of his exposure to asbestos dust and fibers that he came in contact with on various jobsites in South Carolina.

67. At all times mentioned herein, Defendants acted through their duly authorized agents, servants, and employees who were at all times relevant herein acting within the scope and course of their employment. At the time of its manufacture the manufacturers acted unreasonably in designing or formulating the relevant products, and this conduct was a proximate cause of the harm for which damages are sought.

68. Mesothelioma is a progressive, insidious disease and Decedent's asbestos dust and fiber exposure in South Carolina to the Defendants products or on the Defendant's premises and for which Defendants are otherwise liable contributed to the Decedent's contraction of his disease.

69. Decedent's diagnosis of mesothelioma was caused by breathing asbestos dust and fibers from asbestos-containing products or asbestos containing materials at Defendant's premises or with regard to the products the Defendants manufactured and sold.

70. Decedent have obtained and attached as **Exhibit A** hereto, a report by a physician who is appropriately board-certified, in compliance with S.C. Code §§ 44-135-50(A)(1), 44-135-70 and 44-135-80.

71. As a result of the development of mesothelioma caused by breathing asbestos dust and fibers from defendants' asbestos-containing products and exposures due to defendants' negligent acts and omissions, listed herein and that will be further identified in this suit, Decedent has suffered and sustained very serious life threatening injuries, specifically mesothelioma, requiring extensive and painful medical treatment.

72. Decedent has further suffered great pain and mental anguish as a direct result of the aforesaid injuries. The illness and disability of Decedent was the direct and proximate result of the negligence, recklessness and willfulness of the Defendants, in that each produced, sold and otherwise put into the stream of interstate commerce, asbestos and asbestos-related materials which the Defendants knew were deleterious, poisonous and highly harmful.

73. Decedent believes that his injuries and illnesses are permanent in nature and that he will be forced to suffer same for the remainder of his life, that his enjoyment of life has been greatly impaired and, further, that his expected life span has been greatly shortened.

74. Decedent alleges that as a result of the aforesaid illnesses, he has been forced to incur large amounts of medical expenses by way of doctor and drug bills and verily believes that he will be forced to incur additional expenses in an effort to treat his illnesses as aforesaid, all to Decedent's damage, compensatory and punitive in amounts to be determined by the trier of fact.

75. Decedent alleges that as a result of the aforesaid illnesses, he is no longer able to provide the same services, comfort, society, consortium, companionship and protection to his wife, Plaintiff Jeanette Howe which damages are continuing in nature.

76. As a direct and proximate result of the Defendants' conduct as alleged above, the Decedent has suffered a dramatic reduction of his life expectancy, incurred great mental and physical pain and suffering, sustained lost wages and lost earning capacity, incurred medical

expenses, and his enjoyment of life has been greatly impaired, which damages are continuing in nature.

FIRST CAUSE OF ACTION
Negligent Failure to Warn and Defective Product Design

77. Plaintiffs incorporate herein by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

78. Defendants (or their predecessors in interest or parties with whom they acted in concert), and each of them, are or at times relevant hereto, were miners, manufacturers, processors, importers, converters, compounders and/or retailers of asbestos and asbestos-containing materials or otherwise profited from asbestos related services. In the case of Defendant Metropolitan Life Insurance Company, it owed a duty to Decedents and is liable as alleged in the fourth cause of Action below.

79. Defendants, acting through their agents, servants, and/or employees have caused certain asbestos and asbestos-containing materials to be placed in the stream of interstate commerce with the result that said asbestos and asbestos-containing materials came into use and released fiber by or in the vicinity of the Decedent Wayne Ervin Howe, or were otherwise negligent. The asbestos manufacturing and selling Defendants negligently produced, sold, supplied or otherwise put into the stream of commerce asbestos and asbestos-containing products or machinery requiring the use of asbestos and/or asbestos-containing products.

80. During the course and scope of his employment at the named facilities or with the named manufacturers and their products, Decedent Wayne Ervin Howe was exposed to Defendants' asbestos dust and fibers and asbestos-containing materials or was otherwise injured due to asbestos exposure for which Defendants are responsible.

81. Defendants owned, operated, or manufactured materials used at and supplied worksites in South Carolina, at which Decedent worked, or entered for purposes of work, and from which he was subsequently exposed to asbestos containing materials including asbestos dust and asbestos fibers. Defendants knew, or should have known, at all times relevant hereto that exposure to asbestos fiber and dust was a known risk factor in the development of potentially fatal lung disease including malignant mesothelioma.

82. Defendants knew, or should have known, that Decedent Wayne Ervin Howe, or others similarly situated, would come in contact with the asbestos containing products for which Defendant may be liable. As a designer, developer, manufacturer, distributor, supplier, installer or seller of the above-described asbestos and asbestos-containing products, Defendants each owed a duty to foreseeable users, handlers and bystanders to such use of said products to use ordinary care in designing, manufacturing, marketing, supplying and selling said products in such a manner as to render them safe for their intended and foreseeable uses.

83. Defendants knew, or should have known, that Decedent Wayne Ervin Howe, or others similarly situated, would be in danger of developing fatal asbestos diseases such as the asbestos cancer known as mesothelioma as a result of such exposure.

84. The dangers of breathing asbestos dust and fibers were first published in the medical literature in the 1890s. By the late 1950s, there were hundreds of medical articles highlighting the dangers of being around asbestos dust. Defendants knew or should have known that the asbestos fibers contained in the relevant products had a toxic, poisonous, and highly deleterious effect upon the health of persons inhaling, ingesting or otherwise absorbing them.

85. Defendants have known or should have known since the early 1900s of scientific literature that clearly indicated that workers could carry home on their work clothes industrial dust and fiber, such as asbestos, thereby exposing their family members to the hazards of asbestos. By the 1960s, studies were being published on the occurrence of asbestos disease, including mesothelioma, in family members of workers exposed to asbestos.

86. The illness, disability, and of the Decedent is the direct and proximate result of the negligence, recklessness and willfulness of the Defendants, jointly and severally, in that they produced, sold and otherwise put into the stream of interstate commerce, asbestos and asbestos-containing materials which the Defendants, and each of them, knew were deleterious, poisonous and highly harmful to Decedent's body, lungs, respiratory system, skin and health.

87. Defendants owed a duty of care toward the Decedent. Defendants breached that duty by their negligent acts and omission.

88. Defendants knew, or, in the exercise of ordinary care, should have known, that the asbestos and asbestos-containing materials were deleterious, poisonous and highly harmful to Decedent's body, lungs, respiratory system, skin and health. At the time the products left the control of the manufacturers, the manufacturers unreasonably failed to adopt a safer, practical, feasible, and otherwise reasonable alternative design or formulation that could then have been reasonably adopted and that would have prevented or substantially reduced the risk of harm without substantially impairing the usefulness, practicality, or desirability of the products. Defendants acted negligently, recklessly and willfully in that the Defendants:

- (a) Failed to advise Decedent of the dangerous characteristics of their asbestos and asbestos-containing products;
- (b) Failed or omitted to provide the Decedent with the knowledge as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliance, if, in truth, they were in any way able to mitigate the dust to protect himself and his family from being poisoned and disabled by exposure to such deleterious and harmful asbestos-containing materials;
- (c) Failed and omitted to place any warnings or sufficient warnings on their containers or premises of said asbestos and asbestos materials to warn the handlers thereof of the dangers to their health in coming in contact with said asbestos and asbestos materials;
- (d) Failed and omitted to take reasonable precautions or to exercise reasonable care to publish, adopt and enforce a safety plan and a safe method of handling and installing said asbestos and asbestos materials;

- (e) Inadequately warned, if, in fact, they warned at all, persons such as Decedent of the dangers to their health in coming in contact with and breathing said asbestos and asbestos-containing materials, even after they knew of the dangers and cancer-causing effects, and up until the present time;
- (f) Did not recommend methods to improve the work environment;
- (g) Did not use, implement or develop alternative products that were available;
- (h) Continued to use a known cancer-causing product, to wit: asbestos;
- (i) Including asbestos in relevant products, and using asbestos even though it was foreseeable that persons such as Decedent would inhale, ingest or otherwise absorb asbestos;
- (j) Including asbestos in relevant products, and using asbestos when the Defendants knew or should have known that asbestos would have a toxic, poisonous and highly deleterious effect upon the health of persons inhaling, ingesting or otherwise absorbing them such as Decedent;
- (k) Including asbestos in products and using asbestos when adequate substitutes for asbestos were available;
- (l) Failing to adequately warn persons working with and around the products of the dangers of inhaling, ingesting or otherwise absorbing the asbestos fibers;
- (m) Failing to provide any or adequate instructions concerning the safe methods of working with and around the products, including specific instructions on how to avoid inhaling, ingesting or otherwise absorbing the asbestos fibers and how to properly and safely remove the asbestos dust from their clothes, possessions, and vehicles to avoid further exposure;
- (n) Failing to conduct tests on the asbestos-containing products manufactured, sold, delivered or installed by the Defendants in order to determine the hazards to which persons such as Decedent might be exposed while working with or around them;
- (o) Designing, manufacturing and selling equipment, machinery, technologies and systems that included asbestos-containing components and required and/or specified the use of asbestos-containing replacement components;
- (p) Failing to comply with governmental regulations designed to reduce exposure to asbestos; and
- (q) Being otherwise negligent and liable for defective failure to warn and defective design.

89. At all times relevant, it was feasible for Defendants to have warned Decedents, tested their asbestos products, designed safer asbestos products and/or substituted asbestos-free products.

90. In the alternative, subsequent to the time the Defendants caused the asbestos products to be sold and distributed, the Defendants knew, or in the exercise of ordinary care, should have known, that asbestos is deleterious, carcinogenic, and harmful to persons using buildings, equipment, or on jobsites, but nevertheless, the Defendants negligently and recklessly failed and refused to warn and advise the Decedent of the dangerous characteristics thereof, and the dangers to the health and welfare of persons coming in contact with and breathing products. Despite possessed with information uniquely available to them relating to the dangerous effects to the person of continued asbestos exposure, the Defendants did not provide that information to the Decedent.

91. The Defendants had a post-sale duty to warn, which duty was breached and, as a result, Decedent suffered injury and damages as hereinafter described. In addition, or in the alternative, after the products left the control of the manufacturers and sellers, the manufacturers and sellers became aware of or in the exercise of ordinary care should have known that the product posed a substantial risk of harm to a reasonably foreseeable user or consumer and failed to take reasonable steps to give adequate warning or instruction or to take other reasonable action under the circumstances.

92. Decedent has suffered continuing and lingering injury to himself due to the Defendants' asbestos fibers, which he inhaled while doing performing assignments on various jobsites. Said fibers, once inhaled, caused repeated and continuing injury to Decedent.

93. As a direct and proximate result of one or more of the foregoing acts and/or omissions on the part of the Defendants, Decedent sustained exposure to and inhaled, ingested or otherwise absorbed asbestos fibers causing mesothelioma, and has suffered injury and is entitled to damages in an amount to be proven at trial.

SECOND CAUSE OF ACTION
Implied Warranty of Merchantability

94. Plaintiffs incorporate herein by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

95. The Defendants, and each of them, impliedly warranted that their relevant products, equipment and asbestos materials were of good and merchantable quality and fit for their intended use.

96. The implied warranty made by the Defendants, and each of them, that the asbestos and asbestos-containing materials were of good and merchantable quality and for the particular intended use was breached and that certain harmful, poisonous and deleterious matter was given off into the atmosphere wherein the Decedent carried out his duties working with asbestos and asbestos-containing materials.

97. As a direct and proximate result of the breach of the implied warranty of good and merchantable quality, Decedent developed mesothelioma and/or other industrial dust diseases caused by breathing the asbestos dust and fibers from Defendants' asbestos-containing products.

THIRD CAUSE OF ACTION

Strict Liability

98. Plaintiffs incorporate herein by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

99. During the pertinent times, Decedent was injured by his exposure to asbestos fibers associated with the products and equipment manufactured and sold by the Defendants.

100. Defendants' relevant products and equipment was at the time of the harmful asbestos exposure in materially the same condition or in a deteriorated condition it was reasonably foreseeable to become when it left the hands of the Defendants.

101. Decedent injury herein occurred because the products and the equipment of the Defendants were in a defective condition unreasonably dangerous to the user.

102. At the time the Defendants, and each of them sold and/or delivered the aforesaid asbestos and asbestos-containing products and at the time said products were used by or around Decedent or by others in his vicinity in the manner and environment intended, they were in a defective condition and were unreasonably dangerous and unfit for their intended use in that they were deleterious, poisonous and highly harmful to Decedent. The above was the proximate cause of the severe damages sustained by the Decedent as herein set forth.

FOURTH CAUSE OF ACTION

Conspiracy, Concert of Action – Defendant Metropolitan Life Insurance Company

103. Plaintiffs incorporate herein by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

104. Beginning in the late 1920's, conspirators including Defendant Metropolitan Life Insurance Company ("Met Life"), as well as Johns-Manville, Raybestos-Manhattan and others, undertook a duty to conduct research on asbestos-related health problems and to inform the public about any health risks that could be associated therewith. In or about 1929, Met Life, through its agents and employees acting within the scope of their agency and employment, including but not limited to Dr. Anthony J. Lanza ("Lanza"), began an investigation of asbestos-related health hazards. In 1935, this study was altered by Lanza, with the full knowledge of Met Life, at the request of and in concert with the asbestos industry in order to wrongly influence the United States Public Health Service, the United States medical community and various state legislatures.

105. Thereafter, Defendant Met Life through the acts and omissions of its employees, most notably Lanza, undertook a series of activities with various members of the asbestos industry including but not limited to Johns-Manville, Raybestos-Manhattan/ Raymark Industries,

Inc., United States Gypsum, American Brake Blok/Abex, and others to suppress and misrepresent the dangers of exposure to asbestos dust to employees of Met Life's insureds and the general public and the medical community.

106. The conspirators through their agent, Lanza of Met Life, made a concerted effort to discredit and to terminate the experiments of certain scientists who were developing data of profound importance for the area of public health in relation to the cancer hazard which existed for workers and bystanders in the asbestos industry.

107. As a direct and proximate result of Met Life's intentional publication of deceptive and misleading medical data and information, and other conspiratorial acts and omissions, Defendant caused asbestos to be used in the occupational settings from which Decedent breathed asbestos dust which resulted in Decedent's injuries. Defendant Met Life, through its agents and employees and officers, aided and abetted and gave substantial assistance to Johns-Manville and Raybestos-Manhattan in their tortious selling of asbestos products and voluntarily undertook a duty to warn the United States Public Health Service, the medical community, and others about the danger of asbestos and consciously and negligently misrepresented the dangers of asbestos to the United States Public Health Service, the medical community, and others, all to the ultimate harm of Decedent herein.

108. Defendant Met Life rendered substantial aid and assistance to the manufacturers of asbestos-containing products to which Decedent was exposed, and such assistance by Met Life aided and abetted the negligence and the marketing of unreasonably dangerous asbestos-containing products by such manufacturers which proximately caused Decedent's illness.

109. In both conducting tests and in publishing their alleged results, Met Life failed to exercise reasonable care to conduct or publish complete, adequate and accurate tests of the health effects of asbestos. Met Life also caused to be published intentionally false, misleading, inaccurate and deceptive information about the health effects of asbestos exposure.

110. Decedent unwittingly and justifiably relied upon the thoroughness of Met Life's tests and information dissemination, the results of which Met Life published in leading medical journals.

111. As a direct and proximate contributing result of Met Life's failures to conduct or accurately publish adequate tests or disseminate accurate and truthful information, after undertaking to do so; (i) the risk of harm to Decedent from asbestos exposure was increased, and (ii) Decedent suffered the injuries described herein.

112. In failing to test fully and adequately for the adverse health effects from exposure to asbestos; in delaying the publication of such results; and in falsely editing such results as were obtained; in suppressing relevant medical inquiry and knowledge about those hazards to promote the sale and distribution of asbestos as a harmless product; and in collaborating with the other co-conspirators materially to understate the hazards of asbestos exposure, all for its own profit and

gain, Met Life acted recklessly, wantonly, and in calculated disregard for the welfare of the general public, including Decedent.

113. Additionally and alternatively, as a direct and proximate result of Met Life's actions and omissions, Decedent was caused to remain ignorant of all the dangers of asbestos resulting in Decedent's, his employers, and the general public to be unaware of the true and full dangers of asbestos, depriving Decedent of the opportunity to decide for himself whether he wanted to take the risk of being exposed to asbestos, denied Decedent the opportunity to take precautions against the dangers of asbestos and proximately caused Decedent's damages herein.

114. During the relevant time period the Decedent was exposed to and did inhale and/or ingest asbestos dust, fibers, and particles, which dust, fibers, and particles came from the asbestos or asbestos-containing products which were mined, milled, manufactured, fabricated, supplied, and/or sold by the Johns Manville and/or Raybestos/Raymark.

115. Defendant, Met Life, together with Manville, Raymark and other persons and entities, known and unknown at times relevant hereto, engages in a conspiracy or concert of action to inflict injury on the Decedent, and to withhold, alter, suppress and misrepresent information about the health effects of asbestos exposure. One or more of said conspirators did cause tortious injury to the Decedent in the course of or as a consequence of the conspiracy of concert of action. At least the following enumerated acts were undertaken by the conspirators in the course of and in furtherance of the conspiracy or concert of action:

(a) In 1932, Met Life, through Lanza and others, assisted Manville with medical examinations of over 1,000 employees of Manville's factory in Manville, New Jersey. The report of this study shows that a large percentage of the employees suffered from asbestosis including employees not directly involved in the manufacturing process. This 1932 medical survey was not published in the medical literature and, therefore, was unavailable to scientists studying the issue of asbestos-related disease. Further collaboration between Manville and Met Life continued the cover-up.

(b) Beginning in approximately 1934, Manville, through its agents, Vandiver Brown and Attorney J.C. Hobart, suggested to Lanza, Associate Director of Met Life, which was then insurer of Manville and Raymark, that Lanza publish a study on asbestosis in which Lanza would affirmatively misrepresent material facts about the health consequences of asbestos exposure. This was accomplished through intentional deletion of Lanza's description of asbestosis as 'fatal' and through other selective editing that affirmatively misrepresent asbestosis as a disease process less serious than it actually is and was known to be. As a result, Lanza's study was published in the medical literature in this misleading fashion in 1935. The conspirators were motivated, in part, to effectuate this fraudulent misrepresentation and fraudulent nondisclosure by the desire to influence proposed legislation to regulate asbestos exposure and to provide a defense in lawsuits involving Manville, Raymark, and Met Life as insurer. Furthermore, upon information and belief, it is alleged that Met Life, at all times relevant hereto, had substantial monetary investments in Manville and Raymark, among other asbestos product manufacturers and distributors.

(c) In 1936, the conspirators or some of them entered into an agreement with the Saranac Laboratories. Under this agreement, these conspirators acquired the power to decide what information Saranac could publish about asbestos disease and to control in what form such publications would occur. This agreement gave these conspirators power to affirmatively misrepresent the results of the work at Saranac, and also gave these conspirators power to material facts included in any study. On numerous occasions thereafter, the conspirators exercised their power to prevent Saranac scientists from disclosing material scientific data, resulting in numerous misstatements of fact being made at scientific meetings.

(d) By November 1948, or earlier, Manville, Met Life (acting through Lanza), Raymark, and others decided to exert their influence to materially alter and misrepresent material facts about the substance of research started by Dr. Leroy Gardner at the Saranac Laboratories beginning in 1936. Dr. Gardner's research involved carcinogenicity of asbestos in mice and also included an evaluation of the health effects of asbestos on humans with a critical review of the then-existing standards of dust exposure for asbestos and asbestos products.

(e) At a meeting on November 11, 1948, these conspirators and others intentionally and affirmatively determined that Dr. Gardner's work should be edited to specifically delete material facts about the cancer-causing propensities of asbestos and the health effects of asbestos on humans and they determined that only an edited version would be published. These conspirators thereby fraudulently misrepresented the risks of asbestos exposure to the public, in general, and to the class of persons exposed to asbestos, including the Decedent.

(f) As a direct result of influence exerted by the above described conspirators, Dr. Arthur Vorwald published Dr. Gardner's edited work in the Journal of Industrial Hygiene, AMA Archives of Industrial Hygiene and Occupational Health in 1951 in a form that stressed those portions of Dr. Gardner's work that the conspirators wished stressed, but which omitted references to human asbestosis and cancer, thereby fraudulently and affirmatively misrepresenting the extent of the risks. The conspirators affirmatively and deliberately disseminated this misleading Vorwald publication to universities, libraries, government officials, agencies and others.

(g) Such action constituted a material affirmative misrepresentation of the material facts involved in Dr. Gardner's work and resulted in creating an appearance that inhalation of asbestos was a less serious health concern than Dr. Gardner's unedited work indicated.

(h) For many decades, Met Life, individually, jointly and in conspiracy with Manville and Raymark, have been in possession of medical and scientific data, literature, and test reports which clearly indicated that the inhalation of asbestos dust and fibers resulting from the ordinary foreseeable use of said asbestos-containing products and/or machinery requiring or calling for the use of asbestos or asbestos-containing products were

unreasonably dangerous, hazardous, deleterious to human health, carcinogenic, and potentially deadly.

(i) Despite the medical and scientific data, literature and test reports possessed by and available to Met Life, individually and in conspiracy with Manville and Raymark, Fraudulently, willfully and maliciously withheld, concealed and suppressed said medical and scientific data, literature and test reports regarding the risks of asbestosis, cancer, mesothelioma, and other illnesses and diseases from Decedent who using and being exposed to Manville or Raymark asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products; caused to be released, published and disseminated medical and scientific data, literature and test reports containing information and statements regarding the risks of asbestosis, cancer, mesothelioma and other illnesses and diseases, which Metropolitan, Manville and Raymark knew were either incorrect, incomplete, outdated and misleading; distorted the results of medical examinations conducted upon workers who were using asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products and being exposed to the inhalation of asbestos dust and fibers by falsely stating and/or concealing the nature and extent of the harm which workers suffered; and failed to adequately warn the Decedent of the dangers to which he was exposed when they knew of the dangers.

(j) By the false and fraudulent representations, omissions, failures, and concealments set forth above, Met Life, Manville and Raymark, individually, jointly, and in conspiracy with each other, intended to induce the Decedent to rely upon said false and fraudulent representations, omissions, failures, and concealments, to continue to expose themselves to the dangers inherent in the use of and exposure to their asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products. Said misrepresentations were false, incomplete, and misleading and constitute negligent misrepresentations as defined by Sections 311 and 522 of the Restatement (Second) of Torts.

116. Decedent reasonably and in good faith relied upon the false and fraudulent representations, omissions, failures, and concealments made by Met Life, Manville, and Raymark regarding the nature of their asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products.

117. As a direct and proximate result of the conspiracy and concert of action between Met Life, Manville and Raymark, the Decedent has been deprived of the opportunity of informed free choice and connection with the use of and exposure to Manville and Raymark's asbestos and asbestos-containing products, and therefore continued to work with and be exposed to the co-conspirator corporation's asbestos and asbestos-containing products and as a result, came in contact with asbestos dust or fibers contracted asbestos-related diseases and other conditions, and/or aggravated pre-existing conditions, as a result of which the Decedent was damaged.

FIFTH CAUSE OF ACTION
Punitive Damages

118. Plaintiffs incorporate herein by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

119. During the pertinent times, Defendants had actual knowledge of the dangers to individuals similarly situated to the Decedent of asbestos exposure, nevertheless, Defendants deliberately, intentionally and purposefully withheld such information, thus denying Decedent of the knowledge with which to take necessary safety precautions such as bagging her former husband's clothes or requiring him to leave them at work periodic x-rays and medical examinations and avoiding further dust exposure, the specifics of Defendants' intentional acts upon information and belief being as follows:

- (a) Failing to warn users of the need for monitoring due to asbestos exposure;
- (b) Never issuing recall-type letters or notices to users;
- (c) Rejecting advice of corporate officials and others to warn of the hazards of their products; such rejection being motivated by the possibility of adverse effects on profits;
- (d) Delaying the use of asbestos warnings and diluting the content of such warnings for asbestos-related products;
- (f) Failed to advise Decedent of medical findings known to Defendants concerning the dangers of asbestos exposure; and
- (g) Suppressed the dissemination of information to Decedent concerning the hazards of asbestos exposure.

120. The foregoing deliberate, intentional and purposeful acts of the Defendants were the direct and proximate cause of Decedent injuries, damages, and subsequent death hereinafter described, and the Decedent is therefore, entitled to compensation and punitive damages.

FOR AN SIXTH CAUSE OF ACTION
(Wrongful Death Action, S.C. Code Ann. § 15-51-10 (2008))

AS AND FOR A FURTHER SIXTH, SEPARATE, AND DISTINCT CAUSE OF ACTION FOR WRONGFUL DEATH, PLAINTIFF JEANETTE HOWE COMPLAINS OF DEFENDANTS, AND ALLEGES AS FOLLOWS:

121. All of the paragraphs above are incorporated by reference.

122. Decedent brings this cause of action for WAYNE ERVIN HOWE'S wrongful death pursuant to S.C. Code Ann. § 15-51-10 (2008), for the benefit of herself Jeanette Howe, as Mr. Howe's widow, and on behalf of the children of Wayne Ervin Howe, as defined by S.C. Code § 15-51-20 (2008).

123. As a direct and proximate result of the negligence, recklessness, carelessness and intentional actions of Defendants as described above, Wayne Ervin Howe died and his wife and children have and will endure grief, sorrow, loss of his love, society and comfort, loss of his advice and guidance and they have been otherwise seriously damaged. Moreover, funeral and medical expenses were incurred and Decedent prays for judgment against Defendants in such amount of actual and punitive damages as the trier of fact may determine.

FOR A SEVENTH CAUSE OF ACTION
(Survival Action, S.C. Code Ann. § 15-5-90 (1986))

AS AND FOR A FURTHER SEVENTH, SEPARATE, AND DISTINCT CAUSE OF ACTION IN THE FORM OF A STATUTORY SURVIVAL ACTION, PLAINTIFF JEANETTE HOWE COMPLAINS OF DEFENDANTS, AND ALLEGES AS FOLLOWS:

124. All paragraphs above are incorporated by reference.

125. Plaintiff brings this cause of action for Decedent's pain and suffering prior to his untimely death, for costs and expenses incurred by the Estate and for the overall benefit of her Estate, pursuant to S.C. Code § 15-5-90, -100 (1986).

126. As a direct and proximate result of the negligence, recklessness, carelessness and intentional actions of Defendants as described, Decedent endured pain, suffering, mental anguish and distress until her untimely death, and Plaintiff prays for judgment against Defendants in such amount of actual and punitive damages as the trier of fact may determine.

EIGHTH CAUSE OF ACTION
Loss of Consortium

127. Plaintiffs incorporate herein by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

128. Plaintiff Jeanette Howe is the spouse of Wayne Ervin Howe.

129. Due to the wrongful and tortuous acts of Defendant, Plaintiff Jeanette Howe has suffered pecuniary loss due to the loss of services of her husband, Wayne Ervin Howe.

130. Plaintiff Jeanette Howe has suffered and will continue to suffer in the future, damages including loss of affection, society, comfort, support, consortium, companionship and the protection of her husband.

131. Defendant's wrongful conduct, alleged above, was a direct and proximate cause of the damages suffered by Plaintiff Jeanette Howe.

WHEREFORE, Plaintiff Jeanette Howe demands judgment against Defendant for compensatory damages for a fair and reasonable amount as determined by the jury and for such other and further relief, both at law and in equity, as the Court may deem just and proper.

PETITION FOR EXPEDITED TRIAL

1. Pursuant to S.C. Code § 44-135-80(B), Plaintiff hereby petitions the Court requesting that a trial date be set on an expedited basis. Plaintiff shows that there is good cause for such an expedited trial setting in that the Plaintiff while grievously ill, is living and wishes to have his claims promptly adjudicated. Further, Defendants will not be prejudiced by such an expedited trial setting.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray to ask that this Court:

- A. Award the Plaintiffs actual and compensatory damages, in an amount to be determined at trial, for the wrongful, negligent, reckless and willful acts of the Defendants;
- B. Award the Plaintiffs pre-judgment and post-judgment interest to the extent allowable by law;
- C. Award the Plaintiffs punitive damages to the extent allowable by law;
- D. Award the Plaintiffs' attorney fees and costs to the extent allowable by law;
- E. Allow a trial by jury of all claims so triable; and
- F. For such other and further relief as may be just and proper.

A JURY IS RESPECTFULLY DEMANDED TO TRY THESE ISSUES.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

August 9, 2016

Spartanburg, South Carolina.



DREXEL UNIVERSITY

School of
Public Health

Department of Environmental and
Occupational Health

Arthur L. Frank, MD, PhD
Professor, Chair Emeritus

November 4, 2015

William M. Graham, Esq.
Wallace and Graham, P.A.
Attorneys At Law
525 North Main Street
Salisbury, NC 28144

Re: Wayne Ervin Howe
DOB: 8/5/45

Dear Mr. Graham:

I am in receipt of medical records in the case of Mr. Howe and have been asked by you to review them and render my judgment regarding any evidence of an asbestos-related disease.

I am currently employed as Professor of Public Health at the Drexel University School of Public Health in Philadelphia. I received my medical degree from the Mt. Sinai School of Medicine in 1972 and during this time and thereafter I worked with Dr. Irving Selikoff regarding health issues related to exposure to asbestos. From 1973 to 1975 I served at the Lung Cancer Branch at the National Cancer Institute of the National Institutes of Health in Bethesda, Maryland and was a Commissioned Officer in the United States Public Health Service. I then returned to Mt. Sinai and completed two residencies, one in internal medicine and the other in occupational medicine. I became board certified in internal medicine in 1978 and in occupational medicine in 1979. I also have a PhD degree in biomedical sciences from the City University of New York having studied the effects of asbestos on respiratory tissue. From 1977 to 1983 I served on the faculty at Mt. Sinai.

From 1983 until 1994 I was Chair of the Department of Preventative Medicine and Environmental Health at the University of Kentucky, College of Medicine where I was a professor, and I was also a professor of toxicology. In 1994 I became Vice President for Medical Education at the University of Texas Health Center at Tyler and was also a Professor of Occupational and Environmental Medicine. In 2002 I became the Chair of the Department of Environmental and Occupational Health at Drexel University's School of Public Health in Philadelphia. I also served as a Professor of Medicine in the Division of Pulmonary Medicine at Drexel.

Over the years I have held a number of positions with the United States Government including service on the Board of Health as a scientific counselor for NIOSH, the National Institute for Occupational Safety and Health. I have chaired the grant review panel for NIOSH. I have done consulting work for NIOSH, OSHA, and the EPA. I currently serve on the Air Pollution Control Board for the City of Philadelphia.

Nesbitt Hall, Sixth Floor, 3215 Market Street, Philadelphia, PA 19104 | Tel: 267.389.5044 | Fax 267.389.6806
publichealth@drexel.edu | alfrank@drexel.edu

Re: Wayne Ervin Howe
November 4, 2015
Page 2

I have also consulted with governments around the world including in China, Thailand, India, Brazil, Israel, and Egypt, among others regarding asbestos-related issues. In 1983 I was elected to the Collegium Ramazzini which is an international organization of physicians and scientists devoted to occupational and environmental health issues. Election to this group is limited to 180 active members. I have been active in the organization including service on the Executive Board. Currently, my time is divided between teaching, research, and service. I teach in our introductory course in environmental and occupational health, a course in occupational cancers, and give lectures in the area of occupational toxicology.

In reviewing the medical records of Mr. Howe I note that his treating doctors were aware of his prior exposures to asbestos. In March 2015 Mr. Howe presented with pain in his left chest and an X-ray revealed a large circumscribed mass along the left lateral chest wall. In May radiological testing made note of calcified pleural plaquing. When tissue was taken from his chest he was found to have a pleural-based malignancy that had spread. The surgical pathology report of May 2015 revealed that Mr. Howe developed a malignant pleural mesothelioma. This was then confirmed at Duke University by Dr. Sporn in September 2015.

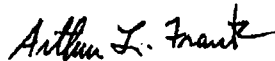
Having reviewed the deposition of Mr. Howe I learned of the details of Mr. Howe's exposure to asbestos. For example, he worked for some 15 years as a pipefitter. He also did work as a millwright, with additional exposures to asbestos. He was also known to do mechanical work on vehicles which included brake work. Through his testimony I also learned that he worked with asbestos-containing gaskets, siding, and other materials.

Based upon my review of the materials sent me, it is my opinion and diagnosis, to a reasonable degree of medical certainty, that Mr. Howe developed two asbestos-related conditions. First I believe he developed asbestos-related pleural disease, called by some asbestosis, given the finding of calcified pleural plaques. Secondly, and more importantly, Mr. Howe developed a malignant pleural mesothelioma as a result of his exposures to asbestos. The cumulative exposures he had to asbestos, from any and all products, containing any and all fiber types, would have led to his developing these conditions. Furthermore, based upon my review of the materials sent me it is my opinion, to a reasonable degree of medical certainty, that Mr. Howe's exposure to asbestos was a proximate cause of the diagnosed mesothelioma, and that Mr. Howe's illness is not more probably the result of other causes.

The hazards of asbestos have been known for more than a century, and the need to protect individuals was written about some 80 years ago.

Should you have any questions about this matter please feel free to contact me.

Sincerely yours,



Arthur L. Frank, MD, PhD
Professor of Public Health

ALF/kmw

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL CIRCUIT

Timothy W. Howe, Individually and as)
Personal Representative of the Estate)
of Wayne Ervin Howe, deceased, and)
Jeanette Howe,)

Civil Action No. 2015-CP-46-03456

Plaintiffs,)

**ANSWER OF
DEFENDANT CLEAVER-BROOKS, INC.
TO PLAINTIFFS' AMENDED COMPLAINT**

v.)

(Jury Trial Demanded)

Air & Liquid Systems Corp., et al.,)
)
Defendants.)

Defendant Cleaver-Brooks, Inc. (hereinafter referred to as "Cleaver-Brooks"),
answers the Plaintiffs' Amended Complaint as follows:

FOR A FIRST DEFENSE TO ALL CAUSES OF ACTION

1. This Court lacks jurisdiction over Cleaver-Brooks and the Plaintiffs' Amended Complaint should, therefore, be dismissed pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure.

FOR A SECOND DEFENSE TO ALL CAUSES OF ACTION

2. Plaintiffs' Amended Complaint fails to state facts sufficient to constitute a cause of action against Cleaver-Brooks and should, therefore, be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE TO ALL CAUSES OF ACTION

3. Cleaver-Brooks denies each and every allegation of the Plaintiffs' Amended Complaint which is not hereinafter specifically admitted, modified or explained.

FILED-RECEIVED
2016 OCT 10 AM 11:42
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

ANSWERING "FIRST AMENDED COMPLAINT"

4. The unnumbered, initial paragraph of Plaintiffs' Amended Complaint makes no actionable reference or allegation as to Cleaver-Brooks. Should a response to this paragraph be required of Cleaver-Brooks, the allegations therein are denied.

ANSWERNG "PARTIES AND JURISDICTION"

5. Upon information and belief, Cleaver-Brooks admits the allegations contained in Paragraph 1 of the Plaintiffs' Amended Complaint.

6. Cleaver-Brooks is without sufficient information to determine the truth of the allegations contained in Paragraph 2 of the Plaintiffs' Amended Complaint and, therefore, denies the same.

7. Upon information and belief, Cleaver-Brooks admits the allegations contained in Paragraph 3 of the Plaintiffs' Amended Complaint.

8. Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 of Plaintiffs' Amended Complaint make no actionable reference or allegations as to Cleaver-Brooks. Should a response to these paragraphs be required of Cleaver-Brooks, the allegations therein are denied.

9. Answering Paragraph 17, Cleaver-Brooks admits only that it is incorporated under the laws of a State other than South Carolina. Cleaver-Brooks denies the remaining allegations of Paragraph 17 of the Plaintiffs' Amended Complaint.

10. Paragraphs 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, and 52 of Plaintiffs' Amended Complaint make no actionable reference or allegations as to Cleaver-Brooks. Should a response to these paragraphs be required of Cleaver-Brooks, the allegations therein are denied.

11. Cleaver-Brooks denies the allegations contained in Paragraphs 53, 54, 55 and 56 of Plaintiffs' Amended Complaint, as written.

ANSWERING "BACKGROUND FACTS"

12. Cleaver-Brooks is without sufficient information to determine the truth of the allegations contained in Paragraph 57 of the Plaintiffs' Amended Complaint and, therefore, denies the same.

13. Cleaver-Brooks denies the allegations contained in Paragraphs 58 of the Plaintiffs' Amended Complaint.

13. Cleaver-Brooks is without sufficient information to determine the truth of the allegations contained in Paragraphs 59 and 60 of the Plaintiffs' Amended Complaint and, therefore, denies the same.

15. Cleaver-Brooks denies the allegations contained in Paragraphs 61, 62, 63, 64, 65, 66, 67, 68, and 69 of Plaintiffs' Amended Complaint.

16. Paragraph 70 of the Plaintiffs' Amended Complaint makes no actionable reference or allegation as to Cleaver-Brooks. Should a response to this paragraph be required of Cleaver-Brooks, the allegations therein are denied.

17. Cleaver-Brooks denies the allegations contained in Paragraphs 71, 72, 73, 74, 75 and 76 of the Plaintiffs' Amended Complaint.

ANSWERING THE FIRST CAUSE OF ACTION
(Negligent Failure to Warn and Defective Product Design)

18. In response to Paragraph 77, Cleaver-Brooks repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 76 of the Plaintiffs' Amended Complaint.

19. Cleaver-Brooks denies the allegations contained in Paragraphs 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, including all subparagraphs, of the

Plaintiffs' Amended Complaint and specifically denies that any post-sale duty to warn was owed, breached or that any alleged breach of a post-sale duty to warn resulted in any injury or damage to the Plaintiffs.

ANSWERING THE SECOND CAUSE OF ACTION
(Implied Warranty of Merchantability)

20. In response to the allegations of Paragraph 94, Cleaver-Brooks repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 93 of the Plaintiffs' Amended Complaint.

21. Cleaver-Brooks denies the allegations contained in Paragraphs 95, 96 and 97 of the Plaintiffs' Amended Complaint and specifically denies that any implied warranty was made, breached or that any alleged breach of implied warranty resulted in any injury or damage to the Plaintiffs.

ANSWERING THE THIRD CAUSE OF ACTION
(Strict Liability)

22. In response to the allegations of Paragraph 98, Cleaver-Brooks repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 97 of the Plaintiffs' Amended Complaint.

23. Cleaver-Brooks denies the allegations contained in Paragraphs 99, 100, 101 and 102 of the Plaintiffs' Amended Complaint.

ANSWERING THE FOURTH CAUSE OF ACTION
(Conspiracy, Concert of Action – Defendant Metropolitan Life Insurance Company)

24. In response to the allegations of Paragraph 103, Cleaver-Brooks repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 102 of the Plaintiffs' Amended Complaint.

25. Paragraphs 104, 105, 106, 107, 108, 109, 100, 111, 112, 113, 114, 115, 116, and 117, including all subparagraphs, make no actionable reference or allegations as to

Cleaver-Brooks. Should a response to these paragraphs be required of Cleaver-Brooks, the allegations therein are denied.

ANSWERING THE FIFTH CAUSE OF ACTION
(Punitive Damages)

26. In response to the allegations of Paragraph 118, Cleaver-Brooks repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 117 of the Plaintiffs' Amended Complaint.

27. Cleaver-Brooks denies the allegations contained in Paragraphs 119 and 120, including all subparagraphs, of the Plaintiffs' Amended Complaint.

ANSWERING THE SIXTH CAUSE OF ACTION
(Wrongful Death Action, S.C. Code Ann. § 15-51-10 (2008))

28. In response to the allegations of Paragraph 121, Cleaver-Brooks repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 120 of the Plaintiffs' Amended Complaint.

29. Paragraph 122 of Plaintiffs' Amended Complaint makes no actionable reference or allegations as to Cleaver-Brooks. Should a response to this paragraph be required of Cleaver-Brooks, the allegations therein are denied.

30. Cleaver-Brooks denies the allegations contained in Paragraph 123 of the Plaintiffs' Amended Complaint.

ANSWERING THE SEVENTH CAUSE OF ACTION
(Survival Action, S.C. Code Ann. § 15-5-90 (1986))

31. In response to the allegations of Paragraph 124, Cleaver-Brooks repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 126 of the Plaintiffs' Amended Complaint.

32. Paragraph 125 of Plaintiffs' Amended Complaint makes no actionable reference or allegations as to Cleaver-Brooks. Should a response to this paragraph be required of Cleaver-Brooks, the allegations therein are denied.

33. Cleaver-Brooks denies Paragraph 126 of Plaintiffs' Amended Complaint.

ANSWERING THE "EIGHTH CAUSE OF ACTION"
(Loss of Consortium)

34. In response to the allegations of Paragraph 127, Cleaver-Brooks repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through and including 126.

35. Cleaver-Brooks denies the allegations of Paragraph 128, as written. Upon information and belief, Cleaver-Brooks asserts that Plaintiff Jeannette Howe is the widow of Decedent Wayne Ervin Howe.

36. Cleaver-Brooks denies the allegations contained in Paragraphs 129, 130, and 131 of Plaintiffs' Amended Complaint.

37. Cleaver-Brooks denies the Plaintiffs' prayer for relief.

ANSWERING THE "PETITION FOR EXPEDITED TRIAL"

38. Paragraph 1 (sic) of Plaintiffs' Amended Complaint makes no actionable reference or allegation as to Cleaver-Brooks. The information presently known to Cleaver-Brooks is insufficient pursuant to S.C. Code Ann. § 44-135-80(B). Should a response be required from Cleaver-Brooks, the allegations therein are denied.

ANSWERING THE "PRAYER FOR RELIEF"

39. Cleaver-Brooks denies the Prayer for Relief and all subparagraphs therein. Specifically, Cleaver-Brooks denies there is any legal basis for the Plaintiff's recovery of attorneys' fees herein.

FOR A FIRST AFFIRMATIVE DEFENSE

40. Plaintiffs' Amended Complaint fails to state a cause of action against Cleaver-Brooks upon which relief may be granted and should, therefore, be dismissed.

FOR A SECOND AFFIRMATIVE DEFENSE

41. Plaintiffs' claims are barred, in whole or in part, by the Statute of Limitations and the Doctrine of Laches.

FOR A THIRD AFFIRMATIVE DEFENSE

42. Plaintiffs' claims are barred, in whole or in part, by the Statute of Repose.

FOR A FOURTH AFFIRMATIVE DEFENSE

43. Plaintiffs' claims are barred by the operation of the Doctrine of Estoppel.

FOR A FIFTH AFFIRMATIVE DEFENSE

44. Plaintiffs' claims are barred by the operation of the Doctrine of Waiver.

FOR A SIXTH AFFIRMATIVE DEFENSE

45. Cleaver-Brooks was not negligent, did not furnish an unreasonably dangerous product, and did not make or breach any express or implied warranties.

FOR A SEVENTH AFFIRMATIVE DEFENSE

46. In the alternative, Plaintiffs' claims for breach of warranty are barred by Plaintiffs' failure to give prompt notice of any breach of warranty as is required by the Uniform Commercial Code.

FOR AN EIGHTH AFFIRMATIVE DEFENSE

47. Plaintiffs' claims are barred, in whole or in part, by Plaintiffs' and/or Decedent's comparative and/or contributory negligence, gross negligence and/or assumption of risk.

FOR A NINTH AFFIRMATIVE DEFENSE

48. No products of Cleaver-Brooks, allegedly containing asbestos, were ever sold to Plaintiffs and/or Decedent's employers nor were Plaintiffs and/or Decedent ever exposed to any products allegedly containing asbestos, and allegedly manufactured or distributed by Cleaver-Brooks. In the alternative, if it be proven at trial that any products, attributable to Cleaver-Brooks, were furnished to Plaintiffs' and/or Decedent's employers and that Plaintiffs and/or Decedent were exposed to said products, all of which is expressly denied, then any products attributable to Cleaver-Brooks, which may have been furnished to Plaintiffs' and/or Decedent's employers and to which Plaintiffs and/or Decedent may have been exposed, were furnished in strict conformity with the specifications furnished by the United States Government and/or Plaintiffs' and/or Decedent's employers.

FOR A TENTH AFFIRMATIVE DEFENSE

49. Plaintiffs' and/or Decedent's employers had knowledge, equal or superior to Cleaver-Brooks, with respect to possible health hazards associated with Plaintiffs' and/or Decedent's employment and, therefore, if there was any duty to warn Plaintiffs and/or Decedent or provide protection to Plaintiffs and/or Decedent, which is expressly denied, it was the duty of said employers and not of Cleaver-Brooks and any breach of that duty was an intervening and/or superseding cause of Plaintiffs' alleged injuries.

FOR AN ELEVENTH AFFIRMATIVE DEFENSE

50. Cleaver-Brooks denies that Plaintiffs and/or Decedent suffered an asbestos-related injury. In the alternative, if Plaintiffs should prove that they and/or Decedent suffered an asbestos-related injury, such asbestos-related injury resulted from Plaintiffs' and/or Decedent's exposure to asbestos-containing products manufactured, sold, supplied, or distributed by those Defendants, or other present or former producers, distributors or

suppliers of asbestos containing products who filed for protection from creditors under federal Bankruptcy Laws.

FOR A TWELFTH AFFIRMATIVE DEFENSE

51. Plaintiffs receipt of benefits or entitlement to benefits under the Workers' Compensation Act, Social Security Administration, long and/or short term disability, or other similar compensatory systems or settlements, entitles Cleaver-Brooks to a reduction, set-off and/or credit against any Judgment that might be entered against it in this action.

FOR A THIRTEENTH AFFIRMATIVE DEFENSE

52. Plaintiffs, Plaintiffs' and/or Decedent's employers or parties other than Cleaver-Brooks, altered or modified any product manufactured by Cleaver-Brooks to which Plaintiffs and/or Decedent were allegedly exposed and damages thereby and such alteration or modification occurred after said product left the control of Cleaver-Brooks.

FOR A FOURTEENTH AFFIRMATIVE DEFENSE

53. Plaintiffs or Plaintiffs' and/or Decedent's employers knew of, discovered or should have known or discovered any alleged defect or dangerous condition of any product allegedly manufactured or distributed by Cleaver-Brooks, or of a circumstance inconsistent with the safe use of said product and then unreasonably and voluntarily exposed Plaintiffs and/or Decedent to the alleged defect or dangerous condition.

FOR A FIFTEENTH AFFIRMATIVE DEFENSE

54. Cleaver-Brooks acted reasonably in the design and formulation of its products.

FOR A SIXTEENTH AFFIRMATIVE DEFENSE

55. At all times material hereto, the state of the medical and industrial art was such that there was no generally accepted or recognized knowledge of any unavoidably unsafe, inherently dangerous, or hazardous character or nature of asbestos-containing

products used in the manner and for the purpose described by Plaintiffs. Therefore, Cleaver-Brooks was under no duty to know of such character or nature or to warn Plaintiffs, Decedent or others similarly situated

FOR A SEVENTEENTH AFFIRMATIVE DEFENSE

56. Plaintiffs' and/or Decedent's alleged injuries and illnesses, the existence of which is expressly denied, were caused or contributed to by the neglect, misuse, fault and want of due care, or other intervening and/or superseding acts or omissions, by Plaintiffs, Decedent or by others over whose actions, omissions and breach of duties, Cleaver-Brooks had no control and/or for whose actions, omissions or breach of duties, Cleaver-Brooks is not liable.

FOR AN EIGHTEENTH AFFIRMATIVE DEFENSE

57. Even if Plaintiffs and/or Decedent were exposed to or came into contact with any product of Cleaver-Brooks, which is expressly denied, such contact or exposure was not the cause of Plaintiffs' and/or Decedent's alleged injuries and illnesses and was not sufficiently significant to have been a cause of Plaintiffs' and/or Decedent's alleged illnesses. Further, as such, Cleaver-Brooks is not liable for indemnity or contribution to any party in this cause.

FOR A NINETEENTH AFFIRMATIVE DEFENSE

58. If Plaintiffs and/or Decedent sustained any injuries as a result of the use of or exposure to any product manufactured or sold by Cleaver-Brooks, which is expressly denied, such injuries were proximately caused by the acts or omissions of Plaintiffs' and/or Decedent's employers, who were sophisticated purchasers and consumers who failed to take adequate precautions, failed to provide Plaintiffs and/or Decedent with a safe work place, and failed to warn Plaintiffs and/or Decedent of any health hazards that may have been associated with exposure to or contact with any such products.

FOR A TWENTIETH AFFIRMATIVE DEFENSE

59. Plaintiffs' and/or Decedent's employers knew or should have known of any health hazards associated with any Cleaver-Brooks products, allegedly containing asbestos, which is expressly denied, at the time such products were purchased by Plaintiffs' and/or Decedent's employers. The failure of Plaintiffs' and/or Decedent's employers to act in a prudent fashion constitutes negligence which proximately caused, substantially or solely contributed to Plaintiffs' alleged injuries and damages and Plaintiffs' and/or Decedent's employers are solely liable to Plaintiffs for any injuries and damages Plaintiffs and/or Decedent may have sustained.

FOR A TWENTY-FIRST AFFIRMATIVE DEFENSE

60. In the event Plaintiffs have already, or in the future, entered into any settlement or compromise with, or execute any release of, any present or future Defendant, Third-Party Defendant or any non-party, for any of Plaintiffs' and/or Decedent's alleged injuries and damages, Cleaver-Brooks is entitled to a credit or set-off of: (a) the amount of consideration to be received by Plaintiffs in such settlement or for such release; and (b) the proportionate or pro rata share of liability of the settling or released party or non-party.

FOR A TWENTY-SECOND AFFIRMATIVE DEFENSE

61. Plaintiffs' claims are barred, with regard to Cleaver-Brooks, by Plaintiffs' lack of privity with Cleaver-Brooks.

FOR A TWENTY-THIRD AFFIRMATIVE DEFENSE

62. Plaintiffs' claims against Cleaver-Brooks are preempted by the regulations of the Occupational Safety and Health Administration or other applicable federal laws.

FOR A TWENTY-FOURTH AFFIRMATIVE DEFENSE

63. Plaintiffs' claims in the Amended Complaint, and each count thereof, that seek exemplary or punitive damages violate Cleaver-Brooks' right to substantive due

process as provided in the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 19 and other applicable provisions of the Constitution of the State of South Carolina, and any other state's law which may be applicable.

FOR A TWENTY-FIFTH AFFIRMATIVE DEFENSE

64. Multiple awards of punitive damages against Cleaver-Brooks would violate Article 1, Section 19 of the Constitution of the State of South Carolina, the prohibition against being twice placed in jeopardy for the same offense embodied in the Fifth and Fourteenth Amendments to the United States Constitution, the common law of the State of South Carolina, and any other state's law which may be applicable.

FOR A TWENTY-SIXTH AFFIRMATIVE DEFENSE

65. Plaintiffs and/or Decedent should have taken action to minimize or eliminate their damages, if any, and therefore Plaintiffs are precluded from any recovery or, in the alternative, any recovery must be reduced by the operation of the Doctrines of Avoidable Consequences and Mitigation of Damages.

FOR A TWENTY-SEVENTH AFFIRMATIVE DEFENSE

66. Cleaver-Brooks did not authorize, approve or ratify the acts or omissions attributed to it or any other party in this cause.

FOR A TWENTY-EIGHTH AFFIRMATIVE DEFENSE

67. Plaintiffs' and/or Decedent's alleged injuries and damages, if any, were proximately caused by or contributed to by exposure or inhalation of noxious and deleterious fumes and residues from industrial products or byproducts prevalent on the job sites, by the cumulative effects of exposure to all types of environmental and industrial pollutants of air and water, or by substances, products or other causes not attributable to or connected with Cleaver-Brooks.

FOR A TWENTY-NINTH AFFIRMATIVE DEFENSE

68. Plaintiffs' Amended Complaint fails to name both necessary and indispensable parties to whose absence complete relief cannot be accorded among those already parties. Therefore, this action must be dismissed, or alternatively, the action should be stayed pending other appropriate relief by the Court.

FOR A THIRTIETH AFFIRMATIVE DEFENSE

69. Plaintiffs' Amended Complaint should be dismissed for its failure to comply with the requirements of Section 44-135-10, *et seq.* of the South Carolina Code, also known as the "Asbestos and Silica Claims Procedure Act of 2006," as the Plaintiffs have failed to make the prima facie showing required by the Act.

FOR A THIRTY-FIRST AFFIRMATIVE DEFENSE

70. Plaintiffs do not have standing to bring this claim pursuant to Section 15-5-150 S.C. Code Ann., also referred to as South Carolina's Door Closing Statute.

FOR A THIRTY-SECOND AFFIRMATIVE DEFENSE

71. Cleaver-Brooks asserts that an award of damages, if any, is subject to and limited by the applicable provisions of S.C. Code Ann § 15-38-10, *et seq.*

FOR A THIRTY-THIRD AFFIRMATIVE DEFENSE

72. Cleaver-Brooks pleads the limitations on damage awards pursuant to S.C. Code Ann. § 15-32-510, *et seq.* and requests bifurcation in accordance with these statutes.

FOR A THIRTY-FOURTH AFFIRMATIVE DEFENSE

73. Punitive damages are inappropriate since Cleaver-Brooks did not engage in any malicious, reckless, wrongful or intentional conduct upon which an award of punitive damages could be based.

FOR A THIRTY-FIFTH AFFIRMATIVE DEFENSE

74. Any award of punitive damages should not exceed the greater of three (3) times the amount of compensatory damages pursuant to S. C. Code Ann. § 15-32-530.

FOR A THIRTY-SIXTH AFFIRMATIVE DEFENSE

75. That no acts or omissions on the part of Cleaver-Brooks were the proximate cause or cause in fact of the alleged injuries and damages.

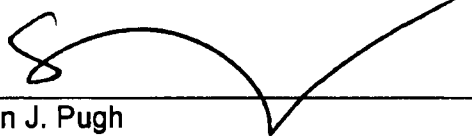
FOR A THIRTY-SEVENTH AFFIRMATIVE DEFENSE

76. Cleaver-Brooks owed no duty to Decedent as alleged in Plaintiffs' Amended Complaint. In the alternative, Cleaver-Brooks asserts that the alleged breach of any duty owed to Decedent was not a proximate cause of Plaintiffs' alleged damages.

Defendant Cleaver-Brooks, Inc. prays that Plaintiffs take nothing in this cause and that it recover its costs incurred herein. Cleaver-Brooks, Inc. prays for such other and further relief, both general and special, legal or equitable, to which it may be justly entitled.

RICHARDSON PLOWDEN & ROBINSON, P.A.
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By:



Steven J. Pugh
Joseph E. Thoensen

ATTORNEYS FOR DEFENDANT
CLEAVER-BROOKS, INC.

October 5, 2016

CERTIFICATE OF SERVICE

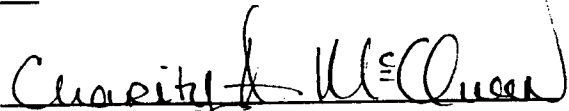
I, Charity A. McQueen, an employee of Richardson Plowden & Robinson, P.A., do hereby certify that a copy of the **ANSWER OF DEFENDANT CLEAVER-BROOKS, INC. TO PLAINTIFFS' AMENDED COMPLAINT** in the above-referenced matter has been served upon the following counsel of record, through e-mail and/or the United States Mail, Postage Prepaid, First Class, addressed as follows:

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Charity A. McQueen

October 5, 2016

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF YORK
4 2015-CP-46-00346
5

6 The Estate of Wayne Howe, et als.
7 vs.
8 Cleaver-Brooks, Incorporated
9

10 York, South Carolina
11 March 12-21, 2018
12 Before the Honorable Jean H. Toal

13 APPEARANCES

14 For the Plaintiffs: Dean, McVey, Holder

15 For the Defendant: O'Neil, Pugh
16

17 Reported by: Michael C. Watkins

18 Official Court Reporter
19
20
21
22
23
24
25

1 You are participating in a time-tested system and it's
2 extremely important for you to listen to all of the evidence
3 that's presented. Now, you're going to take notes during the
4 trial of the case, but please remember these are for your
5 purposes only, they should not be discussed with anybody else
6 and don't allow this note taking to keep you from listening and
7 trying to absorb what the evidence is and what the witnesses
8 are telling you. I have told you about cellphones and social
9 media, and again, the directive is don't use cellphones to try
10 to contact anybody and talk about the case or do research or
11 post anything on social media, don't use any of your devices to
12 do that about this case. I'm sure you're going to perform your
13 duties accordingly, and now we will begin this trial. The
14 plaintiff has the burden of proof and so the plaintiff will
15 begin with plaintiffs opening statement. Oh, I'm sorry, now
16 the most important thing I am leaving out, now that I have
17 given you this charge, will you stand and take your oath as
18 jurors?

19 (The jury was sworn.)

20 THE COURT: Ms. Dean, you may begin.

21 MS. DEAN: Thank you, Your Honor. Good afternoon. I'm
22 Jessica Dean, I'm working with Mr. Holder and Ms. McVey, you'll
23 also see Ryan and his brother, Alex, helping us. We're here to
24 represent Wayne Grant -- I'm sorry, Wayne Howe and his family.
25 Wayne Grant is one of his good friends and coworkers and I do

1 that a lot especially when I'm nervous. I want to start off
2 just telling you why I believe that this is a big and important
3 case to both parties. I think it's clear why this is an
4 important case for this family. Wayne Grant (sic) died of
5 cancer, it's an asbestos cancer called mesothelioma. No one
6 disputes that he lost over 13 years of his life because of that
7 and that it's really a particularly terrible way to die, but
8 this is also a big and important case to this company because
9 the allegations in this case are severe. What we believe we
10 can prove to you, and we have to prove it, is that this company
11 sold boilers that had a lot of asbestos in them. They sold it
12 throughout the country exposing thousands of people to
13 asbestos, and in this case they did it in a time frame when
14 there's no excuse, when what they knew, understood, thought
15 about it and did not justify their actions, that's why we're
16 here. Before I do anything I think I want to just kind of
17 introduce who is who. That is Wayne Grant (sic) -- they keep
18 telling me -- I'm nervous, that's Wayne Howe. I met him about
19 three weeks before he passed away. He died on March 7th two
20 years ago. Again, there's no dispute as to why. I would like
21 to introduce you to his family. Janette, this is his wife.
22 They got married when they were children in my mind, they were
23 married for over 50 years and they had two beautiful children.
24 This is Wendy, their oldest daughter, this is Tim and this is
25 Tim's wife, Julia. You're going to get to meet most of them,

1 I'll tell you why you will probably not get to hear from
2 Janette in a little bit. This case centers around exposing
3 people to asbestos, and really at the heart of that is
4 understanding why asbestos is deadly, toxic, the biggest health
5 problem this country has ever had, and when that was
6 understood, and understood by some and not others, and that is
7 what I hope to over the course of days demonstrate. I want to
8 start off with the basics, because at least when I started
9 doing this I didn't know, asbestos is an actual rock. It's not
10 man-made, it's mined in California, Canada, South Africa and
11 taken out of the ground. This is an example of an asbestos
12 mine. Companies then process it so that it looks like this,
13 and it's when it is processed into this form that you have a
14 problem, because asbestos fibers when taken out of rock are
15 incredibly tiny. The best way I've heard it is you could take
16 strands of my thin hair and get billions of fibers in one
17 strand, and you would need over five million fibers of asbestos
18 in the air before you could see dust. So you could have
19 millions of fiber not in front of you and not even see it. As
20 small as it is it's as equally indestructible, that's kind of
21 why it was used, it was considered a magic mineral, a miracle
22 fiber. It was tough, heat resistant, water resistant. It was
23 used heavily in industry because if it didn't kill people it
24 was incredibly helpful. Oh, I thought you might be able to see
25 in front of you so if I'm blocking this I was hoping you were

1 looking somewhere else, I will try not to block it. But the
2 thing about it in industry it also ended applying to humans.
3 It's indestructible, and because it's tiny, because of its
4 aerodynamics and size it fits into your lung path easily, it
5 gets into your blood stream and lymph stream easily, and it
6 causes a lot of disease in a lot of places in the human body.
7 It has been established that it's dangerous because it causes
8 at least three deadly diseases; it causes scarring in the lung
9 that makes it impossible to breath if it's severe enough called
10 asbestosis, it causes lung cancer and it causes mesothelioma.
11 Mesothelioma in many ways is the one that became the center of
12 attention because it is so directly and singularly related to
13 asbestos exposure, and it's a disease that this family has had
14 to deal with personally in their life. In addition to causing
15 multiple deadly diseases, it's just also caused those diseases
16 for a lot of people. Asbestos is responsible for one out of
17 every three occupational cancer deaths in this country, that's
18 according to the American Cancer Society and World Health
19 Organization. At one point it was responsible for one out of
20 every two. It's called a pandemic and epidemic, the largest
21 occupational health problem this country has ever faced. Part
22 of the problem isn't just that it's a toxin, it's the nature of
23 the toxin and I want to spend just a few minutes talking about
24 that. It's a toxin that doesn't affect all of us the same way.
25 Certain things, they happen and they're going to affect us the

1 same way, others don't. My brother is a red head, he is much
2 more susceptible to skin cancer than I am. We have the same
3 parents of the skin cell because they've at least figured
4 something out, that being in the sun affects us differently.
5 You know the guy that smoked his whole life and never got sick
6 and the one that smoked for two years in high school and did.
7 Certain types of things attack us differently, and asbestos --
8 and this is undisputed -- is one of those. 100 guys can work
9 on a boiler, most of them are going to be fine, they're not
10 going to get mesothelioma. But what you're going to hear, and
11 this has to do with dose, is that it doesn't affect us the
12 same. So the guy that didn't work on it had a smaller
13 exposure, was working on something else down the way and could
14 still get this disease. The lady who never walked into the
15 plant but laundered the clothes of her husband can get the
16 disease when her husband didn't get the disease, that's called
17 individual susceptibility. From a health standpoint how do you
18 figure out how to deal with this toxin that's really tricky?
19 If I know for sure that it's going to kill people but I can't
20 figure out which person or how to identify them, it became
21 incredibly difficult to figure out what to do, so much so
22 that it's almost universally determined don't touch the stuff,
23 not in any form, not in any product, not in any way. We can't
24 control it. That is individual susceptibility. Another reason
25 is because of latency. Latency is the idea that you're around

1 something, and how long does it take before you feel the
2 effects of it? So someone sneezes in the elevator, three days
3 later you have the flu, that's a very short latency. With
4 asbestos it's documented -- again this isn't disputed -- it
5 takes years, decades. For most people the sweet spot is
6 usually 30 or 40 years, except it's not sweet at all, that's
7 not the best word to use, but that's the length of time you
8 want to use. Two reasons I mention that, when you have a
9 situation like this where a person goes to the doctor and Wayne
10 is told, "Look, you have mesothelioma, it's an asbestos cancer,
11 you can't cure it." You're going to hear this family reacted
12 like everybody else, "Well, can we fight it? What are our
13 options? What do we do? How do we process this?" All they
14 cared about was their health. They prayed, they took it to the
15 church community, but then their doctor, the deacons he worked
16 with, his friends, "Have you talked to a lawyer?" That's the
17 first time in their entire life they've come to a lawyer, they
18 come to us to say, "Is there something connected here?" And
19 then our job is to go back 30, 40, 50 years to piece together
20 what happened. That's one reason this latency period matters,
21 because you're asked to figure out what happened in the 60's
22 and 70's in this case. Another reason is also just how do you
23 control this. If I'm working for ten years on a boiler and no
24 one I worked with got sick it gives you this false sense of
25 security especially if no one tells you it's terrible, because

1 your day in and day out interactions with this is fine, no one
2 is hurt, and it takes 30 years for people that you loved and
3 worked with and knew start getting sick. I kind of talked
4 about this but it's also frightening because they have found
5 that no matter how little or large the dose is, some people get
6 sick, not just the worker, the other people that are hanging
7 out in the garage or hanging out in the plant with their lives,
8 well documented and we'll talk in a little bit about how long
9 it was documented. The aerodynamics of asbestos is the last
10 thing I want to talk about, why it was so understood to be
11 dangerous. You can't see it and it floats in the air, it's so
12 small and light it floats in the air. So you do a job and you
13 tear off asbestos insulation, and I'm going to talk about these
14 things in more detail later, but you grind a gasket and it
15 takes 15 minutes your problem doesn't end there, it floats in
16 the air for hours and then as it settles just walking kicks it
17 back up, and if you vacuum, the filters, the asbestos just goes
18 through. And so you're going to hear one of the reasons again
19 it was a health nightmare is there's no way to use it safely.
20 You have to have a very sophisticated, you have to filter masks
21 and vacuums to even begin to deal with asbestos. You will also
22 hear that there's more than one type of asbestos, the experts
23 will talk about this in much more length, but there's one
24 called chrysotile, it's often called white asbestos; amosite is
25 called brown; and blue African, or blue, and that's called

1 crocidolite. The vast majority of the asbestos used in this
2 country came from Canada and it's chrysotile, or white
3 asbestos. You're going to hear that because of how much it was
4 used it is by far the most dangerous and problematic type of
5 asbestos in our country. Other countries have their own
6 bodies. The type that you're going to hear this company used
7 and knew it was going to be used with their fibers are these
8 first two types. All three of them have the same aerodynamic
9 principles, all three of them are well documented to cause all
10 of the asbestos related injuries, all three of them don't get
11 used or touched in this country as a functional matter anymore.
12 The last kind of concept I want to talk to you about asbestos
13 is that it's been used so much in industry, it was used at
14 Celanese and Duke and Bowater and it's in cars, that even just
15 walking down the streets today years after people stopped for
16 the most part there's still a really low level of asbestos in
17 the background, and that's why they call it background. They
18 don't know because everybody is around it whether that causes
19 disease, but what they found is if you just get the smallest
20 amounts above that people start dying, and that's kind of the
21 substance we're talking about when we talk about
22 what Cleaver-Brooks sold, knew and did. It's odd to have an
23 onion, but the last reason I put that is because asbestos
24 doesn't have what they call in a lot of scientific journals
25 onion principles. Some things like ammonia, if you smell and

1 you jerk back, some things tell you just by their actual
2 physical properties that you have a problem. Asbestos doesn't
3 smell bad, it doesn't itch, it doesn't burn your eyes, it
4 doesn't burn your throat. There is nothing about it that says
5 stop, this can hurt you, this can hurt your family, and unless
6 someone tells you there's no way for even the most responsible
7 human being to figure this out, so that's important, I think.
8 Cleaver-Brooks. They're a company that's a leader in the
9 industry in selling specific types of boilers called packaged
10 boilers, boilers that were used in many different applications,
11 and I'll talk about which ones are important in this case. And
12 the specific boilers in this case sold by Cleaver-Brooks we've
13 been able to investigate, get records from them, these are all
14 different asbestos products we know were in their boilers. And
15 so the reason they are here is because Wayne Howe throughout
16 his life worked on boilers. He was a rigger, a welder, a
17 helper and we'll get into the details of his life later. But
18 we know from records, from actual documents going back into the
19 50's and 60's what asbestos were in the boilers he was working
20 on. This is an example of the Cleaver-Brooks boiler that we
21 have a record of from the 1950's, it's called a fire tube
22 boiler. And kind of in the most basic terms a boiler -- or at
23 least this type of boiler they designed used tubes to direct
24 different types of gasses, whether it be natural gas or propane
25 to heat it through a combustion process, and then it would go

1 through the tubes, the tubes would be submersed in water and
2 the natural gas would heat that water and that's how you have a
3 heating process. This is the type of boiler that we know was
4 sold at the location that Wayne Howe worked. With that context
5 before we get into the specifics of why we believe that what
6 they decide to make and sell to the public was sold in a way
7 that's unsafe and unreasonable, I did want to put this -- and I
8 kind of put it in here to remind myself, I know you can be here
9 for a week or two, I know we have been living this for two
10 years and are incredibly grateful just to have someone to tell
11 this to, but on the other hand I know you probably envy the
12 people that walked out the door, but this is a really long
13 period of time. You have families and work and lives and we've
14 asked you to put a lot on hold to be here and so the family
15 asked me to say thank you, and I don't get to talk to you
16 directly after that again until closing arguments. We talk to
17 witnesses and hope we think of every question under the sun to
18 ask, but I don't get to talk to you, and this isn't even
19 talking to you, it's talking at you. So I did want to say no
20 matter what you decide being heard, having a system where you
21 can say this is why we're upset is just incredibility
22 meaningful and we thank you. The rest of the time I want to
23 spend is to try to take what we plan on doing the next week or
24 so and give you a roadmap. I always feel like after the puzzle
25 and when we put in the pieces it helps, and we have. We have

1 to deal with people's schedules, things don't come naturally in
2 the order you would love them to and so I want to give the
3 outline so that when we bring stuff in it makes some sense.
4 There are some very important things that are undisputed. I
5 don't think anybody functionally disputes that Wayne Howe's job
6 day in and day out had him interacting with different asbestos
7 materials. He worked primarily at Celanese and at Bowater. No
8 one disputes that he died of mesothelioma. No one has said
9 that he conducted himself in a way that was unreasonable. Just
10 for a flavor because you'll get to hear from people that worked
11 with him for years, he was a peacemaker. He was a deacon in
12 his church. He quickly went from helper to being foreman, and
13 to being the foreman that everybody hoped they got. He never
14 came to lawyers because he solved problems, he didn't make
15 them. No one is here saying this guy is the one that's at
16 fault, if only he would have, the main arguments here, I
17 believe, the true disputes are how do we deal with the issue of
18 a person losing over 13 years of life. I mean, what we
19 fundamentally disagree on, what we absolutely need guidance on
20 is two issues, what is this loss worth for this family. And I
21 want to be the first to tell you, Cleaver-Brooks is not the
22 only company that I believe clearly exposed him to asbestos and
23 did it with their eyes wide open. There were a lot of places
24 in those plants that had asbestos, there were a lot of people
25 that had the opportunity to do something different, they're

1 just the only one here. You will never sort out how to divide
2 up that issue, you will never be asked that question. You will
3 just be asked what is the total loss for this family, and Chief
4 Justice Toal will give you instructions on how you decide that
5 and then we need your wisdom, but we fundamentally disagree on
6 what years of life is worth and we need somebody to tell us.
7 The second thing I think we just don't see eye to eye on are
8 punitive damages. We are seeking -- because we think we can
9 prove specific things the law require that if punishment is
10 needed that compensating this family is not enough because this
11 was the pattern and practice of behavior. This was something
12 that was reckless, it was conscious, it wasn't a bad day, it
13 wasn't a bad month, it was how they conducted business, and
14 there are legal standards to determine whether that is
15 appropriate, and we believe it's appropriate and they don't and
16 so that's another reason we just need help. So the fundamental
17 reasons why we believe we're here, in terms of some of the
18 legal words you're going to hear, first we believe there was a
19 breach of warranty, which is just a legal analysis of was your
20 product fit for its intended purposes. And when you consider
21 that issue you have to think what is the normal environment for
22 your product and have you made unreasonably dangerous
23 conditions in that environment, that's at the heart of it. So
24 when I'm asking or they're asking about is this unreasonably
25 dangerous, that's at the heart of it. Some dangers are

1 reasonable, some things don't exist without danger and so the
2 key is whether we can prove that this was unreasonable. Did
3 you have to use asbestos? Did you have to keep your mouth
4 shut? Could you have told them information? What did you
5 know? That's going to be at the heart of why we're asking or
6 driving at those questions. The second theory, and you only
7 have to prove one but we believe we have evidence of both, has
8 to do with negligence. Understanding kind of the heart of the
9 law behind negligence is something you're to hear from the
10 instructions, and so I just want to pause for a moment to say
11 sometimes you have clear books, you have statutes that say you
12 must do this and that's the most basic, but the law says even
13 if the government hasn't sat and written out a regulation, we
14 all have a responsibility to each other. It doesn't matter if
15 you're a person or company, a babysitter or a hospital you have
16 to be reasonable. The best example I can think of is that in
17 most states thank goodness, I'm sorry if you disagree, but you
18 can't text while you drive. But even if that's not on the
19 books and you text and drive and hurt somebody you can be held
20 accountable for not being reasonable. And so much of what
21 we're going to be looking at is was the conduct of
22 Cleaver-Brooks in the 50's, 60's and 70's reasonable to the
23 people they chose to sell their products to. To get guidance
24 on that, how did we figure out what was reasonable in that time
25 frame in an industry you may have never worked in? We ask

1 medical doctors who are going to come and say what was known,
2 what was expected, and there's absolute agreement on this, if
3 there's something that's dangerous and you can replace it, do
4 it, if you can't, let people know, and at the very least
5 communication is the requirement. And I missed the kind of
6 threshold and that is if you choose to sell something to the
7 public investigate what is already known about it, not even
8 talking about doing your own testing or research but just do
9 what other people already know if you decide you're going to
10 make that your business, if you decide you're going to sell to
11 the American people. All of the medical experts agree that's
12 what should be expected, that is reasonable, whether you're
13 talking about the 50's the 70's or now. The second place we'll
14 focus on the law, Chief Justice Toal told you and you will get
15 instructions on what the law is, but there are clear mandates,
16 that if you decide to make a product you are deemed to be an
17 expert in that product, it's not an option. You need to go and
18 look about what you're selling to the public and you are
19 expected to know what's out there, and so you'll get to hear
20 about what was out there and what they're deemed to know. You
21 also look at the business. I mean, I talked to their company
22 representative, they get to pick whoever they want to represent
23 them and we let them know what we want to learn about and ask
24 basic questions. You want to be in the same competitive
25 playing field, right? You want everybody playing by the same

1 rules and you ask the company, would you agree that all people
2 should know what the hazards are about what they're selling?
3 That if they can get rid of them, get rid of them, if you can't
4 to let people know, and everyone agrees on this, those are
5 reasonable expectations. So here are kind of the guidelines
6 for determining if they did it right is clear, because we all
7 agree on what should have been done, and then the question is
8 did they, and I'm going to get into that in just a second.
9 Finally they had a lot of engineers working for them. I did a
10 lot of research with a lot of help about what different
11 engineering society and trade groups said should have been
12 known and what was understood going all of the way back to the
13 30's is what I learned, including some of the groups that they
14 were part of. Complete agreement. Got to research, you've got
15 to test, you've got to warn. So I want to put this in terms of
16 Cleaver-Brooks specifically and what evidence I think you're
17 going to hear about in this company. I think the first thing
18 you are going to hear is that there is simple safety rules that
19 you cannot put people in a position of unreasonable danger, and
20 that that's for the benefit of us all. Their boilers that you
21 will hear absolutely created objective situations in installing
22 it, in moving it and they were meant to be easily moved, and
23 repairing them and tearing them down. Specifically boilers
24 were made -- designed for industrial use, they were also
25 designing for commercial use, so they can be in a hospital or a

1 school or an office building or they could be in industrial
2 plants, those were the two types of designs. There were also
3 in this particular type of boiler dual processes. They were
4 meant for both heating or process boilers. I knew the heating
5 just from being a kid and growing up around boilers in your
6 house, but I want to kind of explain how they were used for
7 heating in a paper mill, or in a big power plant, because I
8 think it will help understand how they can do this dual
9 process. What they would do is there would be giant field
10 erect boilers, I mean ten stories high to process massive
11 amounts of water, which is the first thing to make paper, and
12 these things are bigger than any piece of equipment I've ever
13 seen. And so when they yearly, and at some point in earlier
14 times twice a year, Christmas, 4th of July, shut down the
15 plant, they would go cold. They don't want to do a bunch of
16 repairs in an environment where people can get hurt, so they
17 shut everything down, they do an insane amount of work because
18 they want to get back up and moving as fast as possible. In
19 order to take cold, giant boilers and get them going again they
20 use these boilers. If you've got something that big you need a
21 lot more than a match to light, right, and so these were the
22 starters boilers for these four or five giant boilers in
23 different facilities. But they had a purpose, they were
24 designed specifically to be able to be warm and heat a space --
25 they were processing boilers. And the best example I've seen

1 about this in some of the records has to do with TRS gasses, I
2 hadn't heard of that. But evidently a byproduct of making
3 paper is a sulfuric gas called TRS. At a certain point in time
4 the Environment Protection Agency says "This stuff is harmful,
5 we have to lower the amount of sulfur that you're pumping out
6 of this plant." So what they did is redirect the TMS into
7 these small package boilers, by elevating the heat it reduced
8 the sulfur content, and then they redirected it or vented it
9 into the giant boilers which went through something called a
10 precipitator that further produced the emissions. And so
11 that's a process that has nothing to do with actually heating a
12 space or heating a boiler, but these boilers were designed to
13 do that made them very effective industrial boilers. This is
14 just an example of a field erect boiler, which is very
15 different than a package boiler. And I think the reason I
16 picked this one as a drawing as one of the boilers at Bowater
17 is because that's a person. So the package boiler where they
18 had an extraordinary amount of asbestos in them could fit in
19 this room, this guy could not, so that's just helped me kind of
20 visualize the difference. This is going back to the
21 Cleaver-Brooks boiler, even though they were at least
22 relatively smaller they had a lot of asbestos. I gave you that
23 list of things and you're going to hear from people that can
24 explain all of those different things, I'm not going to do all
25 of them, but just an example, this is a drawing of a rear and

1 back end of one of the boilers. All of these different
2 components were asbestos containing. Some of them were clear,
3 this says that there's asbestos rope, others we really had to
4 dig and do some research. The vee block mix we learned had
5 asbestos in it, the gasket had asbestos, the cement was 100
6 percent raw asbestos, but we had to do digging to learn that,
7 but what we learned is just in this back section you have a
8 bunch of asbestos. That's also true in the front, that's also
9 true on the outside, it's also true in the inside. These
10 boilers were stocked full of asbestos. In terms of the gaskets
11 we don't know for sure if all of them were asbestos but we
12 confirmed that the front gaskets, rear, burning house gaskets,
13 dryer -- were all asbestos. If you've never worked with a
14 gasket before, pictures I think help you understand what these
15 are and why they're dangerous. This is an example of the
16 picture in Cleaver-Brooks of the rear gaskets, usually it is a
17 three foot diameters. Their own manual said you got heat and
18 pressure gaskets, which were like a rubber asbestos matrix,
19 more asbestos than anything else and were flexible and were
20 used to keep any of the heat or steam from venting out, that's
21 why you put them in. You don't want metal on metal, you want
22 something to seal that off, but after you have heat and
23 pressure they stick on. You literally have to take wire
24 brushes and scrapers to get all of that asbestos off, and
25 that's a huge diameter. And the reason I talk about this is

1 because again of the work that was being done here. They were
2 throughout. This is a burning house where you have a
3 large flange, you can see these bolt holes, an asbestos gasket
4 was placed over that and it had a flange that you bolted
5 together, somebody day in and day out when you're doing
6 maintenance you had to repair that off. If you've ever tried
7 to scrape off something really burnt on like a pan with a
8 brillo brushes it's hard, at least for me that kind of helped
9 put it together. This is not a Cleaver-Brooks gasket but it is
10 an example of what a stuck on, baked asbestos looks like.
11 You'll hear from coworkers that this is a good example of when
12 you have heat and pressure what happens. It would take
13 sometimes 15 or 20 minutes to hours just to scrape this off.
14 This has been tested, it's been analyzed, billions of fibers
15 going into the air, it's one of the documented dangerous work
16 practices that was involved with this boiler. This is a
17 photograph super zoomed in of a gasket that's never been baked
18 on, it's brand new. The reason I showed you this is because
19 gaskets usually have 50 to 70 percent asbestos and this just
20 kind of shows you how much asbestos was in there. They took a
21 picture of where they broke it along this line, here are the
22 fibers and they zoomed in at that time. This is the original
23 picture, this is the super zoomed in picture, that's all
24 asbestos fibers that are being wired off. And that's the most
25 closed in -- this is the involved asbestos throughout the

1 gasket. This is another example, and then I think the rest of
 2 it will just come into evidence, but this is what I told you
 3 was 100 percent raw asbestos. They would literally take bags
 4 of raw asbestos, dump it into an either trough or a five pound
 5 bucket, mix it with water, millions of fibers of asbestos put
 6 into the air and they remain in that work space over and over
 7 again for months and weeks on end, typical normal work.
 8 Anytime you tie in your boiler somewhere else, anytime you --
 9 it's on the door, so every time you open the door you're
 10 interacting with that mud because you kind of create it into a
 11 mud, put it in and then you remove it and you have to scrape it
 12 off. So Cleaver-Brooks made and designed boilers, they also
 13 sold the replacement parts. We have actual documents of sale
 14 of asbestos products going to Bowater until at least 1969,
 15 there's a few in the 70's that we're not positive if they were
 16 asbestos or not but we know at least until for sure 1969. Then
 17 also because of how they designed it, and you can see this in
 18 their specifications, required unspecified asbestos. There
 19 were other designs known in the 40's and 50's where you made
 20 things slightly different and you didn't have to use asbestos.
 21 And so at the heart of this is their design, what they did in
 22 terms of making it. And then they also admit that they knew
 23 the environment in which this was going to be used in. A
 24 boiler doesn't do anything on its own, it has to be tied into
 25 something, into a boiler feed pump in order to feed it in the

1 beginning and then to a system, whether it be the giant field
2 erect boiler number one or whether they go and move it to
3 recovery boiler number three, that tie-in, they don't just
4 foresee and they don't just know that that's a normal
5 environment, their boilers don't work without them. So they
6 also knew that there was going to be pipe insulation and
7 asbestos used every single time you installed and tied-in with
8 one of their boilers. I think from that evidence you're going
9 to hear from scientists, including some of their own experts,
10 this was dangerous, this causes mesothelioma, this is why he
11 lost his life. The negligence is more related to at least for
12 this time that I have with you, what did they know. Could we
13 prove what they knew and when they knew it, and what did they
14 do with that information, because you're not to judge them by
15 what they understand today. We know a lot more particularly
16 about the mechanics of how this causes death and disease now
17 than we did before, but did they know enough that a reasonable
18 company says, "Let's go to the design without asbestos," or,
19 "Let's at least tell people to wet this stuff down so we can
20 minimize the problem." And that's part of what we will try to
21 prove to you this week and a little bit of the next. The
22 evidence here is compelling. You're going to hear that there
23 are documents specifically calling out boiler work and
24 insulation in the 1930's indicating it kills. The specific
25 disease that was really at the front of people's mind was the

1 scarring; asbestosis. This is a picture in scientific
2 textbooks that show a lung, and you can see that this white
3 area, this different thickening of the actual vessels in the
4 lungs. And what happens is it scars, almost like you get a
5 scar on your skin it kind of bubbles up, that happens in your
6 airways and if it thickens enough you literally can't breath.
7 They knew that in the 30's, they knew it could be fatal. They
8 knew that you should test to see how much was in the air
9 because you can't see it, they knew you need to take protective
10 measures, they knew you should substitute it, and they knew if
11 you had to use it you should get everybody else as far as away
12 as you could, well documented. By the 50's they began to
13 understand it wasn't just asbestosis, it was also cancer, that
14 lung cancer was directly associated with asbestos exposure,
15 same cancer that we associate with smoking. And this became
16 not just bits and pieces, well understood, not disputed
17 throughout medical literature in every library you go to,
18 knowledge. By the 1960's there were hundreds of articles
19 talking about asbestos being deadly, and there was also the
20 understanding that it caused the disease mesothelioma. Before
21 Wayne Howe walked into Bowater, I mean, before his first day at
22 work this was well understood by Cleaver-Brooks. And it's not
23 just there were so much of the information you're going to hear
24 and we'll lay it out, it's that they understood about his
25 particular disease. Now, the law says you didn't need to know

1 you were going to hurt him in this particular way, you needed
2 to know you were going to hurt him, but this particular way or
3 this particular knowledge was gained. And I want to explain
4 why mesothelioma was such a big deal in the industry, why it
5 caused so many people to start talking about it. I think the
6 person who actually says it best is their own expert. They
7 called a guy named Tim Oury, we actually took videotape of him
8 yesterday in the hotel so I know what he's going to say in this
9 case, and he wrote a book. And in his own book one of his
10 coauthors writes in 1964 one of the first groups ever to be
11 explored at length in relation to this disease were
12 boilermakers, and it was staggering, not my word, how many
13 people were getting sick. And what they learned and discussed
14 in this book is this: They're getting sick from mesothelioma,
15 it's more concerning because it's not a disease that seems to
16 be dose related. Let me explain what I mean by that. All of
17 these diseases are dose response diseases, the more dose the
18 more you're seeing the bad response. Lung cancer is for sure
19 like that, asbestosis is for sure like that, but for
20 mesothelioma they saw a dose response, if you work with it 40
21 years you're more in trouble than a person who worked for one.
22 But what they also found is people who worked with it very
23 little still got this disease. When I mentioned earlier that
24 they couldn't control it, that started becoming clear when
25 mesothelioma started becoming clear. It used to be believed

1 before then because asbestos was so helpful that you could use
2 it and you just needed to do a bunch of stuff. Mesothelioma
3 made clear that there's no way to work with this. This is the
4 same guy in the textbooks that show the difference between lung
5 cancer and mesothelioma. Lung cancers happen in the lung
6 itself, mesothelioma happens in the lining that surrounds the
7 lung and that's called the pleura. The pleura and the
8 peritoneal cavity in your stomach has a very thin lining, and
9 that's where this disease attacks. And the few things we have
10 learned is first it's not caused by smoking. Wayne Howe smoked
11 from when he was almost a kid until 1992, so the first thing if
12 you hear anything about the lung that a lot of people want to
13 know is about smoking. And one thing that's so fundamentally
14 different between lung cancer and mesothelioma is all of us,
15 their experts, Dr. Oury who I talked to yesterday, our experts,
16 this has nothing to do with smoking. This is a signal tumor,
17 it signals just by the fact that you have it that you've had
18 asbestos exposure. So one of the big differences of
19 mesothelioma is the only cause that was even known or
20 understood to be related to it in the 60's was asbestos
21 exposure. And the second thing I've talked about is that they
22 couldn't find with this disease any safe dose. No matter how
23 little you worked with it people were still dying, people's
24 family members were still dying. To better understand kind of
25 the disease itself I thought this picture would help. This is

1 a harvested lung and it still has that mesothelial lining on
2 it. You can't tell that looks shiny, that's the pleura. It's
3 like is a Saran wrap that you put on a sandwich, it's thin,
4 it's elastic, it's function is to move with your lung as you
5 breath. Because your lung sits in your chest wall and your
6 chest wall is lined with nerves, and if you don't have a moist,
7 thin surface to move with it it would be incredibly painful.
8 where this disease attacks is on that lining, and here you have
9 the lining of the lung and the heart, and it could move to the
10 lining of the heart and it did for Wayne Howe, it started in
11 his lungs and it moved to his heart. As it thickens it has two
12 problems: If your lung can't move it can't breath so it
13 becomes more and more difficult to breath until you go to the
14 ER over and over again because you feel like you can't, until
15 you eventually can't. That's kind of the end of life problem.
16 But the more how do you just manage this disease if you're a
17 doctor problem is that your chest wall is lined with nerves and
18 when you start having a massive tumor hitting nerves they don't
19 know how to control the pain. Narcotics, Fentanyl, radiation
20 to kill nerves, they have gotten a lot better, they have tried
21 to figure this out but it is just a really painful disease. So
22 that's why the 60's information became important. We are going
23 to be able to show that not only were they as a company
24 obligated to know because that information was available to
25 them but they did know. They did not warn, they did not test,

1 this is not disputed, they did not replace it, not just at
2 Bowater, not just at one plant, across the board for everyone,
3 that's why we're here. And I want to talk about the choice not
4 to do something about asbestos. This is a ship that's pretty
5 famous if you ever were in the U.S. Navy because there's a
6 story, and it was before World War II there was a ship that got
7 hit and because they didn't have asbestos all of the men were
8 burned. And so for years the United States Navy put asbestos
9 under the lining of their ships, and there's a real question
10 here, what's worse, horrible cancer and disease or not having
11 ships that are safe? I mention that because part of what
12 you're asked to look at is what's reasonable here. Sometimes
13 there's a reason you take risks, and so a lot of the evidence
14 I'm going to look at is why in a boiler when you have mineral
15 wool and fiberglass and replacements that did the job that
16 didn't have the risk. I can understand a debate in other
17 areas, I don't understand why it was here. Now, I relate this
18 to Wayne's life. That's him in 1992, we found this picture.
19 Wayne Howe worked at America Inka, he worked at Crown Cork and
20 Seal, he did short jobs there, he also worked in a gas station.
21 We went through his whole life history. You'll never get to
22 hear his voice. The attorneys that were involved in the case,
23 including Cleaver-Brooks, got to ask him questions for three
24 days. The first day they asked him questions for a full day,
25 they didn't videotape it, he went to the ER the next day, so we

1 waited a few weeks, he came back for two days, he died two
2 weeks later. You'll get to hear, Ryan will probably read it,
3 what he said under oath, how we pieced together his history but
4 you'll never get to meet him. But we do know a lot because we
5 then -- two weeks after that I met Wayne Grant, I met Gilbert
6 Small, I met a bunch of people that worked with him, and then
7 we get documents and that's how we piece together histories
8 that go so far back. He started off as a kid that hated
9 school, dropped out, worked hard, like at 14 worked his way up,
10 never got let go, has employment records of somebody that
11 people were trying to keep on, just got promoted, was as useful
12 as can be. He was one of the few people at Bowater that went
13 from being a contractor to being hired on. He was a good
14 worker. His work, whether it be at the beginning of his career
15 or when he retired as a master mechanic put him around
16 asbestos, it was throughout Celanese, it was throughout
17 Bowater. It wasn't just boilers, it was on pumps, it was
18 valves, it was on pipelines, it was paper machines. So again,
19 I will be the first one, these are not the only companies that
20 we believe are at fault, they're just the one we're here to ask
21 your help on. The Cleaver-Brooks part of this started when he
22 moved from Celanese to Bowater in 1977. He had worked for
23 Celanese for about ten years for a company called A and E, he
24 then went over for ACE, which is a very similar company, they
25 did a lot of rigging work, that's how he started off at

1 Bowater, then they had him just doing anything and everything,
2 he could just fix things. And by 1987 I think he came in as a
3 full-on employee until he retired. In 1977 you will hear him
4 say himself, "Much of my time was spent in the powerhouse
5 working on boilers. There were four, five or six field
6 boilers, there were packaged boilers, I worked on them all the
7 time." He explained how he worked on them, "I welded them, I
8 took out that fire" -- which is asbestos. "I changed the
9 gaskets," which was asbestos, "I worked on the cement," which
10 was asbestos. And that's something he did during all of their
11 shutdowns, and then he was also just the repair guy, so it's
12 just connect the dots from his life. The main three source of
13 exposures came from working on refractory gaskets and then
14 tying them in, because remember, Cleaver-Brooks boilers by
15 their nature were meant to be able to be packaged, moved, used
16 for different purposes and he's the guy that would tie-in the
17 linings and do the insulation of the boilers. Bowater-Catawba,
18 Bowater-Rock Hill, I think people probably now is now Resolute.
19 Sometimes you'll see document that say Resolute, sometimes
20 you'll see Bowater, different people owned the same plant, but
21 he went there in 1977. He did not know, at least not when he
22 was being asked questions a few weeks before he passed who
23 made -- not the boilers, not the pumps, not the valves, he
24 remembered Garlock gaskets and Crane gaskets, and it turns out
25 both of those are in their boilers. But for the most part he

1 did just not have at that time the ability to get into
2 specifics. So how would we know that Cleaver-Brooks was there?
3 we learned that through a few different ways; one, their own
4 records. They have a record showing the sale of the 1957
5 packaged boiler that was used both for heat and processing sold
6 to Bowater, and a bunch of replacement parts sold years and
7 years after that that include asbestos. We have also dug into
8 deeper, because at first we were told by Bowater they didn't
9 have actual boilers in the powerhouse, so we started asking
10 people and we found a coworker who has also passed away but we
11 have his testimony that says, "I also worked in the place, that
12 boiler was a Cleaver-Brooks boiler." So we have testimony from
13 someone who was there, we have the records. This is -- oh, I
14 know why I put in. He also just did work at home, he was
15 really good on cars and that's another exposure to asbestos.
16 They're not involved anymore but they're a part of it. And
17 what you're going to hear is asbestos is called with dose -- a
18 cumulative dose disease, it's your exposures over time that
19 caused the disease. Smoking helps, I mean, it's not the first
20 cigarette or your last, it's using it over time. All of the
21 experts admit the same thing here. It wasn't the first time he
22 worked with a boiler at Celanese or the last time he worked
23 with a boiler at Bowater, it's the cumulative dose. We went
24 through all of this history, which also includes brake work.
25 This is a picture of Bowater. I'm focusing on Cleaver-Brooks

1 not because of his other exposures weren't important but
2 because of who is up here. And this is the powerhouses for the
3 Bowater plant. The main places where Wayne worked is paper
4 machine number one, number three and this powerhouse. The
5 powerhouse is where we believe the boiler was at, and there may
6 be multiple boilers. Now, why do I say that? There are boiler
7 inspection reports now. If you want to know anything about
8 when a boiler was inspected the State of South Carolina keeps
9 that, but they didn't keep it in the beginning years. That
10 1957 boiler they have in their own records isn't the state
11 records because they weren't kept in the 50's and 60's, so
12 that's incomplete. Then we talk to Cleaver-Brooks, was it just
13 this boiler or were there more? They admit their records are
14 incomplete, they don't know. They also say "Look, this boiler
15 could have been used somewhere else in the plant." So we asked
16 about that, "Were there any other boilers anywhere else in the
17 plant?" There's one in the admin building, that doesn't seem
18 likely. But more importantly that's kind of why we dugged and
19 found a coworker that said, "No, I remember packaged boilers
20 too." There were plenty of them. Cleaver-Brooks wasn't the
21 only one making packaged boilers in there, Conductive
22 Engineering was in there and there were others, but that's how
23 we connected the dots from these large plants to where he was
24 working day in and day out for ten hour shifts for years. That
25 boiler was bricked out in the mid 1980's, so the time frame

1 from his exposure was from '77 to about '84 and '85. Art
2 welker is the person that speaks for Bowater just like they had
3 a person speak for them. He at first was asked questions, he's
4 an engineer, he started in 2015, at first he said, "There's no
5 package boilers in the powerhouse," he didn't come until four
6 years after it was taken out. After we showed him testimony of
7 coworkers that remembered that boiler being there he did more
8 research and I think you're going to hear him say now, "I
9 messed up. I did try really hard to figure out what was there
10 but it looks like Wayne Howe, Wayne Grant all of these other
11 people were right, those boilers were there. Am I running
12 slow?

13 THE COURT: Yes, ma'am, it's about time to wrap it up.

14 MS. DEAN: The last thing I will then talk to you and it
15 will take two or three minutes if I can.

16 THE COURT: It's time to wrap it up, yes, ma'am.

17 MS. DEAN: The family can talk more about how this has
18 affected them, and you're asked to evaluate things like what is
19 a life lost worth. I don't spend a lot of time on this because
20 I want you to believe a wrong was done first, because otherwise
21 a lot of people have bad things happen. But once I convince
22 you, if I do, that they did something wrong I'm going to ask
23 you to think about really hard things. Janette is lovely, she
24 has Alzheimer's. Her anchor was taken away from her. She
25 doesn't know why we're here. You will see her but I did want

1 you to know why we may not have her everyday, we're working on
2 her, to figure out how to do this, but you're going to meet the
3 whole family and you're going to just hear about how this has
4 been really life-changing. And then we're going to ask you to
5 find that they were reckless, that this was a pattern of
6 behavior. They bragged that they were the world leading
7 producers of packaged boilers, they set the standard for the
8 industry, then you should have done something differently, and
9 probably the biggest reason we're here is I want that message
10 to get conveyed. I'll just end it with this. We believe that
11 as much as asbestos was known to be hazardous all the way in
12 the 1930's those early records also said it doesn't have to
13 happen. This is an incurable type of cancer and that's just as
14 true today as it was in the 1930's, but it is preventative.
15 Wayne lived his life right, there's no question this shouldn't
16 have happened and we believe it's clear that they should have
17 done things differently. I've taken too long, thank you.

18 THE COURT: Ms. Dean, opening statement for the defense?

19 MS. O'NEIL: Your Honor, Ms. O'Neil. I do need to --

20 THE COURT: Yes and I should have mercy on my jury and my
21 court reporter. You've been listening to a lengthy opening
22 statement, why don't we take a ten minute break and let you go
23 to your jury room and then Ms. O'Neil will present the opening
24 statement for the defense.

25 (The jury left the courtroom.)

1 MS. O'NEIL: Your Honor, I would like to raise just a
2 couple of points, could we do it now or do you want to do it
3 when we come back?

4 THE COURT: Either way it pleases you, go ahead and raise
5 them now and then we'll take our ten minute break.

6 MS. O'NEIL: Thank you. I just wanted to raise a couple
7 of points, Your Honor. I did not object during the opening
8 following your admonishment but I had a couple of concerns.
9 There was a few comments which I think get awfully close to if
10 not over the line of Your Honor's admonitions about conducting
11 this trial and I would like to raise them now as objections to
12 make my record. I'm certainly not requesting a mistrial, I
13 want to be clear on that, I would just like to raise them now
14 to put them on the record. The first one is that in the
15 opening Ms. Dean made reference to the fact that the company
16 sold a lot of boilers throughout the country and exposed a lot
17 of people to asbestos, and she made a number of comments
18 throughout the opening about sending a message, and, in fact,
19 her final comments to the jury was the biggest reason that
20 we're here is she wants the message to be made that we don't
21 have to be here, and I believe that that runs afoul or awfully
22 close to the line of Your Honor's statements regarding we are
23 not here to speak for the community, et cetera. And then the
24 other point was she -- and I believe this was inadvertent but I
25 do want to point it out in case we have this issue come up

1 because it was the subject of a motion in limine and I believe
 2 I need to protect the record, she said that there were a lot of
 3 attorneys, including Cleaver-Brooks attorneys who got to ask
 4 questions of Mr. Howe and that's actually not correct. As Your
 5 Honor will recall not all of defense counsel got to ask
 6 questions and Cleaver-Brooks was one of the ones who did not.
 7 We filed a motion to strike that deposition, Your Honor, if
 8 you'll recall because we couldn't ask questions and it was
 9 denied and I just need to place that on the record, I believe.

10 THE COURT: Thank you, ma'am. Ms. Dean? Briefly.

11 MS. DEAN: Yes. To the first issue I was very careful to
 12 discuss the idea that we would like to see punishment, we have
 13 a higher burden of proof when talking about punitive damages.

14 THE COURT: Well, let me just say that with regard to that
 15 a lot of boilers and a lot of companies and so forth, number
 16 one, this matter is bifurcated and although they do have to
 17 find whether there was reckless conduct and that is the reason
 18 I did not interrupt you and I'm sure the reason that Mrs.
 19 O'Neil did not interrupt you. We need to be very sparing about
 20 what we do about punishing them, finding reckless conduct is
 21 the predicate then we go to the punishment phase. I would
 22 steer clear of talking about their duty to do anything more
 23 than to look at this conduct and find, if you can convince them
 24 of it, that it's more than just simply negligence, it's willful
 25 and reckless and that can be done without getting into the

1 details of punitive damages. I think it's a good reminder not
 2 to do that, and I was on the edge of my seat with many
 3 companies, as I said in the motion in limine and in talking
 4 about what can and cannot be done, we are not here to talk
 5 about other companies. We certainly can talk about the history
 6 of the industry and I've allowed historical stuff as far back
 7 as both parties want to take it about that. We have to make a
 8 difference between that and talking about a lot of companies.
 9 Finally, Golden Rule is absolute not permitted in South
 10 Carolina, it is some places but not here, we cannot talk about
 11 sending a message. That gets right into the Golden Rule and my
 12 court has held that many times, so we need to be careful about
 13 that. And finally Cleaver-Brooks was not able to question Mr.
 14 Howe and, in fact, I don't know of any defense lawyers that
 15 were.

16 MS. O'NEIL: Only defense lawyers.

17 MS. DEAN: It was --

18 THE COURT: Excuse me, only defense lawyers questioned Mr.
 19 Howe but I don't know of any connection between that and
 20 Cleaver-Brooks. There were some defense lawyers whose clients
 21 were not even in the case and Cleaver-Brooks was in the case
 22 but they didn't get to Cleaver-Brooks before Mr. Howe
 23 unfortunately could not complete the depositions. And that's
 24 not anybody's fault, I made some rulings about what I regard as
 25 the preserved testimony if a witness is unavailable, but trying

1 to make any kind of implication of anything on Cleaver-Brooks
2 or anybody else on how the questioning went I think would be
3 unfair. We can talk about the -- I've allowed that where some
4 judges may not have allowed this kind of testimony. But the
5 testimony can be talked about without trying to raise any
6 implications about attorneys for their defendants and what they
7 did or do not do in connection with these depositions is what
8 I'm trying to say. The points are well taken, Ms. O'Neil, and
9 I think you have preserved your position with regard to them.
10 And with that we will take our ten minute break.

11 (A recess was taken.)

12 THE COURT: Please be seated. Ladies and gentlemen of the
13 jury, our opening arguments will continue now, and presenting
14 for the defense is Ms. Elizabeth O'Neil. Ms. O'Neil?

15 MS. O'NEIL: Thank you, Chief Justice Toal. I have the
16 4:00 p.m. spot which is just the most wonderful time to be
17 talking with y'all, but I want to start with thanking you. I
18 appreciate that when you got out of bed this morning you did
19 not think you might be spending your week and part of next week
20 with us here, but your participation in this process, as Ms.
21 Dean said, is very integral to our dispute resolution process
22 and you play a very important role. I'm Elizabeth O'Neil and
23 I'm with a law firm in Charlotte, North Carolina and I'm here
24 with Steve Pugh, who's from a law firm in Columbia, to
25 represent and defend Cleaver-Brooks. And you'll see, there's

1 some other people at our table who are helping me because I
2 started practicing law before the Internet was invented so I
3 need some with the technology and I have brought some young
4 people to help with that. The first thing I want to tell you
5 is I believe when you hear our defense in this case you will
6 see that we mean no disrespect to the Howe family when we come
7 and defend this case. I'm very sorry for your loss.
8 Mesothelioma is a terrible way to die and losing a parent is a
9 very difficult thing, we are all very sorry for your loss. And
10 I mean no disrespect to them when I come here and I say I
11 believe that what the family -- I'm sorry, what the evidence is
12 going to show is that Cleaver-Brooks is not responsible for
13 this family's loss. You heard about Wayne Howe in the opening
14 and I want to talk to you a little bit about Cleaver-Brooks.
15 Cleaver-Brooks made package boilers. Ms. Dean made a reference
16 to this, there's two basic kinds of boilers, there's field
17 erected boilers, which is giant multi-storied, I mean four or
18 five story tall boilers which are assembled in the field, hence
19 in the name field erected, and they are covered in the field
20 with asbestos insulation top to bottom. And then there are
21 package boilers, and this is a picture of a Cleaver-Brooks
22 package boiler. Package boilers, they can be put on a rail
23 car, some of them can be put on a flat bed and toted around and
24 put down on a pad and then connected up, put in some pipes, run
25 some steam, run some water, run some fuel, and you can make a

1 package boiler operate. They come in different sizes. They
2 come in different -- they all come in the same basic shape but
3 have different internal configurations, but the thing that is
4 the same about every Cleaver-Brooks package boiler, and I think
5 the evidence will show this, they are fully assembled at the
6 factory, that they are generally the type of boiler we're
7 talking here which is used to provide steam or hot water, and
8 they have no external insulation. When they are insulated
9 they're insulated at the factory, covered with a metal jacket
10 and then shipped out, and when they get to the site they do not
11 get insulated on site. Now, you will hear, and we admit, some
12 Cleaver-Brooks boilers were made with asbestos containing
13 products, the most common one was asbestos containing gaskets.
14 And I feel like I might be in people's way and I apologize.
15 Gaskets are sealing devices and they are used to prevent leaks.
16 When I first started doing this litigation and I tried to
17 conceptualize a gasket, I started thinking about the washer in
18 my faucet, they were supposed to stop leaks but in a different
19 kind of way. Some of them did contain chrysotile asbestos,
20 Cleaver-Brooks admits that, and some of them contained other
21 things like rubber or neoprene. You will hear a bunch of
22 evidence about the Cleaver-Brooks boilers and the kinds of
23 gaskets like the ones sold to the Bowater paper mill contained.
24 The reason that you need a gasket in a boiler is you've got to
25 stop a leak, and the reason you want to stop a leak because if

1 it blows up it's a problem. And so the gasket, and you will
2 hear evidence about this, has to be of sufficient type, size,
3 strength in order to ensure that seal is maintained when that
4 boiler runs. Boilers are what are called pressure vessels and
5 you'll see that that's why the State of South Carolina and
6 North Carolina and Georgia and everywhere else, they come out
7 and inspect pressure vessels regularly so they make sure they
8 don't have leaks. You will see that there are regulations that
9 talk about the use of asbestos gaskets in boilers and pressure
10 vessels. You'll see that as late as 1980 the National Fire
11 Prevention Association said asbestos was an acceptable gasket
12 material. You'll see as late as 1978 they specified it for
13 certain things. You will see that the ASME as late as 1980
14 thought asbestos was an acceptable thing for a gasket material.
15 You'll see they thought that it was acceptable vacuum material
16 when welding, and you'll see that as late as 1980 the ASME
17 thought using asbestos rope as an insulating material in fire
18 tube boilers was appropriate. We believe that that's important
19 evidence because it speaks to the question of whether
20 Cleaver-Brooks was reasonable or negligent when in 1957 it put
21 some asbestos containing materials in a gasket that it sold to
22 the Bowater Paper Mill where Mr. Howe worked. And I don't mean
23 to suggest to you you're going to see evidence that says you
24 had to use asbestos because you will not see that, but you will
25 see that it was permissible. So Cleaver-Brooks boilers also

1 had asbestos in the refractory, Ms. Dean touched on this, a
2 little confused, lawyers don't testify, only witnesses testify,
3 but Ms. Dean touched on the refractory that went into the rear
4 door in the boilers. And you will see some evidence that
5 Cleaver-Brooks boilers sold to the Bowater Paper Mill had some
6 asbestos containing refractory in them, put in at the factory
7 and then sent out. This is a picture of the Bowater Paper
8 Mill, it's a big facility. And you see those big stacks there,
9 some of those stacks go where field erected boilers are, the
10 big multistoried ones, and that's important because some of
11 these stacks are where the powerhouse is at Bowater, and that's
12 important because Cleaver-Brooks only sold a package boiler.
13 They sold this boiler and we know, we have some documents we
14 believe you will see in evidence, that we sold this boiler in
15 1957, built it in the factory, shipped it to Bowater. The door
16 gasket, which is -- goes around the rear door and the front
17 door, you'll see this -- I believe you'll see this exact piece
18 of evidence here on the left, the door gasket was 38 and one
19 quarter inches in diameter. I believe you will hear some
20 evidence that the opening for that boiler, the actual inside
21 was 12 inches. And that's important because one of the
22 questions you're going to be asked in this case is to evaluate
23 some evidence about whether or not Mr. Howe was working on a
24 Cleaver-Brooks boiler. Some of the evidence you're going to
25 hear is he was inside the boilers at the powerhouse, and we

1 believe you're going to hear evidence that shows that the
2 Cleaver-Brooks boiler that got sent to Bowater isn't the kind
3 of boiler that a person can get inside. You will also hear
4 that the Cleaver-Brooks boiler that was sold to Bowater in 1957
5 did not have any asbestos containing insulation on it, when it
6 was insulated at the factory and covered with metal it was not
7 asbestos containing insulation. That's a picture of a field
8 erected boiler that's actually being put up, and I think you
9 will hear a lot of evidence about field erected boilers. I
10 believe you will hear that there were four in the powerhouse at
11 Bowater, four of these giant field erected boilers, none of
12 which were manufactured by Cleaver-Brooks. I believe you will
13 hear a lot of testimony that Mr. Howe and his coworkers spent a
14 lot of time working on these field erected boilers at Bowater
15 and some other places where Mr. Howe worked because he did
16 spend his career as a boilermaker. You can get inside one of
17 these and I believe you will hear a lot of evidence about Mr.
18 Howe being inside the boilers. You will also hear about Mr.
19 Howe's work history, and you will hear he worked at a lot of
20 different places, and you will hear that at every single one of
21 these places he worked with insulation materials. You will
22 hear that he worked them on different kinds of products, but
23 that at all of his job sites he was working with insulation
24 materials, that's the common theme in Mr. Howe's working
25 history. You will also hear he did a lot of car maintenance,

1 that he was a helpful person and he changed the brakes on his
2 wife's truck, her postal truck, you will see he did that for a
3 number of years. So I believe what you will see in the
4 evidence is a lot of insulation asbestos exposure for Mr. Howe
5 over the lifetime of his career. You will hear that he worked
6 with what we call half ground pipe insulation, and it looks
7 just like this, and it is -- I think you'll hear that it's a
8 very dusty product. You will hear that people beat it off with
9 hammers, beat it off pipes with hammers and cut it with saws.
10 They dropped it on the floor and it was dusty. You will hear
11 about what we call blanket insulation which is another kind of
12 asbestos containing insulation that was wrapped around pipes at
13 various places where he worked. But what you will not hear is
14 Mr. Howe said he worked with a Cleaver-Brooks boiler, not when
15 he worked at the Roof Service Station, not when he worked for
16 Daniels Construction, not in the Army, not when he worked for
17 Associated Mechanical Erectors, not when he worked at Celanese
18 or Bowater or a Foundry from 1977 to '78, not when he worked at
19 Bowater from '78 to '85, and not when he worked at Bowater from
20 '85 to 2000. You will not hear Mr. Howe or anybody say that he
21 worked in a Cleaver-Brooks boiler. What you will hear is that
22 Mr. Howe worked with boilers at Bowater, and you will hear some
23 testimony about their being more than one package boiler at
24 Bowater. You will hear that there was one in the
25 administrative building, that there was a package boiler in the

1 powerhouse. You will hear that when Cleaver-Brooks sells a
2 boiler to a place like Bowater, that big industrial setting,
3 Cleaver-Brooks doesn't know where they put it. Cleaver-Brooks
4 ships the boiler to Bowater and Bowater installs it wherever
5 Bowater decides. You will hear testimony from Art Welker, who
6 works at Bowater, that the package boiler in the powerhouse was
7 not a Cleaver-Brooks boiler. You will hear that the boiler in
8 the powerhouse at Bowater, the package boiler, was what we call
9 a water tube boiler, that's a different type of boiler than the
10 boiler Cleaver-Brooks sold to Bowater in 1957, you will hear
11 that that boiler, the Cleaver-Brooks boiler, was a package
12 boiler called a fire tube boiler, they're two different things.
13 Cleaver-Brooks probably would not like me to say this but it's
14 sort of like having a Ford or a Chevy, they are not the same
15 thing, they are two cars but they are not the same thing. A
16 water tube boiler and a fire tube boiler are different, and I
17 believe what you will hear is that the package boiler in the
18 powerhouse at Bowater, and you will hear this from Bowater,
19 Bowater's corporate representative, that it was a water tube
20 boiler. That's important, because we do not dispute that Mr.
21 Howe had mesothelioma, we do not dispute that mesothelioma was
22 the cause of his death, we do not dispute that mesothelioma is
23 a terrible way to die, we agree with all of those things. But
24 the fact that Cleaver-Brooks sold asbestos containing boilers
25 and Mr. Howe has mesothelioma does not equal liability in a

1 lawsuit. And so you're going to hear some evidence about
2 disease causation, and Ms. Dean touched on this and I am
3 mindful of the late hour so I'm going to go through this
4 quickly, you're going to hear testimony that there are a number
5 of steps required before asbestos can cause a disease. You
6 have to have a product that contained asbestos, Cleaver-Brooks
7 admits that it did. The product has to release asbestos
8 fibers, Cleaver-Brooks will admit that in certain circumstances
9 the asbestos containing materials that it put in its boilers
10 and then shipped off, under certain circumstances asbestos
11 fibers can be released from those. You will hear that in order
12 to cause disease those asbestos fibers have to get air born,
13 they have to get out in the air. And you will hear that
14 asbestos fibers then have to travel into the breathing zone,
15 and the breathing zone is generally considered to be the area
16 around your nose and mouth. This courtroom is big, there's a
17 lot of air in this courtroom, my breathing zone is not at the
18 exit sign, and I think you will hear some evidence about that
19 and what is a breathing zone. You will hear for asbestos to
20 cause disease it's got to get out of the product and get into
21 the breathing zone. You will hear that asbestos has to be what
22 they call respirable fibers, which means it has to be of a
23 certain size and shape, although I'm going to say that loosely
24 because this is way outside of my area of expertise, this is a
25 medical scientific issue, in order to get into your lungs and

1 cause disease, because you'll hear that the body has a lot of
2 defense mechanisms and they can -- even if you get something in
3 your lungs or get something in your mouth it doesn't
4 necessarily get to the lungs. You will hear that you have to
5 have sufficient latency, the amount of time between your
6 exposure and the development of your disease or mesothelioma to
7 be caused by asbestos, and then you actually have to have the
8 disease. And I will tell you that Cleaver-Brooks acknowledges
9 Mr. Howe has the disease, we just don't believe that the
10 evidence will show Mr. Howe meets all of the steps. And
11 specifically what we think it won't show is that Mr. Howe was
12 in a position to breath asbestos fibers that may have come out
13 of a Cleaver-Brooks' boiler, because we believe there will be
14 no evidence of Mr. Howe working with -- there was definitely
15 one at that big Bowater site at some point in time but we don't
16 believe you're going to hear any evidence about Mr. Howe
17 working on the Cleaver-Brooks boiler, a package boiler, yes,
18 not a Cleaver-Brooks boiler. And as I said before, I believe
19 Art welker is going to come and tell you that the boiler in the
20 powerhouse was not Cleaver-Brooks. You will hear about the
21 different types of asbestos fibers, and Ms. Dean touched on
22 this a little bit. I believe what you will hear in the
23 evidence is these amphibole type fibers, much more toxic, those
24 are the fibers in the thermal insulation; amosite is what's in
25 half ground, it's what's in blanket insulation, it's what's in

1 the insulation that goes on those giant field erected boilers
2 that Mr. Howe spent his career working on. I believe that what
3 you will hear is the asbestos containing materials that were in
4 the Cleaver-Brooks boiler built in 1957 and shipped to Bowater
5 were chrysotile. That's important because they have different
6 kinds -- I believe you will hear they have different kinds of
7 toxicity, different propensity to cause disease, different
8 responses within the human body. You will hear about the dose
9 response, and again, this is something that Ms. Dean touched
10 on. Dose response is how much of something it takes to cause a
11 disease or a problem, and my two examples here are -- or four
12 examples, sugar, coffee and water, and at some point even water
13 can be lethal. You've got to drink water to survive but at
14 some point it can be lethal. And I don't know mean to suggest
15 that you're going to hear evidence that says you need asbestos
16 to survive, but this is -- you'll hear evidence about dose
17 responses, you will hear illustrations about how dose response
18 works and how that relates to determining whether or not
19 asbestos causes mesothelioma and whether or not asbestos from a
20 Cleaver-Brooks product causes mesothelioma, because I believe
21 one of the things you will hear is that if you can't show
22 exposure you can't show causation. You will hear about the
23 lung capacity -- you'll hear all kinds of things about the
24 pulmonary system, at the end of this trial you will know more
25 about the pulmonary system than you ever wanted to know, you

1 will know more about asbestos than you ever wanted to know, and
2 you will have a whole new vocabulary of words that you can go
3 and impress your friends with about those things. But you will
4 hear that the lung is designed to process and clear inhaled
5 pollutants; dust, dirt, asbestos fibers, and that it's designed
6 for that. And you'll hear, I believe, that there's a threshold
7 below which an inhaled pollutant cannot cause an injury, and
8 that goes back to the question of dose. You'll hear that
9 there's a debate about what that is or if it is with respect to
10 asbestos, and you'll hear a lot of testimony about why that
11 debate is, how it's developed. But ultimately at the end of
12 the day what I believe that you'll hear is evidence about how
13 our lungs worked and how it is that the body is set up to try
14 to clear out any kind of toxin or pollutant that you might get
15 into the body. But again, I believe that every witness will
16 tell you that when they talk about disease causation of
17 mesothelioma one of the predicate requirements is exposure.
18 We're here not to decide if asbestos causes mesothelioma, but
19 if Cleaver-Brooks products were the source of asbestos for Mr.
20 Howe's mesothelioma, and I believe that there will be no
21 evidence to show that. Ms. Dean talked a little bit about
22 mesothelioma being a signal tumor and how if you have it it
23 signals the potential that someone was exposed to asbestos, and
24 you'll hear that. You'll also hear that a certain number of
25 mesotheliomas are idiopathic meaning people don't know what

1 caused them. I believe that you will hear that the best way to
2 determine whether a particular mesothelioma is caused by
3 asbestos exposure is to look at the lung tissue and see what's
4 in the lung tissue. I believe that you'll hear that even if
5 you don't have lung tissue you can sometimes determine if
6 asbestos is caused -- I'm sorry, if mesothelioma is caused by
7 exposure to asbestos by looking at other things. But none of
8 that will change the fact that this is a lawsuit and what you
9 need is proof that Cleaver-Brooks' product caused Mr. Howe to
10 have exposure to asbestos which caused his mesothelioma, and I
11 think if you listen very carefully to the evidence you will not
12 hear anybody say that Mr. Howe worked with a Cleaver-Brooks
13 boiler. I look forward to trying the case with you, I
14 appreciate your time and attention today and I will be back at
15 the end of the case.

16 THE COURT: Thank you, Ms. O'Neil. Ladies and gentlemen
17 of the jury, you have heard the opening statements of both
18 sides so now it's time for the plaintiff to put forward its
19 case. Plaintiff's first witness?

20 MS. DEAN: Yes, Your Honor, we have the testimony read-in
21 of Mr. Wayne Howe.

22 THE COURT: Yes.

23 MS. O'NEIL: I thought we needed to approach, I was wrong,
24 Mr. Pugh has corrected me.

25 THE COURT: What's that?

1 MS. O'NEIL: I said I thought we needed to approach, but I
2 was incorrect, Mr. Pugh has corrected me.

3 THE COURT: Yes. Ladies and gentlemen, you're going to
4 hear from now what is called a deposition, and this is a sworn
5 statement given under oath and taken down by a court reporter.
6 Sometimes if a witness cannot be available we will use this
7 form of putting testimony in front of you and that is what is
8 going to be done now. And this is the deposition of Mr. Howe,
9 is it not?

10 MS. DEAN: Yes, Your Honor.

11 THE COURT: And there are -- normally you don't hear from
12 witnesses unless both sides cross examine the witness, there
13 are exceptions to that, and one of them is if the witness is
14 unavailable as Mr. Howe is, and in that case you may be able to
15 hear a sworn statement of this nature and that's what you're
16 going to hear now.

17 MS. DEAN: Is it okay for Mr. Travis to --

18 THE COURT: Yes, please.

19 MR. HOLDER: At this time the plaintiffs would call Wayne
20 Howe.

21 (At this time the deposition, of Wayne Howe was
22 Taken.)

23 THE COURT: All right. That concludes the testimony of
24 Mr. Howe?

25 MS. DEAN: Yes, Your Honor.

1 THE COURT: All right. Now where are we? It's 5:00, I'm
2 asking whether you're going to put forward another witness at
3 this time?

4 MS. DEAN: We had not intended to, Your Honor.

5 THE COURT: Very good. Ladies and gentlemen of the jury,
6 that is going to conclude our first day about this case, let's
7 talk about when to expect you tomorrow. I like to start court
8 at 9:00 or 9:30 but I am sensitive to what your home needs may
9 be. If we start at 9:00, will that be too early for y'all? It
10 looks like 9:00 would suit you, very good. Please be in your
11 jury room a little before nine and we'll try to get started as
12 close to the time as we possibly can. Court has concluded for
13 the day, remember my admonitions and particularly with regard
14 to any research, getting on social media, things of that nature
15 and please don't talk about the case with each other or with
16 anyone else. You can tell them you're on jury duty but don't
17 get into the details of the case, please. Thank you and I'll
18 see you tomorrow morning.

19 (The jury left the courtroom.)

20 THE COURT: All right, Counsel. Now, you had some things
21 you wanted to take up with me so let's have at it. Who will
22 commence? Are we referring to a book that yours truly has got
23 or --

24 MS. O'NEIL: They are motions in limine and we put them
25 together for us, I would have to confess I don't think we put

1 it all together the same way for you, I've got another copy in
2 the car.

3 THE COURT: No, that's okay, I'll try to do the best I
4 can.

5 MR. PUGH: I'll try to be quick because I know we're at
6 the 5:00 hour and I've been told how these have been dealt with
7 previously so I just will make this quick.

8 THE COURT: Thank you, sir.

9 MR. PUGH: Your Honor, we filed an omnibus motion in
10 limine, and one of the things that we talked about was the
11 plaintiffs each and every exposure theory. In fact, we
12 filed -- I believe we filed a separate motion in limine on that
13 as well. I have been advised that that is not news to Your
14 Honor and you are well aware of how those experts who will
15 testify in this case will testify, and I would simply say we
16 would stand on the briefs that we filed, but I understand Your
17 Honor's ruling has been consistent that experts are experts and
18 they can talk about what they talk about. And the cumulative
19 exposure is one thing, this single fiber theory is something
20 different and I don't think we're going to hear any of that in
21 this case.

22 THE COURT: Yes, Mr. Pugh. You've got it exactly right.
23 This is the battle of the experts, of course, and some experts
24 on the plaintiffs' side have a different view of how much
25 exposure and how much dose or potential dose it takes to result

1 in mesothelioma, and most of the testimony I've heard in all of
2 these cases it's really not a single fiber of exposure but it's
3 a cumulative exposure, but there is a departure between the two
4 sides as to how much exposure is necessary to get beyond
5 certain levels and put a worker at risk of contracting
6 mesothelioma, and I believe that all of what will be offered by
7 you two sides from what I can tell will be a difference of
8 opinion as to how much cumulative exposure it takes. But I do
9 not believe that you will be forced to deal with an expert that
10 says a single fiber and I wouldn't allow that if that's what we
11 faced, so I think my ruling will be consistent with what I have
12 done in the other cases.

13 MR. PUGH: Understood, Your Honor. And Your Honor has
14 already dealt with a couple of these earlier today, but just to
15 be clear that the parties will not be publishing pleadings to
16 the jury, and the plaintiff not rattling off who was sued and
17 who is no longer here, those types of things, I believe we're
18 all clear on that. Your Honor has already dealt with this
19 reptile business last Friday and that's crystal clear, I
20 believe.

21 THE COURT: Yes. I fortunately have not heard anyone get
22 into this business of the reptile theory or any appeal that
23 would be an appeal to passion and prejudice or to the fears
24 that people have and I wouldn't permit such, but I believe
25 you've got lawyers that are far away from that. Publication by

1 a plaintiff's lawyer apparently sent the whole defense bar into
2 a tail spin about the reptile theory so I wouldn't allow such
3 and don't believe you will face it.

4 MR. PUGH: Correct. Your Honor, I believe we have worked
5 amongst ourselves a couple of issues, that being with regard to
6 a potential for set off. My understanding is that the
7 plaintiffs would provide that information after the verdict if
8 necessary.

9 THE COURT: Yes, sir, if necessary. If there is a verdict
10 for the plaintiff and only if there's a verdict for the
11 plaintiff, then we would face the issue of setoff and I would
12 handle that at that time. That's not for the jury to handle,
13 that's for us to handle, and at that time we would look at
14 other parties to the proceedings and other receipts by
15 plaintiff and so forth.

16 MR. PUGH: Understood. Another issue I believe we've got
17 worked out at least tapered amongst ourselves is if and when we
18 move to toward the punitive phase the issue of net worth and
19 what we would provide to the plaintiffs and how that would be
20 dealt with, I think the only wrinkle is what about this parent
21 company business.

22 MS. MCVEY: Well, I think the bigger issue at least for us
23 at this point is we would like to have net worth information
24 before the punitive phase arrives, we're not keeping the jury
25 waiting. Of course, it wouldn't come in unless the jury found

1 in our favor, but what we wouldn't want to do is be waiting to
2 get some net worth information, I know we touched on that a
3 bit.

4 THE COURT: We can't predict how long the case will go but
5 I think you need to tell the clients and when we get in a zone
6 where we feel like we're a day or two away from having the jury
7 get the case I would want you to produce to them some net worth
8 information so that we can get a verdict and we don't -- you
9 have to get a verdict and then the jury -- I have a special
10 verdict form that requires them to find separately the issue of
11 willful, reckless or wanton conduct, and if and only if they
12 find that we would then proceed. But I would want them to have
13 some net worth information before that time and I will leave it
14 for you two to work out when that time is, but I don't want to
15 have to wait on them.

16 MR. PUGH: My instruction to my client will be that Your
17 Honor doesn't want to wait on anything, it shouldn't have to
18 since we have a jury in the box, so I understand perfectly what
19 you're telling me.

20 THE COURT: Very good.

21 MR. PUGH: We filed another motion in limine, Your Honor,
22 which was to preclude evidence or introduction of other
23 Cleaver-Brooks' products that are not at issue in this case. I
24 don't know that any of that was really in openings and we
25 deferred that to --

1 THE COURT: I think what I have said about the other
2 Cleaver-Brooks products as I've said about other products and
3 other defendants is that on the issue of knowledge and
4 foreseeability their posture with respect to all of their
5 product lines is in play to talk about what they know and what
6 they did with that knowledge, but I think some discretion needs
7 to be used in how to go there. Because this is not about
8 saying they're terrible and bad because they make so many
9 different products that have asbestos in them, it's more a
10 question of the timeline and the knowledge than anything else.
11 So I want plaintiffs to be circumspect about how they handle
12 that and if they get into that and focus their concentration on
13 time rather than volume if that's a way to kind of make it
14 clear. I think the plaintiffs understand well where I go with
15 that, Mr. Pugh.

16 MR. PUGH: Understood, Your Honor, thank you. The other
17 thing I think that we've discussed, I know we've discussed it,
18 is this business about the diseases other than meso, I'm not
19 sure whether that's really a big issue in the case.

20 MS. MCVEY: I think when it becomes a big issue, and
21 Judge, you've decided this many times when we talk about notice
22 or foreseeability, our argument, of course, is that the
23 defendants don't have to foresee the exact harm of
24 mesothelioma, just that exposure to their asbestos products
25 could result in damage or disease to the plaintiff.

1 MR. PUGH: And my recollection or at least what I've read
2 in the prior proceedings or similar proceedings with Your Honor
3 is that good for the goose and gander theory on that and I
4 appreciate that and I understand that.

5 THE COURT: And, you know, there are other cases that you
6 could show and activities which he was engaged in, likely those
7 are working on brakes and cars and so forth, that's goose and
8 the gander in my view.

9 MR. PUGH: Understood.

10 THE COURT: I think there's plenty of technical and
11 scientific evidence that will come forth from witnesses for
12 both sides that would discuss how much of a role other
13 activities had in this particular situation but I think it's
14 kind of fair game for both sides.

15 MR. PUGH: I think I only have two more, Your Honor, and
16 that is this business about post-sale evidence. The issue
17 of -- the evidence in this case is that Cleaver-Brooks sold
18 them some time in 1957 or so, certainly there is at least some
19 evidence being put forth by the plaintiffs of parts or
20 additional components perhaps being sold by my client to
21 Bowater or other job sites of Mr. Howe. It's my understanding
22 that plaintiffs may want to use some of that evidence,
23 causation and notice perhaps with regard to the one or more of
24 their experts and we talked about deferring that until that
25 point until we see kind of what that is, I just wanted you to

1 be aware.

2 THE COURT: Yeah. Generally speaking if there's hard
3 evidence that Cleaver-Brooks supplied parts or gaskets or
4 packing or otherwise to the areas that he worked in at the
5 times he worked in them that would be fair game in my opinion.
6 But I'm like you, let's see what develops.

7 MS. MCVEY: And that's fine. I think you started off with
8 there's no post-sale duty to warn.

9 MR. PUGH: I didn't say that, no.

10 MS. MCVEY: Okay. There is evidence of replacement parts
11 being sold but we can address it as they came.

12 MR. PUGH: I take that position but I didn't momentarily
13 or previously.

14 MS. MCVEY: Sorry.

15 MR. PUGH: No, that's fine. Your Honor, I believe that
16 there may be a couple of gentlemen who may testify in this case
17 either live or by deposition who themselves had lawsuits,
18 asbestos related lawsuits against multiple defendants including
19 Cleaver-Brooks, and I believe at least if not two of those were
20 resolved and obviously we wouldn't want any of that coming in
21 in front of the jury.

22 THE COURT: I have faced that many times before and we've
23 been very careful to restrict the use of their testimony in
24 such a way that they don't get into their own personal suits
25 and things of that nature, their own illnesses so forth and so

1 on.

2 MR. PUGH: And I only raise that for all of us, because
3 it's my understanding that at least one of these fellows is a
4 coworker and plaintiff's counsel wouldn't have any control over
5 them anymore than I would, so when you put somebody up there
6 you never know what they're going to say.

7 THE COURT: Exactly. But I think you will find counsel
8 will make the effort to be sure that we don't have any of that
9 creeping in. The most traumatic example was a very lengthy
10 deposition of Mr. Taylor who then was involved in a big suit
11 that was settled right before trial before me. And we may -- I
12 think it was probably evident to the jury in that seconds of
13 his testimony being played he was becoming ill and they could
14 make their own conclusions, but we made no reference to his
15 situation or his suit.

16 MR. PUGH: I understand. That's all I have.

17 THE COURT: Very good. Ms. McVey?

18 MS. MCVEY: Your Honor, I think we are good. The only
19 one -- and I don't know that it will come up with any of our
20 experts, but in the past sometimes defendants want to bring in
21 where other courts have kept out expert witnesses for a variety
22 of reasons in other courts.

23 THE COURT: Yes. I don't allow trying to impeach the
24 witness by saying whether they were allowed to testify in
25 another case or not allowed to testify, nor do I allow them

1 to -- other than general testimony about their experience and
2 their past experience and the fact that they're consultants and
3 they're hired and so forth, that, of course, is okay. But
4 trying to either tear them down or pump them up by saying, "Oh,
5 my testimony was admitted by this plaintiff's judge and that
6 bar, his testimony wasn't admitted therefore he's not worthy of
7 belief," I don't allow that.

8 MS. MCVEY: And the last one, and I think we have agreed,
9 I think Ms. O'Neil and I talked about it, but it's just the
10 idea of Mr. Howe's smoking history.

11 THE COURT: His smoking history?

12 MS. MCVEY: Yes, ma'am.

13 THE COURT: Yeah.

14 MS. MCVEY: That it could come in for evidence of maybe
15 about his life expectancy but not that smoking causes
16 mesothelioma, or that if Mr. Howe had followed -- since he
17 didn't follow the warnings on smoking he wouldn't follow the
18 warnings --

19 MS. O'NEIL: I'm not doing that, Your Honor.

20 THE COURT: Your opposing counsel is not going to take it
21 that far, they want it for the basic medical history mostly in
22 terms of life expectancy as I understand it. But they are not
23 disputing that mesothelioma can only be caused by exposure to
24 asbestos. And their witnesses, I know who their witnesses are,
25 they'll be saying that just as they always do, but they won't

1 raise any issue about those packet warnings I don't believe.

2 MS. O'NEIL: No, Your Honor, we are not going to do that.

3 THE COURT: Anything else, Ms. McVey, Ms. Dean?

4 MS. DEAN: I just have a scheduling issue if this is the
5 appropriate time. I would like counsel to know that we're
6 bring Dr. Brody tomorrow, we're going to have some documents
7 including their documents, medical records and social security
8 records that we'll make sure to exchange probably late today
9 but today that we'll likely publish. We would also like to
10 show the deposition of Mr. Bogan, which we don't think there
11 are any objections to that, tomorrow.

12 THE COURT: Here is what I would like you to do with the
13 depositions and if you've got some -- about the documents.
14 Jamie Rutkoski is very good about working with you on that and
15 she did a great job in Stewart very recently working with
16 counsel to see how we will proceed. If I need to make rulings,
17 of course, I will, and we certainly want all of that taken care
18 of so that the depositions themselves may run quite smoothly as
19 far as the jury is concerned.

20 MS. DEAN: If we have objections either to that deposition
21 or to exhibits, do you want us here at any point before 9:00 to
22 discuss those?

23 THE COURT: Yes. I generally try to arrive here sometime
24 between 8:00 and 8:30, so let's see if we can't plan on meeting
25 early if we've got something that needs to be clarified about

1 these objections, it doesn't sound like there's a whole lot.

2 MS. DEAN: If we meet among each other and agree on a time
3 to show up between 8:00 and 8:30 based on how many objections
4 we think we have, is that okay with the Court?

5 THE COURT: Yeah. I'll try -- here is the way I will
6 arrange myself tomorrow, I'll just make it a point to be here
7 at 8:00 and then you can -- if I don't have anything to do I
8 can find other things to occupy my time.

9 MR. PUGH: Can I deal with one thing for Johnny Bogan? It
10 will take 30 seconds.

11 THE COURT: Yes, sir.

12 MR. PUGH: Johnny Bogan was disclosed by the plaintiffs I
13 believe some time last week. We had asked for his deposition,
14 a copy of the transcript and we were told that it existed, I
15 received a copy late last night, so we would object to Mr.
16 Bogan's testimony. Now, in the interest of fair and full
17 disclosure to Your Honor that deposition was taken in 2001 and
18 someone who used to be in my firm was apparently there so I
19 believe that will factor into Your Honor's ruling but I wanted
20 to at least put that on the record.

21 THE COURT: Well, it's in the record and I will allow the
22 deposition and you all will work with each other to see what
23 needs to be dealt with on it, but your position is respected
24 and is on the record.

25 MR. PUGH: Thank you, Your Honor.

1 MS. DEAN: In order to maximized your time, we had three
2 other plans tomorrow all that became moot with resolutions in
3 the last two days. I'm concerned that we might get done early,
4 and my idea to fix that time given coworker and expert
5 restraints, because we even canceled two experts to make things
6 quicker is to maybe play the videotape of their expert out of
7 turn if we can make that work. And we first wanted to see if
8 we did that either now or in the morning at least deal with two
9 kind of large class group of objections that we already know
10 are on the table and get a ruling on it and that will be
11 something that everyone --

12 MS. O'NEIL: I can't agree with that, Your Honor, because
13 depending on happens in the plaintiffs case I might not call
14 that expert.

15 THE COURT: I understand. She doesn't have to agree to it
16 but --

17 MS. O'NEIL: I want to move things forward --

18 THE COURT: Ms. O'Neil, there's no need for apology, if
19 you've got something you don't agree with you don't have to
20 agree so that's all right. But Ms. Dean, now I don't want us
21 to get through midday or anything without anything to do,
22 that's not fair to the jury. What are you talking about in
23 terms of how long you think you've got a case for tomorrow?

24 MS. DEAN: I think without Dr. Oury we're looking at
25 midafternoon, but I may call Dr. Oury myself.

1 THE COURT: All right. Well, that's good. Just don't
2 leave me high and dry, but Ms. McVey is rolling her eyes at the
3 notion --

4 MS. MCVEY: No, no, no, that was no rolling.

5 THE COURT: No, I don't think you were rolling your eyes
6 at my ruling, rolling your eyes that she might call Dr. Oury.

7 MS. MCVEY: No. Let the record reflect there was no eye
8 rolling.

9 MS. O'NEIL: We would definitely need to discuss that with
10 Your Honor. I confess, I do not know the law in South Carolina
11 but I will look it up, but I know in many jurisdictions there's
12 case law that says the opposing party cannot call the opposing
13 expert adversely.

14 THE COURT: I haven't explored that in a long time so I
15 really don't know the answer to it, so now that everyone knows
16 that that's a possibility I know you will research it well.

17 MR. PUGH: That makes me feel better because Ms. O'Neil
18 looked to me for that answer and I had no idea.

19 (Break in proceedings.)

20 (Court recessed for the day and resumed at 9:00 a.m.
21 On Tuesday, March 13, 2018.)

22 THE COURT: Let me take up one thing about the jury that
23 has come to me and see what you think. This is Ms. Giles who
24 is, I think, juror number 82. Ms. Giles is a young mother and
25 she has her two year old child, she could have asked for an

1 exemption, of course, in that situation, but she has a two year
 2 old child in daycare in Lake wylie which is quite a distance
 3 from here, and she really needs to leave -- she almost was late
 4 picking her child up yesterday and they got out around 5:00,
 5 but she really needs to leave here at 4:30. I'm not going to
 6 be able to guarantee to meet that, I hate to lose her but I'm
 7 fearful that I would disadvantage her and I'm not going -- I
 8 lived with that with my girls all of my trial life scrambling
 9 around, both Bill and myself and both being in trials and it
 10 was really the devil and now I've got my grandchild that I
 11 often jump into the breach if my daughter and her husband get
 12 stuck, so I understand how that is. And I am going to --
 13 unless you all have some other reason that I should consider I
 14 am going to allow her to be excused and seat the alternate,
 15 that will leave us with two alternates. Yes, ma'am?

16 MS. O'NEIL: The defense has no objection. I was just
 17 looking at the jurors and talking to Mr. Pugh, I apologize.

18 THE COURT: Sure. Ms. Dean?

19 MS. DEAN: Your Honor, I think today we were going to tell
 20 you that we did work, we took Ms. O'Neil's idea of trying to
 21 get the Bowater video ready, we have that, I still suspect
 22 we're going to be done by 4:00, and so --

23 THE COURT: So we could hit the target today but the
 24 question is the rest of the week.

25 MS. DEAN: Given the number of witnesses, I have no

1 concern about completing our case absent their corporate
2 representative who can't come until the next week, even with
3 that 4:30 time limit. I've lost a jury because of not having
4 alternates, we've already lost one, it would be my preference
5 to make sure we hit the nail on the head at 4:30 than to
6 lose --

7 THE COURT: I understand. Ask the bailiffs to bring in
8 Ms. Giles. Thank you, sir.

9 (Juror Giles entered the courtroom.)

10 THE COURT: Good morning, Ms. Giles, you could just have
11 a seat right there. I have explained to the parties your
12 dilemma and the fact that I'm completely on your side about
13 this, I'm not going to have you have a problem. They will be
14 concluded today at 4:00, we don't know what the rest of the
15 week will bring but we suspect that we may be able to conclude
16 earlier than I normally adjourn court. Stay with us today
17 let's see how it develops, and if we finally run into a
18 schedule -- because I'll get them to tell them what we are
19 going to do before the day begins, if we run into something
20 that's a problem then I'll let you go. But we want to keep you
21 today because we know we can guarantee you you will be out in
22 plenty of time and get up to Lake Wylie?

23 THE JUROR: Okay.

24 THE COURT: Very good, thank you, ma'am.

25 (The jury left the courtroom.)

1 THE COURT: I don't understand this note, bring in juror
2 181.
3 (Juror Plueger entered the courtroom.)
4 THE COURT: This is Ms. Plueger, isn't it?
5 THE JUROR: Yes, ma'am.
6 THE COURT: Ms. Plueger writes a note that says, "I'm a
7 stay at home mom today and there's a five hour window my
8 husband cannot be there, they get off the bus at 2:20." Are
9 you saying you need to leave by 2:20?
10 THE JUROR: No. I'm concerned like if a late time like
11 leaving them alone like if we're getting out at 6:00 or
12 whatever.
13 THE COURT: Today we are going to be done at 4:00.
14 THE JUROR: Okay.
15 THE COURT: Is that okay, can you handle that?
16 THE JUROR: They're fine by themselves for a couple of
17 hours.
18 THE COURT: Okay, very good. I assure you we'll be out by
19 4:00.
20 THE JUROR: Okay. But is there other days when they're
21 going to be --
22 THE COURT: I don't know. Ms. Giles is having some child
23 care issues too and I'm just going to have to let you know day
24 by day, but right now hang with me today I know I can get you
25 out of here by 4:00.

1 THE JUROR: Okay. Sounds great.

2 (The juror left the courtroom.)

3 THE COURT: Okay. So far so good. Let me put on the
4 record a couple of things and then we'll see what you all want
5 to raise. There is a proposed instruction that the two of
6 you -- two sides have agreed upon regarding the testimony of
7 Mr. Bogan. I will read this as you all have written it so I
8 think that ought to take care of Mr. Bogan. Yes, sir, Mr.
9 Pugh?

10 MR. PUGH: Your Honor, I have looked at what Ms. Dean
11 wrote, that is fine, I would just say subject to our objections
12 to the entire Bogan depositions.

13 THE COURT: Exactly, now you put upon the record and I
14 will just make sure to reiterate today that it is preserved.
15 Your objection was that it was an extremely late disclosure and
16 you were honest enough to say that you kind of knew about Mr.
17 Bogan but you felt it was not in keeping at all with what I had
18 ruled about when witnesses have to be disclosed, you are right
19 about that, but I have decided all things considered to
20 overrule the objection and allow Mr. Bogan to testify and your
21 objection is well taken and is fully protected on the record.

22 MR. PUGH: The only other objection, Your Honor, very
23 quickly is I was taught early on like many things in life,
24 relevance is in the eye of the beholding. Mr. Bogan's
25 testimony is entirely, at least as to what they want to put in,

1 as to Mr. Sizemore. It has no relevance, didn't even know Mr.
2 Howe, never references to Mr. Howe, never references Mr. Howe's
3 work, never references work on a Cleaver-Brooks boiler at
4 Bowater particularly in the powerhouse. So we would further
5 object that not only was it untimely but I think it's confusing
6 the issues, it's a real relevance issue here because that jury
7 is going to be sitting there saying, "Sizemore, Sizemore, what
8 does this have to do with Howe?"

9 THE COURT: Well, we've got some other Sizemore issues to
10 deal with, I won't completely abandon ship on you about
11 relevance and that is going to continue to be an issue as I
12 looked at the testimony. So let me just kind of say
13 preliminarily I won't to throw it out right now because of
14 relevancy but if things develop as that testimony comes in that
15 are problematic then I will deal with it.

16 MR. PUGH: Understood, Your Honor. Would you like to hear
17 from me on the other deposition which is Mr. Crites?

18 THE COURT: I've got this depositions here -- by the way,
19 you tagged two things that you were concerned about and one of
20 them is on page 137 Cleaver-Brooks at Bowaters concerning Mr.
21 Sizemore and he says he was not at Bowater, and another is a
22 Babcock and Wilcox boiler and they look alike and we could get
23 them mixed up, I'm not going to exclude either of those things.
24 So if Bogan comes in with all of the confusion there already is
25 about Sizemore I'm not going to start cherry picking for either

1 side on what comes in or what doesn't come in.

2 MS. DEAN: Your Honor, may I --

3 THE COURT: Ms. Dean, I don't want to take all day on this
4 but certainly if you want to get something on the record I will
5 let you.

6 MS. DEAN: First while Cleaver-Brooks' counsel
7 acknowledged that they knew about the deposition because they
8 had a lawyer there, I need it to be on the record, it wasn't
9 that a lawyer from the firm was there, it was that
10 Cleaver-Brooks had a representative there.

11 THE COURT: They're not making an objection on that basis.

12 MS. DEAN: The second is the first objection, and I think
13 this is proven by Mr. Pugh's comments, the only reason this
14 deposition is relevant is because he identifies Cleaver-Brooks'
15 boiler at Bowater. They have designated parts about a Michelin
16 plant which no one ever worked at in this case and I think
17 there's a real 403 and 401 issue. And in the last ones we did
18 not object to any of their designations --

19 THE COURT: They designated that thing about the Michelin
20 plant because they wanted to say that Babcock and Wilson (sic)
21 boilers can be confused with other type of boilers, that's what
22 they want it there for and I am going to permit that.

23 MS. DEAN: And then the final is while both of us have the
24 reference that Mr. Sizemore contacts someone, that's why I
25 think that instruction is helpful, and the time it referenced

1 Mr. Sizemore's work and his exposures that had nothing to do
2 with the boiler we took out, we think their last two lines just
3 referencing whether Calvin Sizemore worked with Cleaver-Brooks'
4 boiler is not only irrelevant but really has a place for
5 confusion. They still get in the testimony that he confused
6 the boilers but whether Sizemore worked on them or not is not
7 an issue.

8 THE COURT: Well, I understand that and I have overruled
9 that, if I let in Bogan I'm letting it all in.

10 MR. PUGH: Thank you, Your Honor.

11 THE COURT: Now, we come to the expert, let me deal with
12 that right now. McGee against Bruce Hospital and the Highway
13 Department against ESI Investments both stand for the
14 proposition that somebody else's expert can be used in your
15 case and I'm going to rely on that. I'm going to allow those
16 experts to be used.

17 MS. O'NEIL: May I respond briefly?

18 THE COURT: Yes, ma'am.

19 MS. O'NEIL: I understand your ruling but -- so I think
20 both of those cases are distinguishable on the grounds that in
21 both of those cases the party retaining the expert had
22 indicated that they were going to call the expert in the case,
23 we have indicated on the record we're not sure if we're going
24 to call an expert in the case. In the McGee case the
25 plaintiffs had actually -- I'm sorry, the party who wanted to

1 call the expert, I don't recall if it was plaintiffs or
2 defendant, had actually disclosed that expert as a potential
3 witness in their pretrial, but I also would ask the Court to
4 look at the question under rule 32 -- got to put my glasses
5 on -- C which says, "The introduction in the evidence of the
6 deposition or any part thereof for any purpose other than that
7 for contradicting or impeaching the deponent makes the deponent
8 the witness of the party introducing the deposition. So if Ms.
9 Dean is going to call or going to play Dr. Oury's deposition in
10 her case I would ask the that the Court exercise your
11 discretion to do the following: One, she needs to state that
12 she's calling him as her witness. Two, she has to play her
13 portion of the deposition because I can still decide not to
14 play my part, I don't believe that she's in a position to force
15 me to put on the examination of my own witness, my own expert
16 in her case. I can chose to play my direct in my case-in-chief
17 or not.

18 THE COURT: And number one, I'm not going to deal with
19 this issue of forcing you to do one thing or another. She's
20 going to put up what she wants to put up and you decide whether
21 or not you want to put up what you want to put up. With regard
22 to whether there's any implications in that Rule 32 provision
23 about how she's bound, let me take a look at it, I don't know
24 about that but it will be awhile before Oury's gets put up I
25 would suspect.

1 MS. O'NEIL: So just on the point about what she can put
2 up, Your Honor, for clarification. I had indicated if I called
3 Dr. Oury in my case-in-chief it is my present intention without
4 having seen all of her case to put in all of the direct. Now,
5 when I see her whole case in chief I may change my mind, and I
6 believe it is highly prejudicial to my client to require in her
7 case-in-chief before I have seen her whole case to allow her to
8 put in all of my examination of my witness, and so I think she
9 can only put in -- she can designate from her examination but
10 not mine.

11 THE COURT: That's not what either McGee or Highway
12 Department against ESI says so I'll overrule that objection,
13 you are fully protected about it. But this business how
14 plaintiff may be bound by putting up your expert, I'm going to
15 take a look that, I am not going to reject that out of hand,
16 I'm going to take a look at it. And Ms. McVey, you don't need
17 to argue about it right now, let me take a look at it first
18 because I really haven't studied that issue, it's an
19 interesting point and I'm going to take a look at it before I
20 do anything.

21 MS. O'NEIL: And let me just give you the followup to
22 that. As I read the rule my request would be if Your Honor
23 believes that the party is taking over the witness and I think
24 that there is a question about -- let me withdraw that, that
25 doesn't make sense and let me sit down.

1 THE COURT: Apparently there's some contention by Mr.
2 Kennaday that he needs to get involved in this thing because of
3 one of the witnesses in this is going to be used. Mr.
4 Kennaday, let me just say that I don't think you have any
5 rights with great respect to enter this case and deal with
6 anything as regards your objections to the witness as you're
7 going to outline them in your case. But let me just say this,
8 I have both of those cases, you are completely protected. We
9 will start with ground zero when your case comes up and you
10 will not be bound by any rulings that have been made with
11 respect to this case, you and your client are completely
12 protected on that.

13 MR. KENNADAY: Thank you, Your Honor. I would ask that
14 what you just stated applies to any future case involving
15 Boater because it's a statement of the incorporation, it's
16 beyond the basis --

17 THE COURT: Absolutely. That's just kind of -- to me
18 everything sits in its own box and is dealt with in the terms
19 of its own objections, that may change on relevancy and the
20 state of the law about what they're saying and a whole host of
21 other things that will come about as you represent your client
22 in your case and you are not going to be precluded by anything
23 that's been done even by me in some other case, we start from
24 scratch in your case.

25 MR. KENNADAY: Thank you, Your Honor, for making a record

1 on that.

2 MR. PUGH: Judge, just to be clear I brought that and I'm
3 sorry but I felt like I am my brother's keeper and --

4 THE COURT: Yeah. He has every reason to want to clarify
5 for this case and all of the other cases in which he represents
6 Bowater so I don't mind doing that at all.

7 MS. O'NEIL: We have one more issued on Crites. Mr.
8 Crites was not disclosed by the --

9 THE COURT: This is --

10 MS. O'NEIL: Mr. Crites --

11 THE COURT: This was the witness of the other case?

12 MS. O'NEIL: That's correct. He was not disclosed as a
13 potential witness they were going to call and we are not
14 raising that as a reason not to use, I'm raising it because we
15 didn't qualify the jury as to whether they know him.

16 THE COURT: That's a good point, that should be done now.
17 Hand up his full name to me and who he is, Ms. McVey, and I
18 will be sure that there's no dilemma there.

19 MS. DEAN: I believe that's also true for a second
20 representative of Bowater that we designated by class, not
21 name, and so if we're going to do that it may make sense to do
22 it for Art Welker.

23 MS. O'NEIL: He was on my list.

24 THE COURT: I asked about Mr. Welker, I remember that.
25 Just hand up the name of this other individual and I will ask

1 the jury about it. Now, is everything that needs to be done
2 preliminarily accomplished?

3 MS. O'NEIL: One other issue.

4 THE COURT: Okay. Yes, Ms. O'Neil?

5 MS. O'NEIL: Ms. Dean -- well, two other issues. Ms. Dean
6 has indicated she wants to publish to the jury some
7 interrogatory responses of Cleaver-Brooks from a Texas case in
8 1998 and they're not verified. So I wasn't a Cleaver-Brooks
9 lawyer in 1998, I haven't represented them in Texas, I don't
10 know they have been verified, but absent verification of
11 interrogatories we would object.

12 THE COURT: Let me ask you this: How did she obtain
13 those? Was that some discovery that you all sent her or she
14 obtain from some other source?

15 MS. O'NEIL: She obtained it from some other source, she
16 did not get it from us. I am guessing because it was in Texas
17 her prior law firm might have had it but I do not know.

18 THE COURT: Which is perfectly okay, there's nothing wrong
19 about that, but my stance about these -- all of these documents
20 go swirling around that were in other cases, if the parties
21 have exchanged them they're on a different footing, and if they
22 are sworn they are on a different footing. But I will not
23 allow it if -- I will not allow an unsworn interrogatory from a
24 1998 case to be introduced here.

25 MS. DEAN: Your Honor, we have two forms of evidence that

1 this was produced in litigation, both the cover letter from the
2 counsel that these are the supplemental responses to
3 plaintiff's set of interrogatories and signature of counsel, we
4 also have the signature page from Cleaver-Brooks. So we
5 believe we clearly have -- this is an admission by a party --

6 THE COURT: The witness himself or herself has got to be
7 given the oath before -- and that's kind of my baseline --
8 before that kind of material is introduced unless it has been
9 exchanged between the parties in discovery in this case.

10 MS. DEAN: We have the exchange between the parties but
11 not in this case. We can prove that it was exchanged --

12 THE COURT: In the other case, I get that.

13 MS. DEAN: That's what we have.

14 THE COURT: Well, my present inclination is no on that so
15 I will not allow that to be used.

16 MS. O'NEIL: Thank you, Your Honor.

17 MR. PUGH: Last matter, Judge, five seconds. We filed a
18 motion in limine on February 23 of 2018 with regard to these
19 conclusions by governmental regulatory agencies,
20 non-governmental organizations, we understand Your Honor is
21 going to allow the plaintiffs to put in evidence --

22 THE COURT: Yeah. All of this trade material and
23 governmental material is coming in, and I know you object and
24 it's on the record that I've overruled your objection. And I
25 do it because of the big factor in these types of tort cases of

1 this type, which is knowledge and warnings or the lack thereof
2 and that is why I allow this material to come in. And I
3 understand you think that is an incorrect ruling on my part and
4 it may be but I am allowing it.

5 MR. PUGH: Understood, Your Honor, and we're ready to go.

6 THE COURT: Very good.

7 MS. O'NEIL: I have one other question, Your Honor, this
8 is not about all of this. Is it okay if I put my phone on the
9 table so I can keep an eye on what's going on with the other
10 people --

11 THE COURT: Yes. As long as it doesn't sound off I have
12 no dilemmas about that.

13 MS. O'NEIL: Then I can perhaps be more responsive on
14 breaks.

15 THE COURT: I'm not troubled by that at all.

16 MS. DEAN: Two quick matters. One is Dr. Brody should be
17 here I'm told at about 10:00, our request is to start doing
18 documents until the moment he gets here, but then to be able to
19 take a five minute break to get him on the stand.

20 THE COURT: You know I'll always allow that, there is no
21 dilemmas there.

22 (The jury returned to the courtroom.)

23 THE COURT: Good morning. welcome, ladies and gentlemen
24 of the jury, I hope you had a good evening on this very chilly
25 morning as we begin this day. Let me give you this kind of

1 thought about where we are. I believe that we will be
2 concluding this day's activity somewhere in the area of 4:00 so
3 we'll try to maximize the time that we have here but, of
4 course, I'll allow you the breaks and things like that, no one
5 should suffer from discomfort. And if there's a comfort issue
6 and we're still proceeding sometimes I get so wrapped up in the
7 testimony I don't look at you but my clerk keeps an eye on you
8 all of the time, just kind of raise your hand like that and we
9 can take a break when you need it. I noticed that the juror
10 who is sitting next to in between Ms. Giles and Ms. Plueger are
11 you comfortable climbing up that height to get to your seat?

12 THE JUROR: Probably not today.

13 THE COURT: Well, let's be sure that when we have a break
14 that this juror is allowed to sit right there next to the
15 foreman so you will be comfortable, I don't want you to have to
16 climb up and down if you don't need to.

17 THE JUROR: Okay, thank you.

18 THE COURT: Yes, ma'am. Ms. Dean will begin with her next
19 witness. Ms. Dean?

20 MS. DEAN: Your Honor, what we would like to do is call
21 Johnny Bogan and read the deposition testimony of both parties
22 at this time.

23 THE COURT: Very good. And ladies and gentlemen of the
24 jury, I have two things to do. This is a deposition of a
25 witness who has passed and his sworn deposition will be

1 presented to you now. But before we start that there is a
2 witness that has been added to the list of witnesses and I just
3 need to check and be sure if any of you know this witness, if
4 so raise your hand. The gentleman is William C-r-i-t-e-s, and
5 he was an official at Bowater. Do any of you know Mr. Crites?
6 Very good. Now, here is your instructions with regard to Mr.
7 Johnny Bogan whose testimony you are about to hear by way of
8 deposition. You are about to have read to you the sworn
9 testimony of Johnny Reed Bogan, he is unavailable because he
10 passed away. You are to give his testimony the same
11 consideration as a witness who is testifying live in the
12 courtroom. The testimony references work done by Mr. Bogan
13 with a Mr. Sizemore. Mr. Sizemore is not a witness in this
14 case but they worked together and the reference is only made
15 for context when Mr. Bogan was questioned about his work at
16 Bowater, so it's a simply a reference point but Mr. Sizemore is
17 not a witness in this case. Thank you. Ms. Dean, you may
18 proceed.

19 MS. DEAN: Your Honor, we would like to call Mr. Bogan,
20 and again Mr. Travis is going to wear a different hat and if
21 it's okay take the stand.

22 THE COURT: Very good. Come forward, sir.

23 (Portions of Johnny Bogan's testimony were read.)

24 MS. DEAN: Your Honor, that completes the testimony of Mr.
25 Bogan.

1 THE COURT: All right. Ms. Dean, call your next witness.

2 MS. DEAN: Your Honor, we have an expert coming probably
3 in a half hour, in between we would like to publish some
4 documents and records for the jury.

5 THE COURT: Very well, you may proceed.

6 MS. DEAN: Are we okay marking these as specific exhibits
7 afterwards or should we do this as we go.

8 (Break in proceedings.)

9 MS. DEAN: Then Your Honor, we would first like to offer
10 as Exhibit 1 an ASME membership list from 1940.

11 THE COURT: Subject to the former objections about other
12 associations and so forth.

13 MS. O'NEIL: Can I say something to Ms. Dean?

14 THE COURT: Certainly.

15 (Break in proceedings.)

16 MS. DEAN: Just guidance from the Court. Since we did do
17 a deposition on Sunday, we marked exhibits there, my preference
18 would be to remark those if and when to use them.

19 THE COURT: I think -- we're going to remark them as Mike
20 takes them in so you just hand them to him, he's pretty good at
21 marking them quickly.

22 MS. DEAN: Affidavit of custodian of records of Dallas
23 Public Library. "I am a professional librarian at the Dallas
24 Public Library and a custodian of records of J. Eric Johnson
25 Central Library, 1515 Young Street, Dallas Texas, 75201, and I

1 am authorized to make this certification. Attached hereto as
2 Exhibit A is a photographically reproduced copy of a membership
3 list, America Society of Mechanical Engineers R621V62, number
4 two, 1940. Membership list including society records part one,
5 1940 and the professional services index.

6 THE COURT: Good. Exhibit 1 for the plaintiff admitted.
7 (The document was received as Plaintiff's 1.)

8 MS. DEAN: Just for reference we got the signature and
9 notary. Showing the binder of the book. Membership list
10 including society records part one, 1940. And a professional
11 service index. The dates and letter symbols in parenthesis
12 immediately following the name of the member indicates his
13 grade of membership and year of election or promotion to each
14 grade. The letter symbols are H. Honorary F. Fellow, a
15 associate and Jay, Jr. Sorry, Your Honor, the copy I had
16 didn't have a highlighted name which is important for
17 reference. Here we go. Brooker 1936, District Manager,
18 Cleaver-Brooks Company. And then Rebbeck (phonetically), Vern,
19 1937, Ohio Engineer, Cleaver-Brooks Company. That concludes
20 our publication for Exhibit 1. The second exhibit, Your Honor,
21 that we would like to admit is a publication from the America
22 Society of Mechanical Engineering called mechanical
23 engineering, I would like to mark that as Exhibit 2.

24 MR. PUGH: Your Honor, just to be clear, I don't want to
25 keep interrupting --

1 THE COURT: You don't need to, you've got a blanket
2 objection to other trade organizations and information or
3 pertaining to them, a preserved objection, admitted over
4 objection.

5 MS. DEAN: Your Honor, at this time -- did you just say it
6 was admitted?

7 THE COURT: Yes.

8 (The document was received as Plaintiff's 2.)

9 MS. DEAN: This is from Science and Industry entitled
10 Mechanical Engineering published by the America Society of
11 Mechanical Engineers, it's from April of 1933, and the section
12 is dust in industry. Dust in industry, the sampling and
13 analysis of industrial dusts. "The abundant evidence at hand
14 showing that the inhalation of certain industrial dusts is an
15 important factor in the causation of pulmonary disease has as
16 emphasized the significance of the quantitative aspect of this
17 problem." Nature of dust. "Research on the problem of
18 industrial dust inhalation has demonstrated that so far as
19 their fibrosis producing qualities are concerned dusts may be
20 divided into three groups. The first, those compounds
21 completely -- composed completely of combined silica, that is
22 silicates such as pure asbestos." Particle size of dust.
23 "Hence we need to only concern ourselves with those dust
24 particles that are less than ten microns in the longest
25 dimension. In order to ascertain whether or not an industrial

1 dust is capable of gaining access to the lungs, it is necessary
2 to make particle size studies of the dust under consideration.
3 In practice the samples for such studies may be obtained by the
4 use of Owen Jet Dust Counter. This apparatus projects the
5 atmosphere of dust directly into a microscope cover slip, this
6 covered slip may then be properly mounted and examined by
7 anyone of several methods. Such sample may be studied
8 microscopically using a magnification of 1,000 diameters, and
9 the horizontal diameter of representative number of particles
10 measured by means of a calibrated feeler ocular micrometer.
11 Many methods have been devised and used for the purpose of
12 determining" -- excuse me -- "and used for the purpose of
13 determining the" -- can I start that over?

14 THE COURT: Yes. It has been enlarged so we can all see
15 it.

16 MS. DEAN: "Many methods have been devised and used for
17 the purpose of determining the quantity of dust in the air.
18 These methods have already been fully discussed in the
19 excellent review of the subject by Dr. Greensburg, suffice it
20 to say that the purpose of dust sampling in either high or low
21 dust concentrations. The Greensburg, Smith -- apparatus now
22 finds universal favor. This instrument has been used by the
23 United States Public Health Service and all of its dust studies
24 during the past nine years. It has also been used by other
25 workers in the field both here and abroad." In reference to

1 the study here 13, we know that's from 1925. Your Honor, that
2 completes our reading of Exhibit 2. The next exhibit we would
3 like to offer is the second American Society of Mechanical
4 Engineering document going back to the 30's, this one is from
5 February of 1935.

6 (The document was received as Plaintiff's 3.)

7 MS. DEAN: Mechanical Engineering published by the
8 American Society of Mechanical Engineers, contents for February
9 1935. There's three sections, occupational diseases, problems
10 of prevention and administration of occupational disease
11 control and toxic dust origin and source of industry. Starting
12 with the third toxic dust, their origins and sources in various
13 industries. Ruel (phonetically) Stratton from the Travelers
14 Insurance Company. "The subject assigned to me presupposes
15 that many industrial diseases are produced through contact with
16 or inhalation of industrial dusts of a toxic nature. While
17 this may produce some repetition of material yet for the sake
18 of those engineers who are especially interested in an
19 individual industry, I feel this paper will have added value."
20 And then it goes through various industries. There are various
21 industries, I want to look at one that says asbestos and
22 asbestos manufacturing. I was hoping those lines were better
23 on her copy, it looks like -- I apologize. "Any mining
24 operations and quarry operations are exposures previously
25 discussed. In the manufacturing of asbestos goods particularly

1 dusty atmospheres are created in the break-out, spinning and
2 picking operations. These crushing and grinding of the fibers
3 as well as the spinning and weaving operations have a tendency
4 to throw asbestos fibers into the air and create a source of
5 dust contamination. Crushing and grinding asbestos products
6 generate dust. And the second article, occupational diseases.
7 The problem with their practical prevention in industry you
8 have an article by F. Robertson Jones, associate of Casualty
9 and Surety Executives in New York. "It is my opinion, which I
10 believe firmly to be well-founded, that the primary essential
11 in meeting the problem of occupational disease is prevention.
12 The preponderance of medical opinion is that of the inorganic
13 dusts constantly generated in the industry only dusts of free
14 silica and perhaps asbestos dust, and these dusts only when in
15 minute particles are harmful, that is harmful in the sense and
16 to the extent of causing specific disabling diseases of the
17 lungs." And in the third article the administration of
18 occupational disease control by Albert S. Gray of the
19 Connecticut State Department of Mental Health. "The control of
20 occupational diseases therefore may be seen to present a public
21 health problem of the first magnitude. Mechanical engineers
22 have a tremendous responsibility in the control of these
23 diseases, for in the majority of the instances this control is
24 but the application of mechanical principles whether it be
25 enclosure, ventilation or both." That completes this document.

1 We would now like to offer as Exhibit Number 4 --

2 THE COURT: Well, Plaintiff Exhibit 3 admitted over
3 objection. Plaintiff's Exhibit 4 is now being offered.

4 MS. DEAN: It's the last American Society of Mechanical
5 Engineering document we pulled. This one is also from the 30's
6 but it's dated May of 1939.

7 THE COURT: 1939 as ASME article.

8 MS. DEAN: Yes, Your Honor. Contents for May 1939.
9 Because this is older and harder to read, Your Honor, I think
10 I'm going to just read it.

11 THE COURT: Yes. Well, put it up there -- you will be
12 surprised how well the jury and I are following this so give us
13 a shot at it.

14 MS. DEAN: Okay. Silicosis and asbestosis by various
15 authors, cited by A. J. Lance, Oxford University Press in
16 London and New York, 1938. "A comprehensive presentation of
17 the medical and public health aspects of these industrial
18 diseases is provided in this work to which several physicians
19 have contributed. The history of the disease, their symptoms,
20 and diagnosis, their pathology and their prevalence in various
21 occupations are discussed as well as methods of prevention and
22 control. Each section has a bibliography." That concludes
23 Exhibit 4.

24 MR. PUGH: Your Honor, I don't believe it matters much but
25 I think that word is edited, not cited.

1 THE COURT: Doesn't matter much.

2 MR. PUGH: I agree.

3 MS. DEAN: Your Honor, is this admitted?

4 THE COURT: Yes. Plaintiff's 4 over objection is
5 admitted.

6 (The document is received as Plaintiff's 4.)

7 MS. DEAN: Your Honor, the next set of four exhibits we
8 agree with counsel that we would reference the Bates labels so
9 that's clear they came from this case. Can we get a brief
10 instruction of just what a Bates label is and that means
11 something?

12 THE COURT: You will hear this term Bates label, it's a
13 whole series of numbers that they put on these documents and
14 they've got a machine that stamps them and then it turns to the
15 next number and they put that in and it stamps it, and it's a
16 way for them to have their own pagination for all this paper
17 that they used in taking depositions and whatnot, so the
18 parties have numbered these things and they are keeping up with
19 it through their Bates numbers. But when they come into our
20 case then you and I will have them labeled as an exhibit in our
21 case and they'll go back to you and you can see them and deal
22 with them, so that's the distinction. You may proceed, Ms.
23 Dean.

24 MS. DEAN: And then I will indicate the number of each
25 exhibit. The first exhibit we would like to admit is Exhibit

1 5, that's just one page and it is BPM, Bowater Paper Mill 16.

2 THE COURT: Sixteen?

3 MS. DEAN: Yes, ma'am.

4 THE COURT: All right, admitted. Counsel, admitted
5 without objection or is it the same objection?

6 MS. O'NEIL: No, Your Honor. We have no objection to the
7 admission of our own documents used in this case.

8 THE COURT: Plaintiff's Exhibit 5 without objection.

9 (The document was received as Plaintiff's 5.)

10 MS. DEAN: Customer file Cleaver-Brooks, date entered
11 9/23/57, date shipped 11/5/57, invoice date 11/11/57. Shipped
12 to Bowaters Carolina Corp., C. O. Daniel Construction Corp
13 Catawba, South Carolina. Item number, quantity ordered one,
14 description P-700-30 S. Cleaver-Brooks progress boiler unit
15 number 0-18343, 15 pound design pressure including gas burning
16 equipment, insulated and lagged electrical current 440 volt,
17 three phase 60 cycle. I believe that concludes what we were
18 going to read from this document.

19 THE COURT: Very good.

20 MS. DEAN: Exhibit 6, Your Honor, also has Bates labels.

21 THE COURT: All right.

22 MS. DEAN: These are from CB MAN underscore Howe two, and
23 they go to 50. And it's entitled Cleaver-Brooks Progress
24 Package Boiler Operating Manual.

25 THE COURT: without objection admitted.

1 (The document was received as Plaintiff's 6.)
2 MS. DEAN: Just so you see what we're reading.
3 Cleaver-Brooks Progress Package Boiler Operating Manual.
4 Cleaver-Brooks Progress Package Boiler. "This operating manual
5 presents information which will help the persons concerned to
6 properly operate and care for the unit. Refer to Chapter 5
7 with specific information on ordering replacement parts." Some
8 of these, Your Honor, I just would like to put up so people can
9 see the pictures. For pass construction. Table of contents.
10 Chapter one, general description. "Progress boilers are of the
11 horizontal fire tube construction with tubes and baffles so
12 arranged and installed that the products and combustion must
13 pass the length of the boiler four times before being
14 discharged. Combustion is initiated and completed in the main
15 firing tube or furnace. The gasses are forced by centrifugal
16 blower to travel progressively upward through the succeeding
17 and passes to the vent. The quality of combustion air is fixed
18 by the setting of the air damper which controls the inlet of
19 air to the blower." The burner and control system. "Progress
20 boilers have the burner assembly attached to the front head of
21 the boiler and the whole head must be swung open for inspection
22 and maintenance. This unit is equipped to burn gas only, the
23 burner works on the on/off principle." They then have several
24 different just use of the boiler that I would like to show.
25 41, 86, 96, 97, 359, 400 and 403 are listed as valves.

1 Similarly 41, 96, 97, 400, 430 are listed as valves. And this
2 is the right-hand view of the gas burner compressive boiler --
3 I'm sorry, the prior was the right three-fourth view of the gas
4 burner boiler, same size. And this is the right-hand view of
5 the top progress boiler. 41, 86, 97, 400 and 430 are valves.
6 Okay. Chapter two has to do with the operating instructions.
7 For the progress boiler it says, "Progress boilers can
8 either -- can use either a feed water pump or water heater. In
9 cases of a feed water pump -- in cases -- in a case" -- I'm
10 sorry, I had two cups of coffee. "In case a feed water pump is
11 used closing of the electrical entrance switch will
12 automatically start the feed water pump to fill the boiler.
13 During filling the steam valve should be opened to vent the
14 boiler of air -- the proper high and low water levels are also
15 shown in illustration of the water level control on figure 2.1.
16 Caution. Before energizing feed pump be sure all valves in the
17 boiler line are open. We have a schematic, it's labeled figure
18 3.4. Schematic flow diagram for air and gas, I have
19 highlighted part 400 which is the regulating valve, or at least
20 the flange valve. Chapter four has to do with the actual
21 service and maintenance. For general maintenance it says, "The
22 attendant should at all times watch for steam water and fuel
23 connection leaks and repair them as soon as they are noticed.
24 There's a section on gaskets and packing. Inspect the boiler
25 feed pump packing glands weekly and tighten if excessive

1 leakage is apparent. Remove the packing plants occasionally.
 2 And the next page are pictures of that paragraph that actually
 3 goes on here. So remove the packing glands occasionally and
 4 check the packing, replace dried-out packing with semi-metallic
 5 type or a good grade of asbestos packing." The diagram on the
 6 page before that says "Rear head refractory," that gives us a
 7 diagram. And C shows board asbestos one quarter by four by 34.
 8 D is another bared asbestos at one quarter of two by 33. Then
 9 you have vee block mix, which is asbestos. Back to the page
 10 with the packing. There's a second area called refractory
 11 maintenance. It says, "Remove the entire section of block from
 12 the metal, scrape metal clean and install the new block. The
 13 lower half of the rear head refractory is a high temperature
 14 castable refractory. You can see in referencing the material,
 15 we know for V that's vee block mix, asbestos. Your Honor, that
 16 concludes the portions of this exhibit. I think Dr. Brody is
 17 here but I have two more to finish.

18 THE COURT: Go ahead and put up your other two before you
 19 call your doctor.

20 MS. DEAN: Okay, perfect. I know it's tedious but I
 21 appreciate it. Exhibit 7.

22 THE COURT: Plaintiff's Exhibit 7.

23 MS. DEAN: Also came from Cleaver-Brooks. They have the
 24 BPM, the Bowater Paper Mill Bates at the bottom, and they go
 25 from 45 to 61, and I would label this replacement parts sales.

1 THE COURT: Admitted without objection.

2 (The document was received as Plaintiff's 7.)

3 MS. DEAN: Gasket asbestos filler. Gasket J60 service
4 sheet packing graphite U.S. Albion asbestos packing.

5 THE COURT: I that's probably pronounced Albion.

6 MS. DEAN: Thank you, should I spell it? A-l-b-i-o-n.
7 Rope packing twisted JM Thermo-Pac and then it has the same
8 company and it has a date on this one, 9/18/1969. Just for
9 clarity, U.S. Albion asbestos packing. Going to the one
10 labeled 52, at the bottom, cement insulation EaglePicher Super
11 Number 66, May 20th, 1971. Cement refractory fire frax, and it
12 says number one or the alternative is Kaiser H169. The second
13 cement refractory Kaiser number HI69. Insulation. EaglePicher
14 super glass board, 1980. The refractory furnace 100-pound bag,
15 date is for July 15th. I want everybody to see it, I believe
16 that says 1964. JM105 cement asbestos furnace buck 220-pound
17 drum, JM firit, f-i-r-i-t. Insulating blanket. That's another
18 one, insulated blanket refractory vee block mix Kaiser 50 pound
19 bag, July 15th, I believe that's 1964. Your Honor, that
20 concludes the Exhibit 7. Exhibit 8 will be our last exhibit
21 for this morning.

22 THE COURT: Very good. All right Plaintiff's 7 is
23 admitted without objection. Plaintiff's 8.

24 MS. DEAN: Your Honor, Exhibit 8 starts at BPM 26 and ends
25 at 44, these are material parts descriptions for the Bowater

1 boiler.

2 THE COURT: Admitted without objection.

3 (The document is received as Plaintiff's Exhibit 8.

4 MS. DEAN: So there's an item number, what is required, a
5 part number and then the description. So we have two
6 insulation lagging, one required, part number, see table.
7 Under required 35 item number 17, we have gasket asbestos rope
8 and it gives the diameter and number. Under item 18 it lists
9 five cement asbestos JM number 450. On the second column it's
10 the same headings, number 35 is one gasket the head, 38 is one
11 gasket for the head plate, 39 is one gasket for the burner
12 housing. At the bottom you can see the Cleaver-Brooks drawing
13 and here you can see the date, September 20, '56, I believe.
14 This is orientation Cleaver-Brooks document for the shell of
15 their boiler and it references the same boiler type and gives
16 us the same thing up here at the top of the item description
17 and items number seven, ten, 11, and 12, you see flange and
18 welding. On the second column for items number 26, sorry about
19 that, there are three gaskets in the hand hole and it gives the
20 dimensions, and then part number 35 they reference the lagging
21 hook locations. This is another Cleaver-Brooks drawing, this
22 is for the baffler assembly front extension and they're listing
23 out for item 3, one gasket JM tadpole, style 123, size seven.
24 This is their drawing for insulation lagging and
25 Cleaver-Brooks, drill holes for item number 11. And in the

1 description they show in items one, two, three and four lagging
2 in the top right left. Then in item six and seven they say
3 insulation blanket -- insulation blanket and tell us the type,
4 microlite, and give us the number, thickness and width. The
5 head rear is insulated. This is a Cleaver-Brooks document.
6 And then first they reference the item numbers where three and
7 four are listed as board asbestos from JM. Nine is 60 pounds
8 of vee block mix asbestos. Ten is 150 pounds of refractory
9 castable. 11 is rope asbestos from JM 4202. And you have
10 cement asbestos furnace. And then finally it -- and appears
11 it's one pound of that, I apologize. Then item 13 is two
12 pounds of cement refractory fire frax number one. Context.
13 Just highlighted out where those different parts are first by
14 highlighting on the actual numbers and then you can see that
15 they point to where on the head all of these things are. For
16 the observation window assembly in the Cleaver-Brooks drawing
17 we see that they have required under item number four gaskets,
18 asbestos, sheet packing and JM60 with specific dimensions.
19 Cleaver-Brooks drawing for the plate, head and front insulated.
20 It says pre-insulation .5 cubic feet of vee block asbestos, and
21 under item four gasket head. For the gasket head they have
22 another drawing so we can figure that out, it's right here,
23 also from Cleaver-Brooks, and we know that's a JM tadpole
24 gasket. They after discussing -- entirely for refractory
25 insulation they get the temperature regulated at 24 Fahrenheit.

1 They have specification for refractory in the dry oven and
2 indicate that the material is fiber super duty PCE 34. They
3 have the gasket for the dry oven where they identify the
4 material is JM tadpole give us a specific style. They have
5 gasket for the burning housing telling us the materials are
6 American Gasket wire inserted gasket cloth and give us the
7 Raybestos number 656. We're getting near the end. This is for
8 the front head assembly. If you look at the rear, this is the
9 front, and they have the same -- the items that Cleaver-Brooks
10 requires, the part numbers for that and the description. And
11 this just references some of the things we looked at, gasket
12 burner, the gasket access cover, a gasket for the gas, a flange
13 gasket inlet and a gasket for the pump cover cavity. And then
14 we know the material for each of these, we have for instance
15 gasket burner and we know it's a JM style 60. We know that
16 there's a gasket belt access, we know the material, red rubber
17 and a specific number. Same with the gasket -- sorry, gasket
18 for the gas inlet, we have a specific number. This is the last
19 one. We have the number of gasket cover pump packing. Your
20 Honor, at a later time we would like to enter in the documents
21 about those numbers from the other company but we would
22 rather --

23 THE COURT: Yes. I understand you've got a translation to
24 these parts numbers and what they're containing. Very good.

25 MS. DEAN: Could we take a short break to get Dr. Brody?

1 THE COURT: Yes. Ladies and gentlemen of the jury, let's
2 take a ten minute break while she sets up for this next expert
3 witness, you may go to your jury room.

4 (The jury left the courtroom.)

5 THE COURT: Very good, ten minute break.

6 (The jury returned to the courtroom.)

7 THE COURT: Very good. Ladies and gentlemen of the jury,
8 welcome back. Ms. Dean, call your next witness.

9 MS. MCVEY: Your Honor, we would call Dr. Brody, Dr.
10 Arnold Brody to the stand.

11 THE COURT: Dr. Brody, it's nice to see you, come have a
12 seat, please. All right, Ms. McVey, examining Dr. Brody on
13 direct.

14 THE witness, ARNOLD BRODY, was first duly sworn and
15 testified as follows:

16 DIRECT EXAMINATION

17 BY MS. MCVEY:

18 Q Good morning, Dr. Brody.

19 A Good morning.

20 Q Would you please introduce yourself to the jury?

21 A Sure. My name is Arnold R. Brody, B-r-o-d-y, and I
22 have a cold, I'm sorry, that's the first apology of the day.
23 Yes.

24 Q What do you do for a living, Dr. Brody?

25 A Well, I'm retired. I was the Vice Chairman of the

- 1 A No.
- 2 Q We also asked you about machine shops, where the
3 machine shop area was.
- 4 A Correct.
- 5 Q Any boilers?
- 6 A No.
- 7 Q Right next to that, the pulp mill, any boilers?
- 8 A No.
- 9 Q We spent some time going through all of this and I
10 don't want to do the same, but the main place where boilers
11 would be is where?
- 12 A In the powerhouse.
- 13 Q And in February you believed there were how many
14 boilers in the powerhouse?
- 15 A Can you define the time frame?
- 16 Q February 19th or earlier, the last time you and I
17 talked.
- 18 A As the mill is currently configured.
- 19 Q Yes.
- 20 A As the mill is currently configured there are five
21 boilers present.
- 22 Q And then we went back in time based on documents and
23 you believed that in earlier times it may have been even
24 less, right?
- 25 A That is correct.

1 Q In other words, the belief -- and you've kind of did
2 what you did today and you took an oath, right?

3 A Yes.

4 Q Was that at most the number of boilers you believed
5 after hundreds of hours of searching was five, right?

6 A Yes.

7 Q You also believed there was one work place there would
8 be a boiler, right?

9 A That is correct.

10 Q Where is that?

11 A That would have been in the administrative building
12 outside of the main process area located north of the
13 facility, yes.

14 Q Have I circled the right spot?

15 A Yes.

16 Q And in terms of how many boilers, I understand there
17 was a time that it changed, but you believed at one time
18 there were how many? It's kind of maybe an ugly question.
19 Was there a boiler change at some point at that facility?

20 A There were additions to the number of boilers
21 throughout the history of the facility from the point that
22 it was constructed to where we are now.

23 Q And in terms of when it was built, how many boilers
24 were put in?

25 A Originally there were to my knowledge originally

1 was taken, it's written in really, really small print in the
2 bottom that says 2014?

3 A Yes.

4 Q This is something you found and provided to us less
5 than a week ago.

6 A That is correct.

7 Q You have done some work in research since you were
8 deposed last month and this is one of the things you found.

9 A This is a drawing that was annotated, yes.

10 Q The powerhouse I've circled in the middle, it looks
11 different at least in terms of the birdseye view.

12 A That is correct.

13 Q Have there been changes to the powerhouse throughout
14 the decades that the plant has existed?

15 A Yes.

16 Q Have you since learned that your sworn testimony
17 earlier that at most there were only five boilers at the
18 time there was inaccurate?

19 A Yes.

20 Q It is fair to say you have found records that there are
21 more boilers in that powerhouse.

22 A That is correct.

23 Q You've also been able to kind of tighten up what you
24 know about this administration building, right?

25 A That is correct.

1 Q Before we get there you also found there was a boiler
2 somewhere else, right?

3 A Yes.

4 Q I have kind put an asterisk on where number two paper
5 machine was, or is. What did you find out about that area?

6 A Prior -- since the construction of the facility, the
7 initial establishment of the facility there was an
8 administrative or office building that was located where
9 that asterisk is approximately located, that building was
10 demolished as a part of the construction of the number two
11 paper machine in the '84 to '86 timeframe.

12 Q And this is not meant to be a criticism, but given when
13 you walked in and given the limitation on the documents, you
14 swore under oath something that you have learned to be
15 untrue but in terms of where these boilers were at the time.

16 A That is correct.

17 Q Not intended, you just learned.

18 A That is correct.

19 Q There are three different manufacturers of package
20 boilers that you didn't know were at Bowater a month ago
21 that you now know for sure were there based on additional
22 research, correct?

23 A That is correct, I did not know the names of the
24 manufacturers.

25 Q Tell us for a minute in terms of your document search

1 how you figure that out, how after February 20th and leading
2 up I think until this week you found these documents I'm
3 about to show the jury that I got Monday that clarified that
4 just in terms of what you did to find out.

5 A I was reviewing documents that were located in a dead
6 file storage area that --

7 Q It's called dead file storage area?

8 A Dead file. These files are something that may not
9 necessarily provide information for current operating
10 processes but might have some historical value, and I'll
11 leave that at that. As part of that I located a file, a job
12 file that indicated a package boiler that was located in the
13 powerhouse area. And beyond that as -- taking that, I'll
14 refer to it as a bread crumb information, I was able to
15 locate a drawing that gave an indication as to where that
16 package boiler was at one time located in the powerhouse.
17 In addition I was able to locate drawings that indicated --
18 excuse me, not drawings, but documents that indicated two
19 smaller package boiler units that were at the facility.

20 Q I want to get to the actual documents in a moment, but
21 in terms of kind of where you found these extra documents
22 some of them were related to the access files and some of
23 them were related to the dead files, correct?

24 A That 's correct.

25 Q And again, not meant to be a criticism but you were

1 able to kind of black and white identify that even the index
2 for that access file is sometimes wrong, it didn't have
3 information and therefore you didn't find it --

4 A That is correct.

5 Q For these dead files, how many files were you talking
6 about? Are they by boxes, cabinets, how were they
7 organized?

8 A They are by boxes.

9 Q How many boxes are we talking about?

10 A I cannot give you an accurate number on it.

11 Q I don't know entirely why we call them bankers boxes
12 but are talking something like this?

13 A Some are roughly about that size, some may be larger.

14 Q Were you able -- let's start with your firsthand
15 knowledge first to know when you came in in 2015 how or what
16 got into the dead files, how they were organized, anything
17 like that?

18 A As I came in to the facility in 2015, no.

19 Q Do you know whether the dead files represent 10 percent
20 or 90 percent of what is dead at the plant? I mean, I don't
21 know how to ask that better, but do you know?

22 A I believe I understand your question. And no, I would
23 not know as to what percentage that would represent what may
24 be or may not be in service or how much there might have
25 been at one time.

1 Q Actually going back to this. As I understand it if
2 we're to add what we know today you believe that you have
3 records confirming at one time, one, two, plus six, a total
4 of eight boilers at the facility, correct? Did I add that
5 up right? Here is what I mean by at one time --

6 THE COURT: Let him answer if he can first.

7 A I believe I understand what you're asking, and as far
8 as the -- to be very clear as best I can, the number three
9 recovery boiler was constructed in 1983, that boiler, which
10 was in the administrative building where the large asterisk
11 is located, I do not know the exact timing that that
12 building was demolished, there could have been an overlap in
13 time in which the small package boiler that was located
14 there and the units that were in the powerhouse were all
15 there at the same time. So based upon the summation that
16 you provided, yes, it's possible there could have been up to
17 that number of eight boilers at the facility, yes.

18 Q And so if I take a snapshot in a clear year just to
19 make sure we're on the same page, 1980.

20 A Okay.

21 Q -- recovery boiler number three wasn't there yet,
22 you're saying I have records of seven boilers, right?

23 A That would be correct.

24 Q If I take a picture in 1985 when paper machine number
25 two came in so we know this guy is destroyed we're also

1 going to get a snapshot of seven.

2 A The package boiler that was located at the
3 powerhouse -- that I came to understand that was located at
4 the powerhouse would have been demolished some time in the
5 1984 to 1986 timeframe, I do not have records as to when
6 that unit was removed from service.

7 Q Let me give you a cleaner year. If I go 1990 and I
8 take a snapshot there's going to be seven because the boiler
9 that's at the asterisk would have been removed by that time.

10 A That one would have been gone, there would have been --
11 in 1990 that would have left five boilers in the powerhouse
12 and one in the administrative building, which brings us to a
13 total of six.

14 Q And then there's kind of what I will call the muddy
15 time when the construction was happening where this boiler
16 and this boiler may have been taken out.

17 A That is correct.

18 Q Okay. So whether it be five or seven based on your
19 knowledge and in your records you only show that there's
20 five to seven boilers at the plant at any given time.

21 A In that period -- please be clear on the time frame.

22 Q 1960 to the present.

23 A There would have been -- to present the maximum number
24 given as you referred to that muddy construction period,
25 there would have been the five boilers that remained in the

1 powerhouse, the package boiler that was at the powerhouse,
2 the unit that was in the administration that was removed
3 from the area that's now known as the paper machine, and
4 then the unit that was in the administration building. I
5 count eight.

6 Q I want to try to get -- we've already identified the
7 brand names of five of them, I would like to try to figure
8 out the brand names of those last three.

9 A Okay.

10 Q I want to make sure I got that right, four Babcock and
11 Wilcox, one Erie, right?

12 A That is correct.

13 Q You have been able to identify a Kewanee Boiler,
14 correct?

15 A That is correct.

16 Q We've marked as Exhibit 43, which I will hand you --
17 MS. DEAN: They've already been premarked.

18 Q That's a record you found within the last week.

19 A That is correct.

20 Q And when was that boiler identified to go in?

21 A It would have been in 1961.

22 Q You found a second record, which I have marked as
23 Exhibit 44, about that boiler.

24 THE COURT: The Kewanee Boiler, that's a record, it's
25 plaintiff's exhibit number what?

1 MS. DEAN: Forty-three, Your Honor.

2 THE COURT: Forty-three?

3 MS. DEAN: Yes.

4 THE COURT: You just showed that to him?

5 MS. O'NEIL: Yes, Your Honor.

6 THE COURT: All right. Admitted without objection?

7 MS. O'NEIL: Admitted without objection, Your Honor.

8 (The document was received as Plaintiff's 43.)

9 THE COURT: Very good. Now you're going to Plaintiff's
10 Exhibit Number 44?

11 MS. DEAN: Yes, Your Honor.

12 THE COURT: And that's which one?

13 MS. DEAN: It's also a Kewanee 1961 boiler but it's a
14 drawing.

15 THE COURT: All right. Admitted without objection?

16 MS. O'NEIL: No objection, Your Honor.

17 (The drawing was received as Plaintiff's 44.)

18 Q And first just to confirm from your review, Exhibit 43
19 and Exhibit 44 appear to be discussing the same, what --
20 it's just a boiler, right?

21 A Yes. It is a boiler, a small package boiler.

22 Q In terms of the location of that boiler I want to hand
23 you what we've marked as Exhibit 45 which is a March 18,
24 1971 document. Is this another document that you provided
25 us this week?

1 THE COURT: Are you going to put it up -- identify it a
2 little bit more than that.

3 MS. DEAN: Sure. It's a Bowater letter from Sammy
4 Blackburn, an engineer. It doesn't have a subject line but it
5 says attention, Mr. Chandler.

6 THE COURT: And it bears the date March the 18th, 1971?

7 MS. O'NEIL: I apologize, Your Honor, it's not a Bowater
8 letter, it's to --

9 THE COURT: It's to Bowater from -- it's got a letterhead
10 on it.

11 MS. DEAN: It says Factory Insurance Association and it's
12 to -- or from Sammy Blackburn.

13 THE COURT: Right.

14 MS. O'NEIL: Thank you.

15 THE COURT: Without objection?

16 MS. O'NEIL: Without objection, Your Honor.

17 (The letter was received as Plaintiff's 45.)

18 Q And to clarify, this is a document that you found at
19 Bowater, correct?

20 A That's correct.

21 Q It gave us two pieces of information, one it references
22 the same Kewanee Boiler and it let's us know where it was
23 at, right?

24 A That is correct.

25 Q Where was it at, or -- where was it at?

1 A The document states it's in the new office building.

2 Q Okay. It also identifies the Cleaver-Brooks Boiler,
3 correct?

4 A That is correct.

5 Q This is the first time, even though you had spent
6 hundreds of hours of work that you were able to verify what
7 we have marked as Exhibits 5 and 6 in this case there was a
8 Cleaver-Brooks Boiler on these premises.

9 A I don't recall seeing those exhibits, but this document
10 states there was a Cleaver-Brooks Package Boiler on site.

11 Q Let me ask you that. We have records, some of them
12 that the jury has seen, from Cleaver-Brooks about their
13 boilers at the site. Have you seen those?

14 A No. I do not recall seeing those documents.

15 Q I'll come back to this list but I want to pause for a
16 moment. Can we -- I'm going to hand what you what we have
17 marked as Exhibits 41 and 42. I'll give you a moment, but
18 these are some of the records we obtained. Have you ever
19 seen them before?

20 MS. O'NEIL: Justice Toal, just for the record could we
21 ask Ms. Dean to read the Bates numbers for 41 and 42 into the
22 record?

23 THE COURT: Well, they've now been admitted into evidence
24 and I assume they were identified that way when they were
25 admitted, right?

1 MS. O'NEIL: But not with the Bates numbers. My concern
2 is the transcript may become the worse from the documents at
3 this point and this way we can --

4 THE COURT: All right. What is it?

5 MS. DEAN: Your Honor, the first, which is Exhibit 41, are
6 from the Bowater Paper Mill and it says BPM, and Bates numbers
7 are one, 16, 14, 13, two, three, and four.

8 MS. O'NEIL: Thank you.

9 MS. DEAN: And then the second, which is Exhibit 42, also
10 came from Cleaver-Brooks and have the label BPM, and those are
11 Bates labeled six, five, seven, eight, nine, ten and 11.

12 MS. O'NEIL: No objection.

13 MS. DEAN: And 12.

14 Q Sir, have you seen these before?

15 A Bear with me for just a moment. Please bear with me as
16 I review these first.

17 (Break in proceedings.)

18 A To answer your question, this is the first time I have
19 seen these two exhibits, Exhibits 41 and 42.

20 Q Exhibit 41 is the one I'm displaying here, and you can
21 see here there's a number that I have highlighted, 18343.
22 Do you see that?

23 A I do see that.

24 Q I'm just going to write that over here. And every page
25 of these documents -- and these are not in Bates labeled

1 order, they were mixed together so I have pulled some out,
2 do you see that that unit number -- and I'll give an
3 example --

4 A I do.

5 Q -- boiler unit number 0-18343?

6 A I do.

7 Q And in every one that we've marked as Exhibit 41 you
8 see that unit number.

9 A I do.

10 Q What is a unit number for a boiler?

11 A It is equivalent to a serial number, so it's a unique
12 identifier for that unit. It allows for traceability that
13 helps in -- now in registration, but previously any repairs
14 that might have happened, and it helps support both the
15 manufacturer and the entity that ends up owning that unit.

16 Q Why not just use the model number? We've seen a lot of
17 documents with the model number for it and we've seen
18 catalogs, I don't mean we as you, but we as people in the
19 courtroom --

20 A I understand.

21 Q -- that show us about the model number and what was in
22 it and what was specified, why do we need this unit number
23 or serial number?

24 A A model number may not always be exactly indicative of
25 how that equipment was shipped or the specifications for its

1 construction. There may have been unique items or certain
2 aspects that were required for that particular installation
3 such as the ability to fire just natural gas, propane, fuel.
4 That serial number or that unit number would help in the
5 traceability of the documents to understand how that
6 particular unit was configured for its final application. A
7 model number does not always give that application, because
8 a model number is generally based on the operating size or
9 the unit size.

10 Q Okay. You said it helps give traceability of the unit,
11 I want to understand that better.

12 A Okay.

13 Q This is Exhibit 6, the jury has seen it, I don't
14 believe you have. It's an operating manual that we were
15 provided and in Mr. Howe's case based on their records. And
16 it provides all sorts of information, we tediously went
17 through about how to order parts, things like that. If I
18 want to know for a company that's sold a bunch of these
19 specifics about the one I got or the two I got or the three
20 I got, does this unit number help me do that?

21 A It does.

22 Q In terms of your access files or just the business of a
23 facility, is that important whether it's a boiler or a pump
24 or other equipment to help organize things like maintenance
25 histories, files and other day to day functional needs in

1 maintaining equipment at the facility?

2 A I will answer in two aspects. Yes. It helps us for
3 the purposes of going back and understanding ordering parts,
4 specifically how that unit was configured. Our asset index
5 is not based upon the manufacture or a serial number so I
6 cannot directly go back by that serial number. But if I go
7 back through my asset index, if I find what that number is
8 and I can go find the serial number that's associated with
9 that piece, then I can talk, for lack of better terms, more
10 intelligently, more productively with the manufacturer.

11 Q And I think the very part of what you said I want to
12 follow-up on. It doesn't just allow Bowater as a company to
13 talk more intelligently, it allows the manufacturer of the
14 product to correspond more intelligently about that
15 particular unit.

16 A That is correct.

17 Q Exhibit 42 I'm now putting up. A different unit number
18 is identified, correct? This one, unit number 0-18344 is
19 the second unit number, correct?

20 A I do see that there are two different unit numbers.

21 Q And can you just confirm for me -- and I highlighted
22 this -- two things: One, that this is all relating to
23 Cleaver-Brooks boilers going to Bowater, and two, that I
24 pulled out the ones that have this second unit number and
25 I've highlighted where I have that.

- 1 A Yes.
- 2 MS. DEAN: Can I approach again?
- 3 THE COURT: Of course.
- 4 Q So Exhibit 45 is the one and only piece of paper that
- 5 you found that says Cleaver-Brooks on it, right?
- 6 A That is correct.
- 7 Q And we know a few things from this piece of paper.
- 8 One, that a 30HP Cleaver-Brooks gas fire boiler went to the
- 9 administration building, right?
- 10 A That is correct.
- 11 Q Administration building is not the powerhouse.
- 12 A That is correct.
- 13 Q It was up north of the powerhouse.
- 14 A Physically, yes.
- 15 Q We also know that this is referencing a conversion of
- 16 two boilers, one that includes this Cleaver-Brooks boiler
- 17 and it was referencing it in 1971, correct?
- 18 A That is correct.
- 19 Q Do we know a unit number for this boiler?
- 20 A Based upon this document, no, we do not.
- 21 Q Do we know when it was installed?
- 22 A Based upon this document, no, we do not.
- 23 Q We certainly can know that it was there in '71 and they
- 24 were changing it up then, right?
- 25 A Something occurred with it, yes.

1 Q So if I want to know if this is a third Cleaver-Brooks
2 boiler or one of the two that we have in the Cleaver-Brooks
3 files, can you tell me?

4 A I cannot definitively tell you at this moment.

5 Q I want to hand you what I have marked as Exhibit 46 --

6 MS. DEAN: -- which, Your Honor, is a mechanical floor
7 plan for Bowater.

8 THE COURT: Is it without objection?

9 MS. O'NEIL: No objection.

10 THE COURT: Very good.

11 (The floor plan was received as Plaintiff's 46.)

12 MS. DEAN: And then Exhibit 47, which is a September 15,
13 1964 combustion engineering document relating to Bowater.

14 THE COURT: 1964?

15 MS. DEAN: Yes, Your Honor.

16 THE COURT: Without objection?

17 MS. O'NEIL: No objection.

18 (The document was received as Plaintiff's 47.)

19 MS. DEAN: And exhibit -- please don't be upset with me
20 but I misspoke. Exhibit 46 is actually -- is correct, it's a
21 mechanical floor plan relating to Bowater. Exhibit 49 is also
22 a floor plan relating to Bowater, but this one deals with the
23 combination boilers and I don't have a correction, I just
24 wanted to establish it --

25 THE COURT: Well, let's get straight here. 46, mechanical

1 floor plan Bowater, what date is on that?

2 MS. DEAN: It is incredibility difficult to read, the
3 first number is definitely a six.

4 THE COURT: All right. And then 47 is a September of 1964
5 combustion engineering document?

6 MS. DEAN: Yes.

7 THE COURT: Forty-eight is what?

8 MS. DEAN: It's a second drawing, this one has the title
9 general arrangement combination boilers.

10 THE COURT: General arrangement combination boilers.

11 MS. O'NEIL: I'm sorry, Justice Toal, is that 48 or 49?

12 THE COURT: Well, 49 is a floor plan, 48 is something
13 else. What is that?

14 MS. O'NEIL: Forty-eight relates to the South Carolina
15 Department of Labor of Licensing and Regulations.

16 THE COURT: So 48 is a LLR licensing document causing a
17 boiler report, am I right?

18 MS. DEAN: Yes, Your Honor.

19 THE COURT: All right. And then 49 is the floor plan for
20 the general combination boilers or -- what is 49?

21 MS. DEAN: Yes, general arrangement combination boilers,
22 and it's a diagram.

23 THE COURT: Okay. All right, we've got it. All without
24 objection?

25 MS. O'NEIL: That's all without objection.

1 THE COURT: Very good.

2 (The documents were received a Plaintiff's 47-49.)

3 Q I'm going to hand you 48 and 49 and just ask you to
4 verify, these are also documents that you provided this week
5 relating to a package boiler at Bowater made by a company
6 called Combustion Engineering?

7 A That is correct.

8 MS. O'NEIL: Your Honor, I'm sorry to be difficult but she
9 handed him 48 and 49 and I thought 48 was the LLR.

10 THE COURT: She's handing him 48 and 49, that's a LLR
11 document boiler report, and 49 is a general arrangement
12 combination boilers.

13 MS. DEAN: Ms. O'Neil is correct, it's 47 and 49.

14 THE COURT: Forty-seven and 49 is what you've just given
15 him?

16 MS. O'NEIL: Thank you.

17 THE COURT: Combustion Engineering and the general
18 arrangement, and they're related to a Combustion Engineering
19 boiler.

20 MS. DEAN: Yes.

21 Q The numbers I wrote on there you should ignore, that's
22 why --

23 A So the documents that I have in front of me, document
24 number 49, is a general arrangement of combination boiler,
25 this is dated 1967. The other document is a letter from

- 1 Combustion Engineering to Bowater.
- 2 Q Can I see the other -- my internal notes are --
- 3 A Thank you.
- 4 Q Those are referencing a singular boiler from a company
- 5 named Combustion Engineering and they show where that
- 6 package boiler went.
- 7 A That is correct.
- 8 Q We also know when it was put there, correct?
- 9 A That is correct.
- 10 Q When was that?
- 11 A It was in 1964.
- 12 Q So in terms of Bowater's records and sometimes what
- 13 we've seen with our own eyes depending on which one we're
- 14 talking about, we have records of four Babcock and Wilcox
- 15 boilers, an Erie boiler, a combustion boiler, a Kewanee
- 16 boiler and a Cleaver-Brooks boiler, correct?
- 17 A That is correct.
- 18 Q In terms of the Combustion Engineering boiler we know
- 19 that was in '64, the Kewanee boiler in '61, and the one
- 20 Cleaver-Brooks boiler you have referenced from we just don't
- 21 know except that it was before '70.
- 22 A That is correct.
- 23 Q So as it relates to package boilers, have I bracketed
- 24 the right group for what we would call package boilers?
- 25 A Yes.

- 1 Q And as it relates to what we call field erect boilers,
2 have I now bracketed the right group for field erect?
- 3 A Yes.
- 4 Q I will represent to you the jury has heard testimony
5 sworn from Wayne Howe that he worked on a package boiler
6 that was put in in 1957. According to your search the two
7 package boilers, the Combustion and the Kewanee did not come
8 in at that time frame, correct?
- 9 A That is correct.
- 10 Q And the Combustion Engineering boiler that came in
11 later in 1964 was placed on the outside of the powerhouse,
12 correct?
- 13 A It would have been essentially, yes, outside.
- 14 Q A second source of documents that I want to talk to you
15 about relates to this Exhibit 48, I'll give you a copy in
16 case it's easier to see. Are you familiar with the LLR?
- 17 A Yes, I am.
- 18 Q What is it?
- 19 A It's the South Carolina Department of Labor Licensing
20 and Regulation.
- 21 Q Here you can see we did a search of Resolute Forest
22 Products, that's Bowater?
- 23 A Yes.
- 24 Q And it can tell you what's there.
- 25 A That is correct.

1 Q First of all, if a boilermaker under oath says "I after
2 being there four or five times over and over again remember
3 Babcock and Wilcox," do we have documentary evidence to show
4 that's so?

5 A Yes.

6 Q They show Erie City and ECIW in the exact same year, is
7 that the same boiler based on you seeing them with your own
8 eyes --

9 A It is.

10 Q None of the three boilers that you know from Bowater's
11 records, none of the two units referenced in Cleaver-Brooks
12 records make it on this list, fair?

13 A That is correct.

14 Q Do you know why?

15 A I do not know the specific reasons why, I can
16 conjecture.

17 Q What do you know about when they started becoming code,
18 requiring these codes?

19 A I was not in South Carolina at the time, but I believe
20 that South Carolina became a -- what is referred to as a
21 code state in 1998.

22 Q And so even though we know there are a variety of
23 package boilers that were at the facility, if they were
24 taken out before 1998 that might explain why they didn't
25 make it on here?

1 A There is that possibility as to that's why they did not
2 show up on this list.

3 Q But what we do know is while this list gets valuable
4 information, it's not telling you about package boilers we
5 know were there.

6 A That's correct.

7 Q I will represent to you that Mr. Wayne Howe, the
8 testimony came into evidence that he recalls working on a
9 package boiler. Can you confirm whether Cleaver-Brooks
10 boilers, the type, are in fact package boilers as opposed to
11 field boilers?

12 MS. O'NEIL: Objection, foundation.

13 THE COURT: What's that?

14 MS. O'NEIL: I said objection, foundation. He may know I
15 just -- the foundation hasn't been laid.

16 THE COURT: He's already talked a lot about boilers at
17 this place and he's searched all kinds of records, I think the
18 foundation has been laid for him to talk about this. Go ahead.

19 A I'm aware that Cleaver-Brooks makes package boilers.

20 Q We have in evidence Exhibit 10, it's Cleaver-Brooks
21 package boilers for heating and processing, and I just want
22 to ask you first if you've ever seen this.

23 A This is first time that I have seen this document.

24 Q Okay. Cleaver-Brooks represented in this that they are
25 the originator and largest producer of package boilers in

1 the country. Any basis to dispute that?

2 A Could you restate that, please?

3 THE COURT: Yeah, Ms. Dean, when you're asking questions
4 it is awfully helpful if you stay at that microphone if you ask
5 it. When you're going back he's not going to catch it nor is
6 the court reporter and the jury I might add, so repeat the
7 question.

8 MS. DEAN: I apologize, I know I move a lot.

9 Q Cleaver-Brooks represented in Exhibit 10 that they are
10 the originator and largest producers of package boilers. Do
11 you have any basis to dispute that at least in the 50's and
12 60's time frame?

13 MS. O'NEIL: Objection to the lack of foundation.

14 THE COURT: What is the objection?

15 MS. O'NEIL: Lack of foundation.

16 THE COURT: Lack of foundation? Overruled. She can ask
17 the question and we can see whether he knows.

18 A I have no information to dispute or confirm that claim.

19 Q One more question, or actually two on this. They also
20 indicated they originated the package boiler in 1931 and are
21 today the world's largest manufacturer of package boilers.
22 Any reason to dispute those two claims?

23 A I have no information to be able to confirm or deny
24 that claim.

25 Q And then finally they indicate they have a South

1 Carolina distribution area. Do you have any familiarity
2 with that from your job at Bowater?

3 A I do not.

4 Q From the limited records that you do have about
5 Cleaver-Brooks, and again, do you agree with me one document
6 is fairly limited?

7 A I would agree that it is very limited.

8 Q But you have been able to ascertain despite not
9 realizing in February that Bowater and Cleaver-Brooks had a
10 relationship, right?

11 A That is correct.

12 Q Have you noticed in the documents that -- I understand
13 you just saw that I handed them today -- that the work done
14 based on the two units I have from the Cleaver-Brooks
15 records was done by Daniels?

16 A I have not been able to completely digest them yet,
17 so --

18 Q I just want to explain why I'm asking about who Daniel
19 is because I don't think the jury has heard about Daniels
20 yet. Can you tell us what you know about, in broadest
21 strokes, what that company does?

22 A In its relationship with Bowater it was a construction
23 firm. They supplied labor and purchased materials to erect
24 equipment buildings at the facility.

25 Q And even without ever looking at 41 and 42, the two

1 exhibits you had about three minute to look at, you
2 independently know that Daniel had a relationship in
3 building parts at the Bowater plant.

4 A That is correct.

5 Q I will represent to you Exhibit 7 is in evidence, and
6 it demonstrates that Cleaver-Brooks had a relationship over
7 decades at Bowaters by selling replacement parts, gaskets,
8 cement, those type of things. Have you seen any of those?

9 A I have seen some documentation relating back to the
10 relationship between Daniels and Bowater.

11 Q I'm sorry, I should have been clear, I'm going back to
12 Cleaver-Brooks and Bowater.

13 A Oh.

14 Q Sorry. So let me ask you this: Exhibit 7 deals with
15 the Cleaver-Brooks records, not Daniel.

16 A Okay.

17 Q And they show in the 60's, 70's and 80's that there are
18 sales of different replacement parts, some asbestos, some
19 not.

20 A Based upon the documentation that I see, yes.

21 Q Before I showed that to you you didn't have records of
22 repeated sales relating to boilers from Bowater to
23 Cleaver-Brooks, right?

24 A I do not.

25 Q You're not here to say that didn't happen, you just

1 don't independently have a way to verify that.

2 A That is correct.

3 Q Exhibit 6 and Exhibit 8 are in evidence and the jury
4 saw -- I just referenced different things that are in the
5 boiler and we'll set out what I believe we have shown is in
6 there. Are you able to confirm or deny that these
7 components were part of Cleaver-Brooks boilers --

8 A I have no information --

9 Q -- at Bowater? Sorry.

10 A I have no information to deny that that material would
11 have been in any of the Cleaver-Brooks units.

12 Q I want to talk about warnings. The jury heard verified
13 interrogatory responses that -- I don't know where Mr.
14 Holder is -- that Mr. Holder read that they never provided
15 warnings and I want to follow-up by asking you, did you find
16 any indication either in 1971 when this project was
17 occurring or in 1980 when they were selling replacement
18 parts, and I'm representing to you the second, that they
19 ever in written form or in oral form warned about any of
20 those asbestos products that I listed out?

21 A I have no information to indicate that a warning was
22 provided.

23 Q Do you have any indication that they as a company tried
24 to figure out what Bowater knew to make sure it was okay not
25 to warn? In other words, if they said, "Look, we want to

1 figure out if you're already doing something here because if
2 you are we're going to forget about it." Any indication of
3 any effort like that?

4 A No.

5 Q I'm going back to the map just to kind of connect the
6 dots here. In terms of those top two boilers, the boiler
7 that was in the administration building and the one that was
8 in kind of the old office building, you have now been able
9 to piece together whose boilers those are, right?

10 A I believe so, yes.

11 Q One was a Cleaver-Brooks boiler?

12 A Yes.

13 Q One was a Kewanee boiler.

14 A That is correct.

15 Q In terms of the five plus, you've been able to identify
16 that at least one of the plusses is Combustion Engineering,
17 right?

18 A That's correct.

19 Q If I want to know where the one to two documented
20 Cleaver-Brooks boilers are, and I'm saying one to two
21 because we're not sure if this overlaps with the one or if
22 it's the same, you have no idea.

23 A I do not know.

24 Q If a coworker says, "I do. I was a boilermaker, I went
25 there repeatedly," you are not here to dispute that.

1 A I don't have any information to dispute that.

2 Q Did you know Wayne Howe?

3 A No.

4 MS. DEAN: Thank you, those are all of my questions.

5 THE COURT: Very good. Your witness, Ms. O'Neill, cross
6 examination.

7 MS. O'NEIL: Thank you, Your Honor.

8 CROSS EXAMINATION

9 BY MS. O'NEIL:

10 Q Mr. Welker, you know I'm Elizabeth O'Neill, we met
11 yesterday in the hall.

12 A Yes.

13 Q It's good to see you.

14 MS. O'NEIL: The first thing I would like is to move into
15 evidence what we've premarked Defendant's 8, which is a copy of
16 that map that Ms. Dean had showed, the site plan.

17 THE COURT: Without objection?

18 MS. DEAN: Just clarifying that that map is the second one
19 from 2014, no objection to either but I just wanted --

20 THE COURT: Very good, admitted without objection.

21 (The map was received as Defense 8.)

22 Q Now, Mr. Welker, you are here as the corporate
23 representative for Bowater, so I would like to start with
24 just telling the ladies and gentlemen of the jury a little
25 bit about the Bowater Paper Mill on a big perspective. You

1 smiled because you know a few things about that, do you?

2 A I'll try and narrow it down.

3 Q well, let's start with how big is it?

4 A The facility is located on approximately 1800 acres.

5 It was originally initiated for construction in about 1956

6 and construction continued until 1958 or '59 for the

7 establishment of the boilers, the pulp mill and the market

8 pulp drier which was the first part of the process that came

9 on line. Subsequently number one paper machine was built,

10 later the number three paper machine was built and then the

11 number two paper machine was built, and that was

12 commissioned in 1986.

13 Q And when you say that was commissioned in 1986, that

14 means that's when you actually start running and making

15 paper; is that correct?

16 A That is correct.

17 Q So let's back up a little bit again and explain to the

18 ladies and gentlemen of the jury a little bit about paper

19 machines. Paper machine number one and three, built during

20 the 1950's, did I get that right?

21 A During the 1960's.

22 Q And paper machines number one and three, do you know

23 how big they were in their original configuration?

24 A Their original configuration as far as machine track

25 size or the width of the machine is as today as it was then.

1 Q Which is what? You don't have to be precise, are we
2 talking several hundred feet long, 20 feet wide?

3 A The normal width of the number one machine is about I
4 believe 280 inches wide and the overall machine track itself
5 is a real rough number probably about 400 feet long, 400 or
6 500. Number three machine is a 352 inch drilling machine
7 and it too is roughly about 400 -- the track overall is
8 about 400 feet long if I recall correctly.

9 Q And what you say the track for us who are not in the
10 paper making business, how long it is?

11 A That's correct.

12 Q And tell me if I have this right in very basic terms of
13 paper making, do they debark the trees at Bowater?

14 A We do and we receive wood chips from the woods.

15 Q So paper is made from wood chips, correct?

16 A That is correct.

17 Q And there are two ways that -- tell me if I have this
18 right -- Bowater makes paper. First they take trees which
19 come in and they strip off the bark and then they make those
20 chips, correct?

21 A That's correct.

22 Q And then they also buy some wood chips from other
23 places.

24 A That is correct.

25 Q And they put all of that into a digester, that's what

1 it's called, correct, where they digest it and turn it into
2 pulp?

3 A That is one method for making pulp.

4 Q Does Bowater do that?

5 A At this facility there are two means for making pulp,
6 one is the graft process which uses digesters or a
7 continuous digester.

8 Q And then when you get the -- I think I've heard it
9 called slurry which is what comes out which you put on the
10 paper machine; is that right?

11 A We refer to it as stock, or pulp stock.

12 Q Pulp stock. And you put it in on what's called the wet
13 ends, correct?

14 A That is correct.

15 Q And it goes through the paper making process, which is
16 how many feet long did you say one was, approximately 400
17 feet?

18 A Nominally 400 feet.

19 Q So it starts at the wet end and it's pulp stock and it
20 comes out 400 feet later and it's paper.

21 A That is correct.

22 Q The boilers that you described you talked about the
23 Babcock and Wilcox boilers and Erie City boilers, those are
24 integral into this paper making process.

25 A They are.

- 1 Q How big are they?
- 2 A Roughly dimensionally 25 to 35 feet wide by 25 to 35
- 3 feet deep, and approximately 100 to 150 feet tall.
- 4 Q Each?
- 5 A Each, depending on which unit it is.
- 6 Q So at the Bowater Paper Mill there's a lot of pipes,
- 7 right?
- 8 A Correct.
- 9 Q There's a lot of steam pipes, correct?
- 10 A That is correct.
- 11 Q There's a lot of pipe insulation, correct?
- 12 A That is correct.
- 13 Q In the course of your career at Bowater have you had a
- 14 chance to observe what that pipe covering looks like?
- 15 A I have seen various types of pipe insulation, yes.
- 16 Q Have you seen people putting pipe insulation on?
- 17 A I have.
- 18 Q And have you seen pipe which is at the mill and is or
- 19 has been in the past labeled as asbestos containing?
- 20 A I have.
- 21 Q Is a pipe covering -- this has been around a few
- 22 places -- does the pipe covering that you have seen at the
- 23 Bowater Mill look like that?
- 24 A That is representative of some of the pipe insulation,
- 25 yes.

1 MS. DEAN: Your Honor, I want to confirm that that's
2 not --

3 THE COURT: Yes. I've seen this particular exhibit or one
4 like it before, it is crumbling a little but be of good heart,
5 ladies and gentlemen, it is just an exhibit of what it looks
6 like but it's not made of asbestos so none of us will get any
7 asbestos.

8 MS. O'NEIL: It is not. I can state for the record that I
9 bought it from a construction supply shop in approximately
10 2003.

11 THE COURT: Very good. It's not -- it is non-asbestos.

12 MS. O'NEIL: It is not asbestos.

13 THE COURT: Very good.

14 Q And that is the point of my question, Mr. Welker, is it
15 looks the same, correct?

16 A It has the same general physical characteristics, yes.

17 Q I'm going to show you what we previously marked as
18 Defendant's Exhibit 5, which I should have come up here
19 before to find. I'm not going to ask you to look at that
20 entire document.

21 A Thank you.

22 Q All right. So this is a collection of documents that
23 have been admitted into evidence and I will represent to you
24 that they were produced by Bowater in this litigation
25 pursuant to requests made by other lawyers. I would like to

1 just ask you, have you seen documents that look something
2 like this in the course of your work?

3 A Yes, I have.

4 Q I'm just going to show one page to the ladies and
5 gentlemen of the jury. Do you see there under the column
6 where it says LF -- actually let me back up for a minute.

7 A Yes.

8 Q It's correct to say this is an asbestos abatement
9 quarterly report form, just what it says, right?

10 A That is correct.

11 Q And you know from your work at the mill that reports
12 have to be filed when asbestos containing materials are
13 taken out of the paper mill, correct?

14 A That is correct.

15 Q And you know from your work at the mill that that's
16 required by the regulations.

17 A Correct.

18 Q And reports have to be made about what's taken out, how
19 much and what happened to it.

20 A That is correct.

21 Q And these records that we marked as Defendant's Exhibit
22 5 are some of those types of documents.

23 A Correct.

24 Q Are you aware of the fact that when you look there at
25 the LF card, are you aware that that shows the amounts of

1 linear feet of the friable asbestos that were removed from
2 the paper mill during whatever period is covered by this
3 quarterly report?

4 A Yes.

5 Q And if you flipped to the Bates stamp numbers, I'm just
6 going to go to one. Do you see them in the bottom
7 right-hand corner, 100274? Have you seen a document like
8 this before?

9 A I have.

10 Q And you would agree with me it's just another way of
11 showing the amount of friable asbestos containing materials
12 which may have been taken out of the Bowater Mill at
13 whatever period is covered by that report?

14 A Yes.

15 Q If I were to represent to you that if a person were to
16 sit down and add up all of the linear feet and square feet
17 listed in this document that it would come up to something
18 over 40,000 linear feet of asbestos containing material
19 taken out of the Bowater Paper Mill, would you have any
20 reason to disagree with that?

21 A I would say that that's a reasonable number.

22 Q Thank you, I'm done with that exhibit. So you were
23 asked some questions about the documents that you found
24 recently that Ms. Dean said that she asked you some
25 questions about. It's true, isn't it, that after you gave

1 your deposition in this case, the plaintiff's lawyers asked
2 you to do a little more investigation into the package
3 boilers at the Bowater Mill.

4 A Yes.

5 Q And it was in doing this work that you found the
6 document that has been marked as Plaintiff's 45?

7 A That is correct.

8 Q And this document shows that the Cleaver-Brooks gas
9 fire boiler was in the administrative building in 1971,
10 right?

11 A That is correct.

12 Q Did you ever find any documents that said a
13 Cleaver-Brooks boiler was in the powerhouse?

14 A I did not.

15 Q You did find some documents that Ms. Dean asked you
16 about about a Combustion Engineering boiler in the
17 powerhouse, correct?

18 A That is correct.

19 Q Do you know what the conversion was that they're
20 talking about in -- the conversion in the schematic and
21 basic wiring?

22 A I do not know all of the details of that conversion
23 that's referred to in that document.

24 Q I'm going to show you what we marked as -- well, I
25 think this didn't get marked. Well, actually I'm just going

1 THE witness, JOHN TORNETTA, was first duly sworn and
2 testified as follows:

3 DIRECT EXAMINATION

4 BY MS. DEAN:

5 Q Good morning.

6 A Good morning.

7 Q I only met you once, it was a really long time ago but
8 I hope you've been well and it's good to see you again.

9 A Thank you, you too.

10 Q Thanks. where do you work?

11 A For Cleaver-Brooks in Milwaukee, Wisconsin.

12 Q How long have you worked there?

13 A I started in 1985.

14 Q You have been in the position or a role of being what's
15 called in some places a corporate representative, in other
16 places the person most knowledgeable for Cleaver-Brooks when
17 it comes to asbestos questions, right?

18 A Correct.

19 Q And so even though I don't mind talking to you at all
20 my request wasn't necessarily to say "Hey, I would like to
21 speak with John," it's, "I want to understand basic things
22 about Cleaver-Brooks," and we give a topic list and then
23 Cleaver-Brooks picks a person who is supposed to investigate
24 what they know to talk about these things, right?

25 A Correct.

- 1 Q You're that person.
- 2 A Yeah.
- 3 Q And you've been that person for awhile.
- 4 A I have, yes.
- 5 Q You've done this dozens, maybe even more than that, 100
- 6 times?
- 7 A Not in a trial setting but testified at least probably
- 8 less than 100 but nearing that, yes.
- 9 Q Okay. And I think I'm following what you're saying,
- 10 but in addition to trials there will be a court reporter
- 11 that swears you in but have it in a hotel room where we can
- 12 ask you questions and there isn't a judge and jury present,
- 13 correct?
- 14 A Correct.
- 15 Q And in this case alone there were two different times
- 16 we were able to come and talk to you about Bowater, and
- 17 Cleaver-Brooks' relationship with Bowater, right?
- 18 A Yes.
- 19 Q One of those times was the beginning of February and
- 20 one was just the beginning of last week?
- 21 A Yeah, there was.
- 22 Q In order to understand issues that came up before you
- 23 even walked in the door in 1985, you have investigated
- 24 records in order to at least try to understand things that
- 25 happened in the 50's, 60's and 70's, right?

1 A Yes. In one sense or another I have access to our
2 specific boiler records and records of that sort, and I
3 worked with a gentleman that had been this for some period
4 of time before me.

5 Q And we've only heard his name once in this trial,
6 what's his name?

7 A George Province.

8 Q And we just looked at some sworn interrogatory
9 responses in earlier years and he was the person that
10 looked --

11 A At one time, yes.

12 Q And you understand that you have as the person who is
13 picked to do this a responsibility on behalf of the company
14 to investigate what is reasonably known, were supposed to be
15 looking for and investigating what the company either knows
16 or can find out about particular topic solutions, right?

17 A Yes. I spent a great deal of time looking at our
18 records.

19 Q With that context I just want to get some really broad
20 background to start off with. Cleaver-Brooks is a company
21 that is an expert in making, designing and selling boilers,
22 correct?

23 A Yeah. I guess -- I'm not sure I would use the term
24 expert, but certainly we are a boiler manufacturer, we
25 design those boilers and we sold those boilers.

1 Q Really smart teams of people like engineers come
2 together and that's what we mean by expert, to figure out
3 how to make these things and have been for years?

4 A Yes. We started in late '31, early '32.

5 Q And by 1949, so less than 20 years after you started
6 Cleaver-Brooks had already sold hundreds of their package
7 boilers, correct?

8 A By 1949 you said, hundreds?

9 Q Yes.

10 A That's probably a good estimate. I'm not sure I have
11 those numbers right off the top of my head but I think we've
12 seen documents that kind of go through some timelines in the
13 past.

14 Q And because I stayed up way too long looking at a lot
15 of these things they are right at the tip of my fingers, and
16 what I have done if it's ever helpful is taken a notebook
17 and I have references to where I learned something, so if
18 you ever want to check me we have a way to do that, okay?

19 A Okay, thank you.

20 Q To be more specific my understanding is that there was
21 more than 800 boilers sold by the end of the 1940's by
22 Cleaver-Brooks throughout the country, does that sound
23 right?

24 A That wouldn't surprise me. I can't say I've actually
25 gone and looked for those specific numbers, but that

1 wouldn't surprise me.

2 Q And this might be a perfect example. If you looked at
3 that notebook there's a tab that just says Craft trial
4 transcript, or TT. And what I did is looked at page 1561,
5 lines eight through ten, and to refresh your memory even if
6 you hadn't looked recently you knew at the time by 1949
7 Cleaver-Brooks had sold more than 8,000 --

8 A I was going to say, that number sounds a little closer.
9 The 800 sort of surprised me but I didn't have it -- I think
10 Mr. Craft, when we were doing this testimony, had something
11 that he was reading from that had some numbers put in there.

12 Q So ten times what I first said, by 1949 8,000 boilers
13 were being sold by Cleaver-Brooks?

14 A That's what it's saying there, I'm pretty sure we were
15 looking at a document at that time.

16 Q By 1952 -- so before the boilers or boiler at issue in
17 this case Cleaver-Brooks had a presence in 30 states and in
18 three countries, correct?

19 A That sounds accurate.

20 Q Have you seen this at all?

21 A Oh, I'm sorry, I have one here.

22 Q You do. And this is a particularly detailed kind of
23 birdseye view.

24 A I believe I've seen a document like this, whether it
25 was the exact one. I know I had seen from some testimony

1 earlier in the week some -- a layout of the plan, I guess is
2 the way I would say, of Bowater Catawba.

3 Q And you have never walked into, been interacted with
4 folks who work at Bowater, right?

5 A I don't believe so, no.

6 Q You did make some effort by looking at sworn testimony
7 of other people to get your bearings about the specific
8 facts relating to Mr. Howe's case by looking at coworker
9 testimony, correct?

10 A I believe coworker and Mr. Howe's testimony, yes.

11 Q That was the next question. So you were provided Mr.
12 Howe's sworn testimony, you were provided Gil Small's sworn
13 testimony, and you were provided Wayne Grant's sworn
14 testimony, correct?

15 A Correct.

16 Q And from that testimony you were aware that what he and
17 his coworkers were saying is that he worked on every boiler
18 that was in this powerhouse, right?

19 A That's the way it sounded. The way I read it they were
20 talking about boilers, some field erected boilers in the
21 powerhouse.

22 Q And even broader than that, did you see first the
23 testimony of Mr. Wayne Grant -- or Wayne Howe, excuse me, as
24 the jury has heard Wayne Howe's testimony but not Wayne
25 Grant's yet, but where he said that he worked on field erect

1 boilers and one or two package boilers?

2 A I do recall that from one of them, I'm not sure I could
3 say exactly which person it was but I definitely remember
4 seeing it, yes.

5 Q And if you don't remember the person with the testimony
6 we can, I think, work with that. But do you recall Gil
7 Small indicating that he worked side by side with Wayne Howe
8 and that Wayne worked on every boiler in the powerhouse?

9 A In the powerhouse? Yes. I know it was generally
10 talking about in the powerhouse.

11 Q I want to start off with an area where I think we agree
12 and that relates to unit number 18343. You're familiar with
13 that number, right?

14 A Yes, I am.

15 Q I suspect very familiar.

16 A Yes.

17 Q That is a designated number by Cleaver-Brooks to be
18 associated with a specific boiler that was sold at a
19 specific time, right?

20 A Correct. We gave every boiler a unit number, some
21 might refer to it as a serial number, in fact, we might in
22 some documents as well, but the unit number indicates the
23 entire unit, the boiler -- the pressure vessel, the burner,
24 the package itself.

25 Q And even in just the records you guys provided to us in

1 this case that have the Bates labels in the bottom for
2 Bowater Power Company and then a number one through 61, we
3 see this number and sometimes it says unit number, sometimes
4 it says serial number, sometimes it's just out there. That
5 is the unit number, right?

6 A Correct.

7 Q And somebody told us yesterday that that's kind of like
8 a person's social security number but for a boiler instead
9 of a person. Not a bad analogy.

10 A Not bad. It's more related to Cleaver-Brooks. We
11 don't -- it's not a number that's let's say tracked by any
12 national type thing, but it's a Cleaver-Brooks unit number.

13 Q Yeah. The federal government doesn't have it, but --

14 A Not that I know of.

15 Q Correct. The new number as I understand how
16 Cleaver-Brooks organized things tells us not just specific
17 information about this boiler, but also that this is unit
18 number 18343 sold by Cleaver-Brooks.

19 A I would have to say somewhat. There were unit numbers
20 that would be skipped, an example of that would be a boiler
21 that was ordered and ended up -- again, was assigned a unit
22 number and before it was actually built it was canceled for
23 some reason. So in some cases they were beyond that with
24 the subsequent orders so they just skipped that unit number
25 for the next order number that came in. So for the most

1 part particularly when dealing with the timeframe we're
2 talking about, 1957 when we were only building fire tube
3 type boilers, at that time it would have been sequential.
4 We do have other products that had different sequence unit
5 numbers. So as we get past the late 50's it wouldn't give
6 you an idea of the 18,000 boilers built overall by
7 Cleaver-Brooks, but certainly the 18343 roughly fire tube
8 boiler built.

9 Q Okay. So since this is before that time in 1957 it
10 gives us a rough idea but not a precise idea that there were
11 thousands and thousands and thousands of these package
12 boilers fire tube sold throughout the U.S.

13 A Correct.

14 Q The records we have about that unit number confirm that
15 there was a Cleaver-Brooks boiler at Bowater sold in 1957,
16 correct?

17 A Yes. In Bowater -- I guess I would say Bowater on
18 Catawba if I say that correctly.

19 Q Yes.

20 A Yes.

21 Q And I'm always going to be referencing the Catawba
22 location as opposed to the Tennessee location so you can
23 assume that for all of my questions if that helps.

24 A Okay, thank you.

25 Q There is nothing in Cleaver-Brooks, and you've looked,

1 that could identify from your records where that boiler went
2 in that big plant, correct?

3 A Correct. I didn't find anything in my records that
4 gave me an indication of physically where it was in the
5 plant.

6 Q But what the records did tell us, and what I've done
7 here is referenced those Bates labels so that everybody can
8 follow along if they want to see it, are some time frames
9 for important events for the boiler, right?

10 A It look like way, yes.

11 Q And we have kind of bits and pieces of these records
12 that the jury has already seen and have been marked in
13 different places. I decided late last night that it may
14 make sense just to have a group of them, and I've marked the
15 whole group which extends all of the way from 1 to 61 as
16 Exhibit 55. So if I go to 16 and 17 I might be able to
17 learn the date that was ordered and things like that.

18 A Okay.

19 Q Do you have those records with you --

20 THE COURT: Let me stop you there. Exhibit 55 is already
21 in evidence, correct, or are you putting it in evidence now?

22 MS. DEAN: We would like to put it in evidence.

23 THE COURT: Right. It's Exhibit 65 (sic) -- documents
24 with sequential numbers of pages in it that has to do with the
25 history of unit 18343 as I understand it.

1 MS. DEAN: It's not limited to that, Your Honor, but that
2 is part of what it discusses.

3 THE COURT: And so it's documents related to the boiler
4 and to what else?

5 MS. DEAN: It is the Bowater documents provided, as we
6 noted yesterday it referenced two unit numbers.

7 THE COURT: And how many pages are in this material?

8 MS. DEAN: One to 61.

9 THE COURT: One through 61. And each page has that kind
10 of sub-number, so it's Exhibit 55 internally numbered page one
11 through 61.

12 MS. DEAN: Yes.

13 THE COURT: And it contains various documents about this
14 unit and various Bowaters documents.

15 MS. DEAN: Various documents from Cleaver-Brooks about
16 Bowater.

17 THE COURT: About Bowaters. So these are all
18 Cleaver-Brooks documents?

19 MS. DEAN: Yes, Your Honor.

20 THE COURT: All right. Any objection?

21 MS. O'NEIL: No objection.

22 THE COURT: All right, no objection, very good.

23 (The document was received as Plaintiff's 55.)

24 Q If you need to look at these to verify dates and times
25 I have it handy, but the date that that boiler was ordered

1 by Bowater saying, "Cleaver-Brooks, this is what we would
2 like," was in September of 1957, right?

3 A I absolutely would need to look at it too to answer yes
4 I guess is the way I put it. Yes. I guess I would just
5 clarify, you had said ordered by the folks at Bowater, it
6 actually was sold to Crane Company in Chicago, Illinois, and
7 it was shipped to Bowater Carolina, so the Crane Company is
8 actually the purchaser of it. The September 23, 1957 date
9 is on BP16 -- BPM 16, I'm sorry, the actual order, which is
10 on BPM 19, the purchase order itself, was dated September
11 3rd, 1957. I think the date that you would have taken off
12 of BPM 16 is actually the date we entered that order.

13 Q Got it. So a few things, it's actually even a little
14 bit more complicated. Crane Co. in Chicago, Illinois
15 purchased it, it went to Daniels in care of Bowater here in
16 South Carolina, right?

17 A That's the way it looks, yes.

18 Q We know that BPM is an abbreviation for Bowater Paper
19 Mill, it's just the Bates label that's at the bottom?

20 A Yes. I always assumed that but I don't put the Bates
21 numbers on it, but I assumed it.

22 Q And the records about the actual ordering of this are
23 in September of 1957.

24 A Correct.

25 Q And then it was actually after being ordered shipped

1 probably from Pennsylvania from Cleaver-Brooks to the
2 Bowater plant, right?

3 A Actually it was shipped on that date, but it was
4 shipped from Milwaukee, Wisconsin.

5 Q Milwaukee, okay. And that was done in November of
6 1957, correct?

7 A Correct, November 5th, 1957.

8 Q And then we actually have field reports that let us
9 know when they did the start-up service so that when they
10 got the boiler hooked up, ready to go, started, right?

11 A Correct. After it was installed someone verified that
12 it was set up properly and the initial commissioning is I
13 guess what I would refer to that as, or start-up.

14 Q And that was in February of 1958.

15 A Correct.

16 Q The jury saw an exhibit yesterday when we were talking
17 to Art Welker from Bowater, it was marked as Exhibit 45 and
18 it was the one and only record they had verifying a
19 Cleaver-Brooks boiler was at their facility. First, have
20 you seen that record?

21 A Yes, I did.

22 Q Okay. I just have a small clip of it here. But what
23 it indicated is there was, in fact, a Cleaver-Brooks boiler
24 at Bowater, it was put in the administration building, do
25 you see that?

1 A Yes, I do.

2 Q You have no basis to dispute that there was a
3 Cleaver-Brooks boiler in the administration building.

4 A No. Again, our records didn't really call it out but
5 that seems to indicate that it was.

6 Q Did anyone tell you when the administration building
7 was built at Bowater?

8 A I don't recall hearing that, no.

9 Q Do you even know what date that the administration
10 building was built at Bowater?

11 A I don't recall any testimony about when the plant
12 itself was opened so I'm not certain.

13 Q People worked really hard to give us transcripts of
14 what was written yesterday, sometimes at 1:00 in the morning
15 but this came from yesterday. When we met Art Welker I will
16 represent to you this is a picture of him, and he was asked
17 about the admin building and when it was constructed and he
18 indicated that that happened in 1961, and you're learning
19 that for the first time as I tell you, right?

20 A I believe so, I don't think I've heard that.

21 Q For more context we went through two different
22 locations where there were boilers, and did you know he
23 indicated the powerhouse started in '57, the admin building
24 was in '61, some three or four years later. Any reason to
25 dispute that timeline from the company representative from

1 Bowater?

2 A I don't believe I have any information related to it,
3 certainly not in our records when the plant or parts of the
4 plant were built.

5 Q So the boiler we know that Cleaver-Brooks has records
6 of was a boiler that we know was somewhere at Bowater up,
7 started and working years before 1961, correct?

8 A Yes. It was started three years before 1961.

9 Q You indicated you believed there was no indication of
10 location for this boiler, I found one thing I would like to
11 show you from the records which is on page 20 if you just
12 want to flip to it but I also got a picture of it. where
13 they are referencing the boilers that's reflected at least
14 in your records going to Bowater we have a ship to in care
15 of Daniel, and there's a line that says type of building,
16 right?

17 A Yes.

18 Q And there are different type buildings that
19 Cleaver-Brooks sold to. They sold to hospitals and churches
20 and schools and office buildings and plants and factories,
21 right?

22 A All different types of facilities, yes.

23 Q what this says is paper mill, correct?

24 A Yes.

25 Q In terms of what we know about Cleaver-Brooks boilers

1 that were sold in the 50's and 60's time frame is that there
2 were a variety of asbestos components that were used in
3 their package boilers, correct?

4 A Yes. Depends on the boiler, which components or where
5 the component might be, but yes.

6 Q I want to go through the components that first of all
7 we know about in relation to the particular boiler that we
8 have a record from, and I'm going to talk probably a little
9 bit later about how we got from that unit number to getting
10 those records. But for now you are the guy that actually
11 did that work of taking that number, digesting
12 Cleaver-Brooks records to find what asbestos was in this
13 boiler, right?

14 A Yes.

15 Q I would like to go through each of these just hopefully
16 briefly. To do internal work on a boiler, at least the
17 boiler that we know was at Bowater, you have to interact
18 with asbestos, correct? There's no way to get around it.

19 A To open the front or rear door, which is how you would
20 get to internal work, there would be a gasket and I believe
21 those gaskets were asbestos, yes.

22 Q And the jury had to sit through reading a bunch of
23 documents right when we started this so they've seen
24 pictures of the front and rear door, but I just want to back
25 up for a minute just to associate that a little bit more

1 with the actual boiler. The rear side is associated with
2 the fire side, correct?

3 A No, I don't think I'd describe it that way. The rear
4 is the -- both the front and rear have the flue gaskets on
5 the fire side of the boiler, so opening up the front door or
6 opening up the rear door exposes two ends of the fire side.

7 Q Okay. I've heard you reference one side as the water
8 side and one side is the fire side.

9 A There is absolutely a water side and fire side, but the
10 water side is accessed through the handhole plates.

11 Q Got it. So if you go through the rear side and if you
12 open the door, that is something that you would need to do
13 to get to the pressure vessels, and to do that there's a
14 gasket, right?

15 A You would need to do it to get to the fire side of the
16 pressure vessel in the rear, access to the pressure vessel
17 is also through the handhole plates that we -- I just
18 mentioned.

19 Q So we can start there. On the handhole side you have
20 handhole plates and you would have to remove them if you
21 were going to be accessing the boiler through that side,
22 correct?

23 A Yes. To get to the water side you would have to take
24 the handhole plates off and there would be a gasket between
25 the handhole plate and shelf.

1 Q If you're going to the other side and opening the door
2 itself there is definitely a gasket there, correct?

3 A Correct.

4 Q And the main point is regardless of access point, and
5 there might be different reasons why you're using different
6 access points, they're going to be interfering with asbestos
7 gaskets to get into the boiler, correct?

8 A Yes. To view inside the water side or to view inside
9 the fire side you would have to get past the, at least what
10 we originally supplied, an asbestos containing gasket.

11 Q There was insulation on the rear door, specifically
12 millboard insulation behind the refractory; is that correct?

13 A I guess I would term it more as in the rear door. It's
14 on -- it kind of gives the impression it's on the outside of
15 it, it's actually sandwiched, as you said, behind the
16 refractory and the steel that forms the back of the door.

17 Q And we've heard a little bit about the purpose of using
18 gaskets in insulating material is to make sure that when you
19 have different metal surfaces you don't have leaks or things
20 escaping out. Is it fair to say that one of the functions
21 on the door and using a variety of asbestos components is to
22 create a seal?

23 A Certainly in the gasket that goes around the door and
24 on the rope that goes across the baffle of the rear door
25 since we're talking about that, the insulation I don't

1 believe I would qualify that as creating a seal.

2 Q why do they put the insulation cement over the gasket,
3 or sandwiched between like you just described?

4 A Oh, you're talking about a little bit different
5 material. You're talking, I believe, about the cement that
6 was shown around the gasket on the rear door. I thought you
7 were talking about the insulation that was sandwiched
8 between the refractory and the steel of the door.

9 Q Let's talk about it each.

10 A Okay.

11 Q Let's start with first since we're talking about the
12 gasket on the door, why asbestos cement was then mudded on
13 over that gasket.

14 A The gasket is a somewhat irregular surface I guess I
15 will call it. It's not completely smooth, it's not sealing
16 up areas that are machined in any way, so the cement was
17 used to fill in those gaps of that gasket and create a seal.

18 Q And then in addition to that we were talking about --
19 and thank you for clarifying the difference between the
20 two -- that there was kind of a sandwich of millboard
21 insulation behind the refractory. Can you explain that?

22 A In the -- it might be a little bit easier with the
23 drawing but I don't know if you have that ready.

24 Q while you're talking I might be able to find it.

25 A It's actually in these. It's actually used as an

1 insulation break, I guess is what I would call it. Some of
2 the temperatures we're dealing with -- no, that's actually
3 not the one I was thinking of, that's a little bit different
4 than the boiler we're talking about.

5 Q I tried.

6 A Thank you. The temperature that we're seeing at that
7 rear door, which is where we're talking about, one portion
8 of it is in excess of 2,000 degrees, you have a fire down at
9 the other end of the boiler. So there's materials, what's
10 called refractory, that directs those gaskets and make them
11 go the directions we need to in the boiler, and that
12 refractory actually conducts heat pretty well. So the
13 insulation that's behind that refractory between that
14 refractory and the steel on the outside of the boiler that
15 someone could go up and touch, it's there to insulate the
16 steel from the heat of that refractory. Sorry, that was a
17 long-winded answer.

18 Q I appreciate it. The next asbestos component I have on
19 this list is cast insulation. Am I understanding is first
20 just the brand name of the cast insulation used here is vee
21 block mix?

22 A Yes. Quite frankly I'm not sure if it's a brand name
23 or just the trade name of it. The material that I see on
24 our drawings and parts descriptions over the years has been
25 vee block mix.

1 Q The vee block mix was used in the upper half of the
2 rear door and in the inner plate of the boiler, correct?

3 A Correct. It's also used in the lower half behind the
4 cast refractory on this site's boiler.

5 Q I think you've noted before that while some people
6 would call this a refractory, the terminology you believe is
7 more accurate is cast insulation, did I get that right?

8 A Yes. It has insulating properties rather than
9 refractory like properties.

10 Q Distinguish the two for us.

11 A Refractory tends to be more, for lack of a better term,
12 solid and heavy, it's more like concrete, and it's there
13 more to direct heat and actually transfers heat very well
14 just like a concrete floor would transfer heat. An
15 insulation would insulate, I guess. There would be a
16 temperature difference between one side of the insulation
17 and the other side of the insulation. So even though at
18 times I've seen us refer to vee block as refractory, it
19 technically would be an insulation in the properties in the
20 way it's used.

21 Q We heard that sometimes cement might give the wrong
22 idea, it's not like a hard concrete cement. This vee block
23 was much easier to crush.

24 A Vee block certainly is not like concrete. The material
25 I was talking about that's more like concrete was the

1 castable refractory in the lower half of the rear door.

2 Q Right. So you know that just in talking about this
3 cast insulation or this Vee block mix that the operating
4 manuals for Cleaver-Brooks, which gives direction on how to
5 deal with these type -- with these boilers, indicates that
6 you can use a hammer, and I even think it says an electric
7 or air hammer in order to get this stuff out, have you seen
8 that?

9 A I've seen that and I've always kind of wondered about
10 it. Because if you're getting it out, the reason you're
11 getting it out is because it was falling out, so I wasn't
12 quite sure I ever understood the reason for needing at least
13 an air hammer to get things out.

14 Q well, you first don't dispute in actual Cleaver-Brooks
15 manuals at the time that this was being done that's
16 explicitly what they're describing, right?

17 A Certainly not them saying that, no.

18 Q And whether it's fallen out or you're having to push it
19 out, one of the things the manual says is this is dusty and
20 it's important to clean up all of that debris dust, do you
21 recall that?

22 A I don't remember exactly how it says it, but it
23 wouldn't surprise me that it talks about cleaning up the
24 area.

25 Q I think you already referenced this in passing but just

1 to confirm, there was also asbestos rope gasket to cross
2 what's called the wrapper of the rear door between baffle
3 and the tube?

4 A Between the baffle and the tube sheet, yes. There is a
5 rope that goes -- an asbestos rope that went across --

6 Q So if you're going to do work on a boiler that gasket
7 would have to be removed and replaced just by opening the
8 door.

9 A If you opened up the rear door and there had been any
10 time, several months or more past since the last time it was
11 opened you would probably have to replace that.

12 Q In terms of the asbestos cement, just to get an idea of
13 how much asbestos cement that was used on Cleaver-Brooks
14 boilers, there was a document the jury had seen and I think
15 you and I have talked about it in the past that told us how
16 much would be on there depending on the size of the door, do
17 you know what I'm talking about?

18 A I'm not certain.

19 Q Let me try it this way. You know and have seen that
20 the amount of asbestos cement just used in the door could
21 range between one pound and 50 pounds depending on the size
22 of the boiler.

23 A Yes. The cement used across the baffle rope where it's
24 also used is going to vary depending on the diameter of the
25 door and the diameter of the boiler itself, so as it gets

1 larger it would be more. In this particular case we're
2 talking about the smallest of the diameter boilers we had
3 ever built.

4 Q So if we were looking at that, and I looked at the
5 first one as it went in up in size, that would correspond
6 with what you think that is the smallest one.

7 A Yes. Again, I'm not sure what document exactly you're
8 talking about, but certainly our -- the drawings we produced
9 for this case will cull that out as well.

10 Q In terms of the asbestos cement, you have seen
11 documentation from Cleaver-Brooks that referenced the cement
12 in different ways, sometimes they just referenced it by part
13 number JM450, at other times they call it specifically an
14 asbestos filler. You've seen that, right?

15 A I believe so, yes.

16 Q And you have no basis to dispute records that that's
17 100 percent raw asbestos that was being used.

18 A Oh, I don't know that I ever understood it to be 100
19 percent raw asbestos. I suppose it would be what JM450 was.
20 I'm certainly not an expert on what those components were
21 made up of. I understood it to be asbestos cement, or
22 cement that had asbestos content.

23 Q And again, I know we talked years ago and you don't
24 remember looking at that exact issue, 450 asbestos filler
25 was 100 percent asbestos.

1 A I don't remember us looking at it but it doesn't mean
2 we didn't however many years ago that was.

3 Q We can look at that or I can ask you, do you have any
4 basis to dispute Johns Manville's record --

5 A No. Johns Manville's records will say what they say
6 and if it says that then I have no reason to dispute that.

7 Q And a lot of the times in the records it's abbreviated,
8 but JM is almost certainly referring to Johns Manville in
9 the records, just a source of the asbestos products used by
10 Cleaver-Brooks, correct?

11 A Yes. At least in this context I understand JM to mean
12 Johns Manville.

13 Q Cleaver-Brooks also used tadpole style gaskets with
14 their boilers?

15 A Correct.

16 Q Explain what that is.

17 A The tadpole gasket is -- I sort of talked a little bit
18 before when I was talking about opening up the rear door,
19 it's a gasket that actually starts out flat and there's
20 technically a rope down the center of it, and then that
21 gasket is folded over it to form a bulb and a flat part of
22 the gasket. So it's a little more forgiving gasket when it
23 comes to sealing up irregular surfaces.

24 Q You mentioned that there's sometimes temperature
25 differentials which is why you use insulation. Can you give

1 the jury an idea for the boiler that you have a record of
2 just how hot this thing is?

3 A It would depend on where you're talking about. The --
4 I referenced about 2,000 degrees, that would be on the fire
5 side right after the flame, I guess, is the way I put it.
6 The steam coming out of this boiler if we're talking about
7 the steam side of it, it was a 15 pound steam boiler which
8 would be up to 240 degrees steam, so it would depend on
9 where you are. If you're inside the boiler while it's
10 running, which would be impossible at least for more than a
11 couple of seconds, you're dealing with temperatures anywhere
12 from 3,000 degrees from the flame to 500 or 600 degrees
13 before the gasses leave the stack. On the water side or the
14 steam side it would be somewhere in the area of 240 degrees
15 Fahrenheit or less.

16 Q So to simply say that it goes from hot to really,
17 really, really hot.

18 A Depending on the side, I guess, you're looking at.
19 Side isn't physical, it's descriptive.

20 Q And what I mean by that is all of them are above 212
21 degrees.

22 A Yeah. I guess nearly -- at least in the parts of it.
23 Now, the outsides of it when someone touches it would not
24 be.

25 Q Because there's lagging insulation -- I'm just talking

1 about where the gasket and asbestos components are
2 internally.

3 A The components exposed in the inside of the boiler or
4 at least that temperature, yes.

5 Q So if the jury has heard that look, the components that
6 you used whether they be a tadpole gasket or a flange gasket
7 are going to no longer be these malleable rubber gaskets,
8 but they would get stuck on because of heat and pressure,
9 that makes a lot of sense to you.

10 A Stuck on? I guess it depends on what you mean by stuck
11 on. Certainly they will not just -- at least a tadpole
12 gasket, they're actually held on by clips that we put on
13 there so they can be held on while we're closing a door, but
14 you would have to pull it off.

15 Q Another type of gasket, and we've seen pictures of it
16 earlier but I want to discuss with you is a burner gasket.
17 You agree that that's asbestos and just the inner diameter,
18 to give us a perspective of how big it is, was over six
19 inches.

20 A Yes. I could look at the drawings but I think that the
21 burner -- what they're talking about there is the burner
22 drawer which is the component that --

23 THE COURT: Let's pause for a second and let the -- go
24 ahead, Ms. Dean.

25 Q You were saying it's the burner drawer, just give us --

1 A Burner drawer gaskets, and yeah, it's 10-inches or
2 smaller, probably eight inches or smaller on the outside of
3 this.

4 Q There was also a reference in these records to
5 EaglePichers, I think it is EaglePicher 66, you acknowledge
6 that is asbestos, correct?

7 A I guess. I don't know specifically for EaglePicher. I
8 think that's in the same part number as the JM450 so I
9 believe it's an asbestos cement, but I can't say for
10 certain, I can't testify on what EaglePichers' version of it
11 was.

12 Q Is it your belief that that was probably or likely an
13 asbestos containing component?

14 A I would certainly wonder whether it was and would have
15 to talk to EaglePicher or whoever the distributor of it was.

16 Q In an effort to figure this stuff out before we came
17 here we had a chance to talk to you, right?

18 A I'm sorry, talk to me you said?

19 Q Yeah.

20 A Yes.

21 Q To try to understand where the asbestos was and that
22 kind of thing. If you look to the first volume of that
23 deposition on page 101 you can see where you were
24 specifically asked whether Mr. EaglePicher Super 65 was
25 asbestos, and I'll direct you to line 13 where you correct

1 us to say, "No, it's 66 not 65, and yeah, probably it is."

2 Do you see where I'm at?

3 A Yes.

4 Q You stand by that today.

5 A Yeah, and I think that's what I said.

6 Q It's not just that it's something you would investigate
7 further, at the time when we asked you to investigate and be
8 ready you believed it probably was asbestos.

9 A Yeah.

10 Q There's also something called Fiberite, at least I
11 think that's how it's pronounced. Let me start by asking,
12 is that how you would pronounce it?

13 A That's how I have always pronounced it, yes.

14 Q That's an asbestos containing product that you know
15 from your records that was in Cleaver-Brooks boilers,
16 correct?

17 A Certainly in this one on the card it said Fiberite.
18 I've seen it in other boilers as well.

19 Q To just kind of understand the different things that
20 might involve opening up these doors in order to do work on
21 the boiler to clean it as an example, right?

22 A Yes. In order to access the tubes you would have to
23 open at least the front or rear and more than likely both.

24 Q Packing, which is the last thing I have on there, is
25 used in pumps and valves associated with the boilers and I

1 think you're the very first person we're talking to about
2 packing. But when you have moving parts in the system they
3 would use asbestos packing in order to make sure there was
4 storing or leaking, do you agree with that?

5 A I understand that to be the case, yeah, pumps and
6 rotating shafts I guess is the way I put it.

7 Q Perfect. And Cleaver-Brooks' instructions again
8 relating to how you operate their equipment, that when
9 packing gets dry and hard it should be taken out with a hook
10 and then replaced with a good grade asbestos packing when
11 it's reinstalled. You've seen that before, right?

12 A I believe in the manual that we produced in relation to
13 this boiler there was some references to that on the feed
14 water pump if I remember correctly.

15 Q Yes, at least that's my memory. It's not just that
16 Cleaver-Brooks made and designed the boiler, they made
17 available for sale replacement parts for each and every one
18 of those asbestos components, correct?

19 A Yes. If somebody wanted to buy one from us we would
20 have sold it.

21 Q And even in the very limited records that you were able
22 to find in this case you saw instances where replacement
23 parts were being purchased well after the sale of the boiler
24 was called references to 1960's documents and 1970's
25 documents, do you recall that?

1 A I don't recall the specific time. There were two
2 instances that I recall of us shipping a component after the
3 sale of the boiler, it looked like one was probably in
4 relation to a warranty return on a component that failed or
5 failed not to work, and another was switches.

6 Q Yeah. And just to give an example of the time frames
7 to make it more concrete, if you look I think to either page
8 48 of the deposition or 13 of the documents, whichever is
9 easiest for to you flip to, you can see that replacement
10 parts were happening in that particular document for
11 Cleaver-Brooks on September 1969, correct?

12 A Yes. It looks like we shipped ten toggle switches in
13 it looks like August of '69, either August or September,
14 it's hard to say what the ship date is, it's kind of
15 blurred.

16 Q We have seen information that Cleaver-Brooks put out in
17 some of its materials that they were the first world leading
18 producer of package boilers and you know that to be
19 accurate, correct?

20 A Yes.

21 Q Cleaver-Brooks selected and designed the components to
22 make this boiler and they represented to the public that
23 they did so to maximize safety, correct?

24 A Certainly safety, efficiency and all of the other
25 things that go into dealing with a pressure vessel and

1 following fuels and things of that sort, yes.

2 Q The next word was efficiency and the last is
3 dependability. Those are the three things Cleaver-Brooks
4 said that they as a company could do if you bought their
5 boiler, right?

6 A At least those three I would say, yes.

7 Q They backed the entire package. Each component that
8 they selected and put in in the boiler they made, designed
9 and sold to the public, correct?

10 A Yes. Our warranty and our service or our customer
11 service backed the boiler burner packing and stuff.

12 Q We've seen, and the jury has had an opportunity to look
13 at them themselves, but Cleaver-Brooks after selling it
14 would provide manuals that gave instructions on how to
15 operate, install, service and maintain the equipment that
16 they made, right?

17 A Yeah. Typically a manual, at least one went with the
18 boiler if not more than one.

19 Q They also provided training, if someone wanted to pay
20 for it, to operate the boiler and equipment safety, correct?

21 A Yes. You said if someone wanted to pay for it, I think
22 that was also part of the start-up in the boiler as well as
23 was training.

24 Q In addition to that the design that was chosen by
25 Cleaver-Brooks for their boilers specified and required the

1 use of asbestos components, correct?

2 A Certainly our drawings would indicate asbestos in some
3 assemblies and things of that sort, yes.

4 Q This is just an example that I pulled from Bates label
5 number 30 which I tried to write on the bottom in case
6 people want to see it. But this is just one where you see
7 that vee block, rope, cement and a variety of boards, in a
8 Cleaver-Brooks drawing they are requiring each of those
9 components for the specific numbers that are identified in
10 this document, right?

11 A Correct, yeah. The requirement there is the volume or
12 the number of whatever it may be, yes.

13 Q The boiler that was sold in the record that you have
14 for that record ending 43 was not some unusual boiler for
15 Cleaver-Brooks, right? It was one of the model numbers that
16 they had and made available to the public.

17 A Correct. And it was certainly built in response to
18 whatever the customer's requirements were for that
19 particular boiler. But certainly we offered model progress
20 30 horsepower boiler to people as well.

21 Q And the point I'm making and I tried to ask you broadly
22 about Cleaver-Brooks, but even for the particular progress
23 boiler that we have records for in this case, this is a type
24 of boiler that Cleaver-Brooks sold with many of these same
25 exact components that I have up here sold across the country

1 in plants and schools and hospitals and factories.

2 A There may be components like that in other boilers as
3 well, yes.

4 Q And what I'm trying to drive at is that Cleaver-Brooks'
5 conduct and what they sold in their boiler and their
6 instructions and lack of instructions with that boiler to
7 Bowater wasn't an unusual event or a bad day, that was kind
8 of how Cleaver-Brooks conducted itself. You would see very
9 similar boilers, there could be adjustments, sold to
10 different people with very similar operating instructions,
11 very similar instances; is that fair?

12 A I would be a little careful with the term similar. I
13 guess I would say certainly we had all different models, and
14 I don't know if you're talking about that much detail. But
15 certainly we would have sold the boiler, we would have
16 provided a manual, and in some of those boilers they may
17 have had asbestos containing components, yes.

18 Q Asbestos where every time you opened it for any kind of
19 work you had to interfere with that asbestos component when
20 you're the guy in the boiler.

21 A I would be a careful with the any type of work, because
22 there's areas and work you do on boilers that you don't open
23 it. Certainly when you open the doors of a fire tube boiler
24 if it had an asbestos containing gasket you would have had
25 to go past that asbestos containing gasket.

1 Q I think we're on the same page. There is one
2 particular type I haven't talked to you about yet that's
3 listed there in your records called microlite?

4 A Yes.

5 Q You're familiar with that, right?

6 A I'm familiar with it being called out in the record,
7 yes.

8 Q Yes. And that is something you've been asked routinely
9 about because it's an insulating material that was used on
10 the outside of some Cleaver-Brooks boilers and was
11 referenced specifically in the 43 boiler we know went to
12 Bowater, correct?

13 A 43 meaning the unit number? I just want to make sure
14 we're talking about that.

15 Q You read me right. And since we have the last two
16 digits being different I will reference the one we're
17 talking about now that's 43 if that's okay.

18 A Okay.

19 Q And what I said was right, microlite was used as an
20 insulating blanket material by Cleaver-Brooks both in other
21 situations but specifically in the unit 43 boiler.

22 A Yes. If I could just clarify a little bit, you said on
23 the outside, it certainly goes around the shell of the
24 boiler on the outside of that but there's also a covering
25 over the top of that as well that we would call the sheet

1 metal lighting.

2 Q Okay. And we've heard this about pipes as well. You
3 kind of had the initial metal surface, they put insulation
4 over that then and they would cover it with some type of
5 sheet metal on top, right?

6 A I read that in some things, that certainty isn't my
7 expertise I guess I'll say.

8 Q That's what was happening with the Cleaver-Brooks
9 boilers.

10 A Yes. We put an insulating blanket around the shell or
11 at least partially around the shell and then that was
12 covered with a relatively light gauged sheet metal.

13 Q You have not been able to verify whether microlite was
14 asbestos free or asbestos containing, nor have you had
15 anybody show you the exact content of what that is, right?

16 A I have never come across or never been given anything
17 or found anything that said it was asbestos containing,
18 correct.

19 Q Similarly there's nothing that you found that says this
20 is fiberglass or mineral or something else.

21 A No. The terminology used in the description makes me
22 think, and I think I've said this before, it was somewhat of
23 a precursor to blanket fiberglass because it does refer to
24 it as a blanket versus a block I guess I would say, but
25 other than that, no.

1 Q There has been testimony that asbestos blankets were
2 used at Bowater both from the corporate representative and
3 from an occupational medicine doctor that the jury has
4 heard. Were you aware of that?

5 A I thought I recalled some testimony, I can't say for
6 certain that it was this specific case related to the
7 turbans and asbestos blankets being used to cover turbans.

8 Q More specific to -- and I'm familiar with what you're
9 talking about, but to blankets that were used on
10 Cleaver-Brooks boilers, have you investigated or heard Art
11 Welker's testimony on his belief about what that insulation
12 would be made of if it was brought in before 1972?

13 A No, I haven't.

14 Q A very discrete question just as it relates to the
15 first couple of pages of the production that you provided.
16 There is a reference to a conversion with the boiler, do you
17 see that?

18 A Yes, I do.

19 Q They're specifically referencing whether or --
20 short-handed unit 43?

21 A Correct.

22 Q What's happening in those two documents?

23 A It appears to be, from what I gather on it and the name
24 on it, the local rep getting information from us -- our
25 local representative I should say, getting information from

1 us to convert that boiler to burn number two oil or diesel
2 fuel and natural gas. It was originally designed to burn
3 natural gas only and over time people sometimes get other
4 fuels available so they'll allow a boiler to burn both fuels
5 at different times.

6 Q So the 700 series, which is the series at issue,
7 usually indicates that you're talking about just using
8 natural gas.

9 A Correct, a straight gas fire and boiler.

10 Q And what's happening in '73 is their pricing in these
11 two documents that are Bates labeled two and three in that
12 record making a change to the boiler in 1973 where they're
13 trying to add a second source, specifically number two
14 boiler.

15 A Correct, yeah. Convert it to what it says on the --
16 actually BPM three it says convert to combination --
17 abbreviates CMB, number two/gas.

18 Q And because it's just a couple of handwritten notes I
19 just wanted everybody to be able to understand what they
20 meant later on so I appreciate that.

21 A Sure. I don't know that it was actually acted upon. I
22 didn't see any order in the file or in the records to
23 indicate that, but it looked like the question was asked.

24 Q And you didn't see any order in the file either about
25 any conversion work done in 1971, correct?

1 A Correct.

2 Q And the reason I picked the 18 date is you're aware
3 from Exhibit 45 the one document we got from Bowater this
4 week they talk about a conversion in 1971, correct?

5 A Correct, it looked about like a different conversion.
6 I probably have to speculate a little bit on it based on
7 what it said, but it looked like a conversion about the
8 flame safe guard control.

9 Q And in terms of whether Cleaver-Brooks was involved in
10 that or details of what did or didn't happen, we can't get
11 any further clarity from Cleaver-Brooks records.

12 A Correct. I didn't have any record of that in our
13 commercial records.

14 Q I want to talk a few minutes about the Applied
15 Engineering Company, you're familiar with that name,
16 correct?

17 A Correct.

18 Q Explain who that is as it relates to Cleaver-Brooks.

19 A Applied Engineering at the time of the sale of this
20 boiler and for some times around that was the independent
21 sales and service representative in a geographic area that
22 included South Carolina that would have been soliciting the
23 sales of boilers for Cleaver-Brooks as well as involved if
24 there were any after-market sales and any part sales
25 afterwards or service.

1 Q And what you're telling us today is that that was an
2 independent company?

3 A Correct, certainly at that time they were.

4 Q I am showing the Bates label where -- this was just one
5 of several where they're referenced in those records which
6 is both now Exhibit 55 which has the whole collection and
7 I'll also represent Exhibit 41. But they showed Applied
8 Engineering Company right there in terms of who this
9 remittance request is getting paid to, right?

10 A Yes.

11 Q And you saw that there was request in earlier documents
12 for payment for their service work in installing or putting
13 together the Cleaver-Brooks boiler at Bowater?

14 A I'm not really installing or putting it together but
15 starting it up.

16 Q Okay. And then this is Cleaver-Brooks' payment or --

17 A Correct.

18 Q BPM six is the invoice from Applied Engineering to
19 Cleaver-Brooks for the starting service, and BPM five is
20 what we call remittance request, but it's basically
21 generated a payment to Applied Engineer Company for that
22 service. And this is where we have verification of what you
23 just said what they were doing is starting up, I'm pointing
24 to the red line.

25 A Correct.

1 Q They also give the address of where this is located
2 which I put in the red box, do you see that?

3 A Where Applied Engineering is located, not the boiler,
4 correct? Is that what you're saying.

5 Q That's what I was trying to say.

6 A Yes. At least the -- whoever was the partner of the
7 Applied Engineering that received payment. I'm not sure I
8 could tell you for certain that's where the service person
9 came from, but it does say Orangeburg, South Carolina.

10 Q This document has been admitted into evidence as
11 Exhibit 10, and it's Cleaver-Brooks package boilers for
12 heating and processing, have you seen that?

13 A Yes.

14 Q Have you seen this document before?

15 A Yes.

16 Q And they list out sales representatives and leading
17 cities, and when they say sales representative at leading
18 city, right above that they said sales representatives in
19 leading cities, right? I'm right here.

20 A Oh, yes. Yeah. They were a, for lack of a better
21 term, a manufacturer's representative and Cleaver-Brooks was
22 one of the manufacturers they represented.

23 Q What they say in the materials were complete
24 specifications, "Write Cleaver-Brooks Company or contact the
25 sales representatives in the area as shows below." In other

1 words, these are our sales representatives, right?

2 A Yeah. They are people that would solicit the sales for
3 us, yes.

4 Q So when people coming in are putting together the
5 boilers, Applied Engineering are the sales representatives
6 of Cleaver-Brooks at least in their written documents back
7 at this time.

8 A I'm sorry, I don't know if I followed the question in
9 there.

10 Q We know from Exhibit 10 that Applied Engineering, the
11 company that actually went to Bowater and started up this
12 boiler involved, was a sales representative of
13 Cleaver-Brooks. You said a moment ago they're an
14 independent company, but when we look at the actual records
15 what they're saying is these are our representatives in the
16 field doing this work, true?

17 A Yes, but I guess I am a little confused with the
18 difference. It is that they were an independent company and
19 they represented Cleaver-Brooks in the sales and service and
20 in the start-up end of things, but they weren't part of
21 Cleaver-Brooks then.

22 Q Do you recall when we wanted to, again, talk to you
23 just a few weeks ago about this and we asked whether
24 Cleaver-Brooks ever was involved at being at the site, your
25 answer was no.

1 A Correct.

2 Q We know that Applied Engineering absolutely was at the
3 site from the records that you produced in this case.

4 A Absolutely.

5 Q Now that we've kind of gone through what asbestos was
6 involved, I want to spend a few minutes talking to you about
7 what Cleaver-Brooks understood or should have understood
8 about the dangers of asbestos historically, and that's a
9 topic that you are regularly asked to research, understand
10 and answer questions about under oath for Cleaver-Brooks,
11 correct?

12 A Correct.

13 Q First of all, you would agree that Cleaver-Brooks,
14 regardless of the time frame we're looking at based on your
15 review of the company, knew it had to follow laws that
16 applied to them whether they were local, state or federal,
17 correct?

18 A Certainly in relation to what we were doing, building
19 boilers, manufacturing, whatever it may be I would say
20 generally yes.

21 Q And that's why I said that the laws that applied to
22 you. And you would agree that if you're going to be a
23 reasonable responsible company and follow the laws that
24 apply to you the first step is to know what they are.

25 A Yes. In order to follow the law you would have to know

1 what it would be.

2 Q Simple example because the jury has heard about OSHA,
3 if you've got people working day in and day out on asbestos
4 building something like a boiler and you're -- in order to
5 follow OSHA one of the best first steps is to know that it
6 exists and what it requires of you, fair?

7 A Yes. I think all employers were charged with knowing
8 what OSHA required back in the early 70's.

9 Q Thanks for bearing with me, I just wanted to write that
10 down. In terms of what laws apply to Cleaver-Brooks I want
11 to just take a minute and give the jury some varying of
12 where you did the heart of your work. And you know that
13 Cleaver-Brooks had different manufacturing plants, in fact,
14 we've talked about a couple of them in this country, right?

15 A Correct.

16 Q Pennsylvania, Wisconsin, Mississippi, Georgia,
17 Nebraska, and also some internationally in Mexico and Kansas
18 depending on what specific years we're looking at, right?

19 A Overall time frame, yes.

20 Q In Pennsylvania you know that starting in 1956 is when
21 they had a manufacturing plant for boilers that they would
22 then ship to different points in the country.

23 A In that time frame, I'm not certain exactly when the
24 first boiler came out of there but it was certainly in that
25 mid to late 50's time frame.

1 Q Okay. And you know, not because of your own research
2 but because somebody else researched it and showed you, that
3 there were absolutely state laws for folks that were working
4 asbestos in Pennsylvania the very first day that
5 Cleaver-Brooks decided to open the plant in the state.

6 A I believe I have been shown documents related to that,
7 yes.

8 Q I have marked as Exhibit 56 that document you and I
9 talked about.

10 MS. DEAN: Your Honor, we would like to mark this as the
11 Pennsylvania Occupational Disease Act, June 21st, 1939 and seek
12 to admit this into evidence.

13 THE COURT: Ms. O'Neil?

14 MS. O'NEIL: No objection.

15 THE COURT: No objection. Admitted.

16 (The document was received as Plaintiff's 56.)

17 Q I think the best way to do this might be looking at
18 this together but if you want that physical copy I can give
19 it to you.

20 A If I can see it -- yes.

21 Q We also have another one up here. Parts of it are tiny
22 so that might help. So we have the Pennsylvania
23 Occupational Disease Act after June 21st of 1939 pamphlet
24 law and then they give a variety of different numbers, do
25 you see that?

- 1 A Yes.
- 2 Q To get an idea of the first question, "Did this apply
3 to you," they have in section 1010 that "This act shall be
4 called and may be cited as the Pennsylvania Occupational
5 Disease Act, it shall apply to disabilities and deaths
6 caused by occupational disease as defined in this act." Do
7 you see that?
- 8 A Yes, I do.
- 9 Q And if we want to know what they mean by occupational
10 disease, you know that they list out disease types
11 specifically to give kind of reference to what they mean,
12 and we've looked at Subsection L. Do you recall that?
- 13 A I certainly don't recall the times I have looked at
14 this in the past, but it looks like that's what it says,
15 yes.
- 16 Q Asbestos and any occupation involving direct contact
17 with handling of or exposure to the dust of asbestos is one
18 of the occupational diseases identified in the 30's for this
19 state, correct?
- 20 A That's what it says, yes.
- 21 Q You were also aware that Cleaver-Brooks spent money,
22 resources at work to advertise its products, right?
- 23 A Yes. In different publications and things of that
24 sort, yes.
- 25 Q And a couple of examples of those publications, not

1 today but going way, way back to the 40's and 50's including
2 Southern Power Industry HVAC -- correct?

3 A I believe I have seen those in the past, yes.

4 Q And the reason you've seen them is because those
5 particular places where Cleaver-Brooks advertised included
6 information about asbestos and asbestos hazards, that's what
7 was being shown to you?

8 A Yes. I have been shown those in depositions and
9 trials, yes.

10 Q And so going all of the way back to the 1940's for
11 Southern Power Industry and for HVAC in the 50's and every
12 year throughout the 50's you've been shown those
13 advertisements and then the information discussing asbestos,
14 do you recall that?

15 A I don't recall that specifically but I know I've been
16 shown those in the past, yes.

17 Q I'll make it broader. In the 40's and 50's you've seen
18 advertising information where Cleaver-Brooks we know was
19 involved because their picture and advertisement is in it
20 and we also see discussions of asbestos health hazards.

21 A I believe I recall that in some documents I've been
22 shown in the past.

23 Q Let me give one example with the HVAC. For years,
24 yearly in the 50's there was information put in talking
25 about threshold limit values and the need to make sure that

1 if you're working with asbestos to keep the levels to a
2 certain amount, do you recall that?

3 A I can't say I recall that specifically, no.

4 Q I'm happy to refresh your memory.

5 A That's a lot of detail to know off the top of my head.

6 Q You're making the work to create the notebook
7 worthwhile so I appreciate it. If you look to Craft, the
8 trial transcript tab, I think page 60 and 75 we might be
9 able to get on the same page.

10 A Okay.

11 Q And there you can see that you were shown HVAC guides
12 from '51, '52, '53, '55, '56, '57, '58 and '59, do you see
13 that?

14 A Yes.

15 Q And towards the bottom it shows that what they were
16 showing in each of those is that there's a threshold limit
17 value for asbestos.

18 A Correct.

19 Q And in other words they were saying there was a value
20 that you need to stay under in those basic terms.

21 A I believe that's what that means, yes.

22 Q Luckily we have already gone through these documents, I
23 know you and I have before but the jury has already seen
24 them, but they're also familiar with what the American
25 Society of Mechanical Engineering was putting out to their

1 members about needing to test and needing to measure
2 asbestos dust to make sure that you're not creating a
3 hazard. Do you recall that broadly?

4 A In a broad form I believe I have seen that in the past,
5 yes.

6 Q When you were first asked the question when did
7 Cleaver-Brooks as a company understand that asbestos could
8 be a health hazard, it was your belief based on the research
9 you had conducted that that was in the 80's and 90's when it
10 was in the -- do you recall that?

11 A Yes. I remember talking about that years ago, yes.

12 Q Fundamentally a company that is using asbestos
13 insulation gaskets and packing in their own plants both
14 before and after OSHA not knowing about asbestos until the
15 80's or 90's is not reasonable, you would agree with that?

16 A I guess I wouldn't be able to comment on the
17 reasonableness, but certainly we found and since we've
18 talked about that, you and I probably talked about that,
19 that it was -- we found some documents related to early
20 1970's and OSHA.

21 Q Because certainly a company not being aware, it's own
22 representative not being aware when he's under oath about
23 OSHA for ten years wouldn't be okay. I don't mean anything
24 fancy about reasonable, it's just not acceptable conduct.

25 A I don't think I or anyone else have ever said we

1 weren't aware of OSHA. I think the questions usually
2 related to the dangers of asbestos, and quite frankly at
3 that point I didn't have or hadn't located yet any documents
4 that spelled that out. Certainly we knew OSHA was around in
5 the early 70's and it applied to manufacturers and
6 businesses and things of that sort, but as far as the
7 company knowing about the hazards of asbestos it wasn't
8 until we came across those documents that I could put a time
9 on it.

10 Q That hasn't always been your testimony. In other
11 words, it's not always been what you've said before when you
12 were under oath, is that fair?

13 A Correct. We found some documents since some of my
14 earlier testimony that did give us a time period.

15 Q You believed that of the hundreds and hundreds of
16 people working for Cleaver-Brooks that there wasn't a single
17 person you could have determined that ever evaluated OSHA
18 for Cleaver-Brooks during the years when they were selling
19 asbestos containing components.

20 A I guess I would have to hear that again the way it was
21 worded. But certainly there were people evaluating OSHA and
22 I would have assumed that, but in relation to asbestos
23 hazards I didn't have any documents or hadn't found any
24 documents at that time that indicated a time frame.

25 Q The time frame you believed when it first became on the

1 radar was the 80's and 90's in the media, do you recall
2 that?

3 A I think I have only given the 80's and 90's in relation
4 to my knowledge of it. I think I've always just as far as
5 the company or individuals in the company said whenever it
6 was in the general media about it but they would have
7 learned it or could have learned it that way.

8 Q Bear with me hopefully for just a second.

9 A Sure.

10 Q I can't see my screen but everything just went away, so
11 this might be something that I asked somebody else to
12 find --

13 THE COURT: Ms. Dean, we can't hear you when you're over
14 there on the computer, if you're going to make a remark that
15 you want on the record you're going to have to --

16 MS. DEAN: The program just shut down so I'm taking from
17 that that Ms. McVey will look for that for me when I go to
18 another topic and come back.

19 THE COURT: Okay.

20 MS. DEAN: Can I have one second to ask --

21 THE COURT: Yes, ma'am.

22 (Break in proceedings.)

23 MS. DEAN: Thank you.

24 Q If you look at the bottom part of your testimony when
25 you were under oath on page 159 I think we can get back to

1 the original question that I had.

2 A 159 you said? I'm sorry.

3 Q Page 159, lines 19 through 24. I asked you, "Have you
4 talked to a single person out of the hundreds of employees
5 that worked at Cleaver-Brooks since 1972 in order to
6 evaluate what the company knew about OSHA?" And your answer
7 specifically for that, "I cannot say that I have, no." Did
8 I read that right?

9 A Yes, you did.

10 Q We know that the company understood asbestos hazards if
11 for no other reason before the 1980's and 1990's because
12 they were sued for the first time in 1979, correct?

13 A Yes, our first lawsuit was 1979.

14 Q And in terms of just the importance of information
15 received, this isn't just regulations or news, it's
16 something personal being alleged about the company which
17 usually gets people's attention, right?

18 A We were sued in a case in 1979, not being here I can't
19 really say whose attention it got or what it was, but some
20 of the documents may play that out. But certainly we were
21 sued in 1979.

22 Q Your entire job for Cleaver-Brooks, as I understand it,
23 is to help lawyers and the company deal with asbestos
24 litigation matters, correct?

25 A I guess I'd probably define that a little more broad

1 than that. I research our records related to specific
2 boilers and produce those in relation to asbestos lawsuits,
3 and I work with our lawyers in discovery, signing discovery,
4 verifying discovery as well as testifying.

5 Q So you probably know better than most that a lawsuit
6 involves lawyers' attention, evaluation of whatever is being
7 alleged in the lawsuit.

8 A Certainly today, yes.

9 Q Even after there was a suit, so it's not just asbestos
10 but generally mark what we think Cleaver-Brooks is --
11 Cleaver-Brooks continued to sell asbestos products with no
12 warning for years, fair?

13 A I believe after 1979 there may have still been some
14 asbestos components in some boilers.

15 Q You have seen information that there was still some
16 asbestos components at least by the time they were started
17 which kind of takes us to the benchmark of 1985, correct?

18 A I believe so, yes.

19 Q I want to start first with just research and see if
20 anything has changed since the last time I talked to you. I
21 wanted to know if Cleaver-Brooks even understood that it had
22 a duty or a responsibility before it sold things to the
23 public to do research about known hazards with the
24 components of the product it decided to sell and you didn't
25 know. Is that still the case today and am I being fair in

1 my description?

2 A I would say when it comes to duties and
3 responsibilities in that context that sounds a little more
4 lawyerly than I would want to testify to.

5 Q Well, let me divorce it completely from the law and ask
6 you as a person that's part of the company that made
7 specialized products and sold it to the public. Does
8 Cleaver-Brooks appreciate that before you sell something
9 that the bare minimum you should do is see if other people
10 have figured out hazards associated with that somewhere?

11 A Certainly when dealing with the products we're dealing
12 with, which are boilers, which are pressure vessels and
13 dealing with volatile fuels, that absolutely is something we
14 look at in the safety of the product.

15 Q As it relates to asbestos, and I mean all of the
16 different types of asbestos products that they sold, whether
17 it be insulating cement or the gaskets or the packaging,
18 you're not aware after researching and kind of getting this
19 job to learn of a single effort made by anyone to keep
20 abreast of the asbestos health hazards when the company
21 started or in 1940's or in the 1950's or in the 1960's.
22 That's true, isn't it?

23 A Correct. I don't think I have seen any documents that
24 led me down that path.

25 Q In terms of understanding priorities for a person or a

1 company, often what you do and what you invest your time in
2 reflects what you prioritized, do you agree with that?

3 A In a very broad sense I guess I would agree with that,
4 yes.

5 Q Can you give us any concept comparing, for instance,
6 the marketing budget to how much money, time, resources,
7 attention was made by anybody about asbestos health hazards
8 and safety issues for the first 40 years the company was in
9 business?

10 A I don't think I would have a way to quantify that. I'm
11 not -- as we just discussed, I'm not aware of research done
12 in that time period.

13 Q The next thing I want to ask you about is testing.
14 I'll represent to you the jury saw that back in the 1930's
15 the American Society of -- said in every situation a test is
16 needed to evaluate asbestos hazards, it's the role of
17 industry to participate in that. With that in mind and its
18 representation, are you aware of a single test where
19 Cleaver-Brooks spent the money to find out when their
20 employees were making a boiler or when a user was using a
21 boiler the way you expected it how much asbestos got put
22 into the air?

23 A No, I haven't seen any documentation for that.

24 Q Are you aware of any effort to at least benefit from
25 other people's testimony, other companies that did make the

1 decision to test so that you could at least take those
2 results and maybe pay a doctor or an industrial hygienist a
3 fee to help you understand what they mean for your customers
4 and your employees?

5 A No, I'm not aware of that.

6 Q Based on what you've searched -- and again, I want to
7 give context of where your job as being in this role of
8 company representative is to figure out to the extent we can
9 what's out there, and you haven't seen a single indication
10 that a single person in a 50 year history when they were
11 selling asbestos made any effort in this regard; is that
12 fair?

13 A I think you just kind of extended it to 50 years which
14 includes I think the 70's, and then we're getting into OSHA
15 so I'm not sure if you intended to do that or not.

16 Q I did. I want to go all of the way to the 1980's to
17 the very last asbestos product you sent out to the public so
18 I should probably have said 65 years, not a single test, not
19 a single investigation, not a single dime, not a single
20 effort.

21 A As far as testing. However when we get into the OSHA
22 time frame some of the information we provided in relation
23 to the Product Safety Committee of American Board of
24 Manufacturers Association, there was -- I can't say there
25 would be testing there but there was discussion of it.

1 Q When is the first time it was even being discussed --

2 A It looked like there was some discussion of it in the
3 early 70's with OSHA. There was a report from one of the
4 members of the ABMA to the product safety committee of the
5 ABMA.

6 Q How did that information get to Cleaver-Brooks if at
7 all?

8 A Through the product safety committee of the ABMA, which
9 would be -- ABMA is the American Board of Manufacturers
10 Association.

11 Q Thank you. And so even at that time frame, which we're
12 getting into 40 years into their history, that did not
13 inspire Cleaver-Brooks after going and seeing what other
14 people in the industry were doing to make any effort to do
15 any research in order to understand asbestos and asbestos
16 related disease to the products they were selling. I don't
17 mean generally, I mean the stuff that they were selling.

18 A I didn't see any documentation in the testing that you
19 were talking about, no.

20 Q And they continued over a decade after that selling
21 asbestos products.

22 A In certain cases, yes.

23 Q The implication of that decision wasn't just having its
24 effects in 1985 or '86 when they sold the last asbestos
25 product, because you understand that these boilers can live

1 on for decades, right? People could be in 1995 going in and
2 working on a boiler that was sold when you were selling
3 asbestos and still having a problem in much more recent
4 years, right?

5 A Certainly a boiler could last the 20 years or so. I
6 think you're referencing whether or not any potential
7 asbestos components were still there after that would
8 probably would be questionable.

9 Q Depending on which product is going to be replaced on
10 the schedule so it might be for some half a year, for some a
11 few years. But my point is is it's not just the last item
12 that went out of your door that an asbestos hazard could
13 exist, it continued on for at least some -- couldn't it?

14 A The asbestos component could have been there longer
15 than when we shipped the boiler, yes.

16 Q Warnings. During the 1940's 1950's and 1960's
17 Cleaver-Brooks does not warn in any action, correct, about
18 asbestos hazards?

19 A Thank you. No, I have never found that.

20 Q In terms of the ways to warn if they would have wanted
21 to, if that was a priority, one, there's the boiler itself,
22 right? There are name plates on the boiler that say the
23 unit number, that say Cleaver-Brooks, that has information
24 where a warning if you chose could have been put on it.

25 A Correct.

1 Q Two, there are marketing and advertising materials that
2 you spent a lot of money to get out to the public that could
3 be a place to warn folks if you wanted to.

4 A I suppose so. I can't say I have seen any warnings in
5 advertising materials, but I suppose that's possible.

6 Q Three, instruction manuals, which are designed to tell
7 people how to work on things in the right way, that's a
8 great place, right?

9 A It is another place, yes.

10 Q Four, your agents, the guys that you have a
11 relationship all over the country that actually walk into
12 the plant and work with the people at Bowater or whenever it
13 may be to get that boiler started up.

14 A Yes. I would just -- you used the term agent, which
15 I'm not sure they're an agent, they may have been but I
16 don't want to get down that path. But our representatives,
17 yes, would be on the site at times. And we've probably used
18 that term agent in some documents in the past, too.

19 Q And if I found it in these documents I can point it out
20 later. Even if we go forward into the 70's after you have
21 this organization alerting you, OSHA, after OSHA has passed
22 nothing changes, there are no warnings, correct?

23 A Related to asbestos you're saying?

24 Q And that's for all of my questions but I understand why
25 you are wanting it to be clear, but yes, as it relates to

1 asbestos.

2 A That is correct yes.

3 Q And that's true until the very last asbestos product
4 gets shipped out of one of your plants, either in the U.S.
5 or internationally.

6 A I think in relation to something that wasn't boilers
7 that we produced there were some warnings on some invoices
8 in the mid 1980's.

9 Q Do you know what they said?

10 A I don't remember verbatim, but it talked about the
11 asbestos dust being a hazard if I remember correctly.

12 Q So at least at some point in time, and you're
13 estimating somewhere in the 80's, the company acknowledged
14 an asbestos hazard and put that information out there.

15 A There were some invoices we located that said that,
16 yes, on some products that weren't really related to
17 boilers.

18 Q So as it relates to the times here, the 50's, 60's and
19 70's and all of the way up to '84 no warnings not in any
20 form would have been provided to anybody at Bowater.

21 A I didn't find a record to that in relation to asbestos,
22 no.

23 Q In terms of what is from Cleaver-Brooks' standpoint
24 reasonable for its customers, its users to expect I want to
25 explore that just for a few minutes. You would agree that

1 if you have something that is known to be hazardous, it's
2 known to cause not just scarring or burning or something but
3 life or death hazard, that if you can replace that hazard
4 with something that doesn't present the same problem and
5 works just as well you should.

6 A Without a context of what we're talking about in a
7 specific I'm not sure I can say that so broadly, but in a
8 general form, yes.

9 Q And I know particularly being a lawyer now for over ten
10 years there are exceptions for every rule, but I just mean
11 as a general practical every day rule, if you've got
12 something that's bad that presents a potential really bad
13 problem and you have something else that does the job that
14 doesn't have that problem you take option B.

15 A Again, to me it would depend a great deal on the
16 circumstances and what potential is there, it would be
17 difficult to answer that so specifically. But on a general
18 overall, if that's possible, yes.

19 MS. O'NEIL: Can we approach for one second, Your Honor?

20 THE COURT: Yes.

21 (A bench conference was held.)

22 THE COURT: Ladies and gentlemen of the jury, let's take a
23 break. It's about 10:40, I mean 11:40, I don't think we're
24 ready for lunch yet but I think we're ready to all take a
25 comfort break so let's take a 15 minute break.

1 (The jury left the courtroom and a recess was taken.)

2 THE COURT: Thank you, ladies and gentlemen of the jury
3 and Ms. Dean, you may continue with the direct examination of
4 Mr. Tornetta.

5 BY MS. DEAN:

6 Q Just a few more questions on this, and I want to try to
7 be more specific. Outside of trying to substitute out
8 something that's harmful, if you have something used in a
9 boiler that you can't substitute out and you need it for how
10 the boiler works, would Cleaver-Brooks agree that they --
11 even if they still need it and they know it's a hazard they
12 should at the very minimum communicate that hazard to anyone
13 who might face it?

14 A I suppose if the hazard was communicated to us in
15 relation to the way the boiler would be operated, possibly,
16 yes.

17 Q In terms of Cleaver-Brooks' conduct in the boiler and
18 what they did, the first time they ever reached out as a
19 company to an industrial hygienist or an occupational
20 medicine doctor, or somebody that has a scientific medicine
21 background in asbestos wasn't in relation to its employees
22 or its customers, it was in relation to a response to a
23 lawsuit; is that fair?

24 A I'm not aware of us having any industrial hygiene
25 people or, what was it, an occupational --

1 Q A doctor or a scientist.

2 A In relation to our business certainly our attorneys
3 would hire industrial hygienists and things of that sort,
4 yes.

5 Q Perfect example. We heard from a pathologist that
6 Cleaver-Brooks hired in this case, Dr. Oury, I know we're
7 going to talk to an industrial hygienist, Kyle Dotson next
8 week, are you aware outside of litigation defending
9 themselves if they ever hired those same folks in the years
10 they were selling asbestos to their customers and had their
11 employees working on asbestos?

12 A No, I'm not.

13 Q I want to understand better the records for a moment,
14 starting with this concept for a unit number. And you agree
15 in terms of how you investigate these documents, some of
16 what we're also looking to learn is where the boiler went
17 and what asbestos was in that boiler in terms of what you're
18 figuring out in this litigation context; is that fair?

19 A Correct. Did we have a boiler at a site or did we not
20 and what did that boiler contain.

21 Q The unit number, which is identified in something
22 called an index card, is the first step to figuring out the
23 answer to both of those questions, right?

24 A Depending on what you have. If we were given a unit
25 number we could go directly to the commercial records. If

1 we don't have a unit number and just have a job name and
2 location, then we would search through our index cards to
3 identify the unit number if there is one.

4 Q And certainly in most situations and the situation in
5 this case is you know where the guy worked, you know the
6 name of the place but you don't have a serial number or a
7 unit number, is that fair?

8 A That's probably the most common way, yes.

9 Q And the unit number is what you use to get something
10 called commercial records, is that fair?

11 A Yes.

12 Q So the index card is literally a four by six card, I
13 think you described it in the deposition, that identifies
14 the unit, correct?

15 A Yes. They are filed by job site name and location, and
16 then on that and there's some other categories that they're
17 grouped in, but on that would be a unit and a model number
18 in most cases.

19 Q And it's -- and the index cards are indexed
20 alphabetically?

21 A Alphabetical by job name, but first they're categorized
22 in types of product, so some broad categories of models or
23 general categories the boilers were made.

24 Q And those index cards lead you to commercial documents,
25 and so the jury -- and this is part of why I made an exhibit

1 on its own, for the jury to be able to understand which
2 records fit in which bucket we know that the commercial
3 records are one through 25 in those Bates labeled records;
4 is that fair?

5 A Correct, BPM one through BPM 25.

6 Q And what we saw on those commercial records just by way
7 of example were invoices, purchase orders, we saw the date
8 that the boiler started up.

9 A Correct.

10 Q The conversion, sales prices, things like that, right?

11 A Correct.

12 Q Here we're not talking about voluminous records, it's
13 25 pages, correct?

14 A In this particular case it's 25 pages. They are on
15 microfilms so it's not like you're going to a shelf and
16 pulling that off and you have 25 sheets of paper, but, yes,
17 there are 25 documents.

18 Q But in terms of just being able to get through them,
19 understand what they say, do follow-up investigations, crazy
20 manageable number of documents when you only have -- fair?

21 A In this particular case with 25 is much more manageable
22 when it comes to knowing what's in the commercial records.
23 I certainly have had ones that have had hundreds of pages
24 within the microfilm.

25 Q The commercial records then lead to what you would call

1 manufacturing documents, and in this case those are Bates
2 labeled as number 26 to 44; is that fair?

3 A Give me one moment to doublecheck, I believe that's
4 correct.

5 Q And if it's helpful I just pulled them from questions
6 that I asked, I also have it on page 71 of your deposition.

7 A Correct. There are documents within the commercial
8 records that get me to some of the higher -- what we would
9 call the level drawings within those manufacturing documents
10 or engineering drawings.

11 Q And some times the drawing tells us directly that you
12 have the asbestos and that's asbestos, other times it has
13 parts numbers and even more information to figure out what's
14 in that part; is that fair?

15 A Correct. It's usually a combination of the two to be
16 quite frank.

17 Q And it was in this case.

18 A Absolutely.

19 Q And so the last set of documents you gave us were parts
20 descriptions and drawings so that if you wanted to know if
21 the Garlock gasket was asbestos containing and we have the
22 materials that tell us at least some additional information
23 about that.

24 A Correct. I guess I wouldn't refer to them as parts
25 descriptions and drawings, the drawings really is

1 manufacturing documents, the Bates 45 through 61 are all
2 parts descriptions.

3 Q So if I want to go back and reference this slide later,
4 actually take off this drawing part --

5 A Correct. I would put it under manufacturing documents.
6 The category number two is the manufacturing
7 document/drawing, and the category three is the parts
8 descriptions.

9 Q For boilers sold in the 50's and 60's, the actual index
10 card going back to the very first documents were not kept
11 electronically; is that true?

12 A Correct.

13 Q The actual physical cards sit in your office.

14 A Correct.

15 Q You have the most direct access to them of anybody.

16 A Yes.

17 Q And if you have that number figuring out the commercial
18 records that correspond to it can often be done quickly, you
19 said sometimes even an hour max.

20 A If I had the unit you're talking about?

21 Q Yes.

22 A I can get to the commercial records relatively quickly
23 in a matter of minutes, reviewing them would obviously
24 depend upon what I'm reviewing them for and how long they
25 are.

- 1 Q Sure. But just once you have that number kind of
2 figuring out where the next group are, a relatively simple
3 thing.
- 4 A Yes. Again there could be ten, 15 sheets of microfiche
5 which would be 600 to 900 actual documents in some cases,
6 but getting to that microfiche is relatively quick.
- 7 Q In terms of the limits of what you can learn from
8 Cleaver-Brooks' records, you would admit that there's
9 literally no way to search commercial records without going
10 through them one by one by location or job site, you need
11 that number to make use of the commercial records.
- 12 A I'm not sure I completely understand that, so --
- 13 Q I'll ask it this way. There is no way to search the
14 commercial records by job number or location.
- 15 A Correct. They are there numerically by unit number.
- 16 Q You would never take the position that Cleaver-Brooks
17 can determine with certainty that their index covers each
18 boiler that was sold in the 50's and 60's.
- 19 A Not with absolute certainty, no.
- 20 Q More specifically in the 50's and 60's time frames, if
21 I wanted an assurance, "Look, we have complete records
22 here," you can't give that.
- 23 A That something is complete and missing you're saying
24 and I'm not sure I'm following that.
- 25 Q Yeah. For the records that would be in that index

1 folder in the 50's and 60's you have been asked, "Can you
2 give us assurances that those are complete?" And that's not
3 something you can do.

4 A An assurance? No, not with absolute certainty. I
5 think they are very well put together but I certainly
6 couldn't sit here and say that absolutely there's never been
7 one that's been misplaced.

8 Q I want to talk about your belief that they are very
9 well put together. I mean, just within the last week you
10 have determined just in this area kind of broadly that your
11 records for boilers in the 50's and 60's are not complete,
12 do you know what I'm talking about? If not I can be more
13 concrete.

14 A In relation to some boilers that some -- I can't
15 remember the electric company, is that what you're talking
16 about?

17 Q Yeah, I think we're talking about the same thing. We
18 found publicly available records that Cleaver-Brooks boilers
19 in the 1960's were present at two Duke facilities, Duke
20 McGuire in Huntersville and Duke Clifton, and you searched
21 and you searched and you searched and you don't dispute
22 those records, you just don't have that file, do you
23 remember that?

24 A I wouldn't say we don't have that file. We don't have
25 those records of boilers in that place and I wasn't able to

1 determine what those actual boilers were unit number wise or
2 anything like that, we may well have that file in another
3 location. But you're correct, if a boiler is moved and
4 we're not told about it we wouldn't be able to find that in
5 our records.

6 Q And so although you have pretty objective data from
7 state records that at some point in time in the 60's Duke
8 had your boilers, for whatever reason when you went to
9 search that in your records and you couldn't connect those
10 dots.

11 A Actually I guess I just clarified that the data if I
12 recall correctly wasn't from the 1960's. It talked about
13 boilers that were manufactured in 1960 but I believe the
14 data was from 2011ish, so I'm not sure that objectively
15 tells me that something was there in the 60's. It tells me
16 that something from the 60's was there in 2011, I don't have
17 a way to tell whether it was there in 1960 or not.

18 Q I think we may be saying the same thing. It was
19 relating to a 1960's boiler, but the data that indicated
20 that it was at two different facilities you're saying it
21 more recent in time.

22 A Yeah. I think the records were a snapshot, the way I
23 understood them, of what the -- whatever they were state or
24 otherwise records, jurisdictional records, were in a certain
25 time. I don't know that it clearly, at least to me,

1 indicated that they were physically there on the day that it
2 said that the boilers were manufactured.

3 Q But you don't dispute that the records showing that
4 those boilers were at those facilities couldn't be recreated
5 from Cleaver-Brooks' own records, or confirmed.

6 A Correct. I didn't find any number in those records
7 that led me to a unit number that I was able to search.

8 Q Do you see anything wrong with this slide?

9 A If I remember correctly it's spelled a little
10 different, I don't remember why, is 3 A's or 4 A's in it or
11 three?

12 Q At 11:35 last night for the first time I received this
13 from your lawyers. Do you know what it is?

14 A Yes. That is the index card for Bowaters Carolina
15 Corporation for the unit number we've been discussing.

16 Q The index card, that is the first step to get
17 everything else, right?

18 A Yes.

19 Q And I'm not fussing with anybody but sometimes things
20 are filed, written or documented inaccurately.

21 A Correct. Typographical errors are not all that
22 uncommon, particularly back in the days of typing.

23 Q And in the 50's and 60's I think you can be clear that
24 this was a time frame where these were typed out in a
25 typewriter.

1 A Yes, and well after that.

2 Q I want to talk about the second unit that's referenced
3 in the commercial records you produced in this case and that
4 is unit number 018344. You would agree with everything I
5 have said, right?

6 A There is reference to that unit number on a few pages
7 in the commercial records for unit number 18343, I believe
8 it's a typographical error, but --

9 Q So if I called this the 44 unit for shorthand as
10 opposed to the 43 unit just to make it a little easier to
11 talk to you about it, will that be okay?

12 A Sure.

13 Q You were deposed early last week, right?

14 A Yes.

15 Q You were deposed in February, right?

16 A Correct.

17 Q Twenty-five pages of records existed for you to have to
18 understand about the commercial records in this case, right?

19 A Correct.

20 Q Last night for the first time I am provided a card that
21 says this repeated reference in the records to 44 isn't
22 actually going to Bowater like it says but was going to
23 Illinois.

24 A Correct. The unit number 18344 after we understood it
25 was a question that came up, it was looked at and the

1 records for that went to -- I'm going to lose the name, but
2 it was in Monmoth, Illinois, I believe, was the city.
3 American Milling, I believe.

4 Q I want to ask you about after you understood it and
5 when you were first asked to understand this, but let me
6 pause a moment and say, again, how big of a difference is
7 this? One record reports that this unit 44 is going to
8 South Carolina, another reports that it was going to the
9 State of Illinois. One record reports that it was going to
10 a paper mill called Bowater, another reports that it was
11 going to a company called National Protein Corp., right?

12 A Eventually, yes, it was there. Now, I guess I would
13 hesitate to say the one record reports that it's going to
14 South Carolina. There is reference on the start-up report
15 where the start-up person wrote down 18344 and I believe
16 that carried through a couple of other documents, but as far
17 as I can tell and I can say with certainty it was a
18 typographical error, or a written error that became a
19 typographical area.

20 Q Are you aware that a third of the records that you
21 produced referenced the part number as 44, not 43?

22 A The part number or unit number you mean?

23 Q The unit number.

24 A A third of the records --

25 Q That you produced about Bowater all reference unit 44,

1 not unit 43.

2 A I thought there were roughly four incidents of it. In
3 my mind it was sensibly carried through because one led to
4 the other led to the other, but four out of 25 is roughly
5 no -- it's a sixth.

6 Q Do you know how many page those four documents were?
7 Truly, some of them are four pages, some of them are three,
8 some of them are one.

9 A Oh, when taken in the whole -- I was looking at the
10 actual reference 18344 which came on four different pages.
11 But the total of the document is greater than that, yes.

12 Q It's not just that that number is referenced, it's
13 referenced from different people in different contexts at
14 different times, true?

15 A It was referenced initially by a Mister I believe it's
16 Tinner who did the start-up, which then in my mind at least
17 carried through to the invoice which is on BPM six, because
18 they would have used his start-up report to create that
19 invoice and then actually that invoice carried over to our
20 remittance request, which is what they used to create the
21 remittance request. So to me it seemed a little bit like
22 the pass it down the lane type thing where one person said
23 it wrong and then it kept being said wrong, that's the way I
24 interpret it. But once I looked at the records for 18344
25 and saw where it was, it was very clear in my mind that this

1 was a typographical error.

2 Q That's the way you interpret it today, not last week,
3 not last month, today.

4 A I personally didn't look at it last week or last month,
5 quite frankly I'm not sure I noticed it. I don't remember
6 coming across that in the last week -- or prior to last week
7 or prior to last month, and I don't think anyone ever
8 brought it up as we were going through those depositions
9 either.

10 Q You understand -- and again, this is kind of a
11 different process so I just want to make sure everybody
12 understands, that what you are tasked to do is determine
13 what was reasonably known to the company about what was at
14 Bowater and you were asked a lot of questions about that,
15 and it wasn't until Art Welker took the stand today and
16 said, "I looked at these records and see at least two
17 boilers," that these documents appear. That's a fair
18 timeline.

19 A I would say actually looked at the documents and saw
20 two unit numbers. I see one boiler that someone has a
21 typographical error had two unit numbers. I suppose other
22 people can interpret it different ways.

23 Q The unit number in the first report before a document
24 was referenced here isn't even a document from
25 Cleaver-Brooks. This is your agent, or if you don't like

1 the word, the representative that was in Orangeburg that
2 came in and said, "We want to be paid for our service,"
3 right?

4 A Correct. Actually that document is not really first in
5 line, it's second in line. The document that was used to
6 produce that invoice would have been the start-up report
7 itself from that same company from a service technician that
8 would have been there.

9 Q We have another record which shows that number 44 as a
10 unit number, and this is coming not from the representative
11 but from Cleaver-Brooks when they're writing down that
12 number, right?

13 A Correct. And when the person would have been typing up
14 that remittance request they would have been looking
15 directly at the invoice and that unit number that was listed
16 on the invoice, which was the unit number that was listed on
17 the start-up report which is where I said it was sort of
18 like the one created the next created the next.

19 Q What's a field report?

20 A That's what we've been talking about as a start-up
21 report, it's a little more broad than that. If you look at
22 BPM 7 then it could be used for other than just start-up, in
23 this particular case the reason for the call was starting
24 the service.

25 Q And so what we know both from the title and the

1 indication of work is there was an actual person at the
2 facility where the name plate is that identified this boiler
3 in the records who said it's something different than what
4 you were interpreting in 2018 is.

5 A Or wrote something different than what was on there,
6 yes. Whether or not he looked at the name plate I couldn't
7 tell you, but quite frankly if there was a second boiler
8 there that was running 343, there should have been a second
9 start-up report in the file that says 18343.

10 Q This is another document, a supplemental field report
11 in a different time where they identified the number 18344,
12 correct?

13 A I don't know that I would call it different time, it's
14 February 10th versus February 11th on the field report. But
15 the supplemental field report is part of and is turned in
16 together with after the start-up of the boiler.

17 Q You're aware because it was brought up front and center
18 when we had a chance to talk to you that one of the things
19 that we explicitly notice was missing and asked you about
20 when you were under oath in the deposition is where are the
21 index reports, do you recall that?

22 A The index cards?

23 Q Yes.

24 A Yes, that was asked of me.

25 Q "Do you know why a copy of the index cards were not

1 produced in this case" was asked of you almost verbatim.

2 A Yes.

3 Q And you said, "Frankly it's something that we don't
4 ever produce," do you remember that?

5 A Correct, normally we don't. It's a duplicate of the
6 information in the commercial records, it just literally is
7 the index to get to it.

8 Q So as a pattern for the company information is kept
9 from the people asking and brought in last minute when it
10 serves your purpose.

11 MS. O'NEIL: Objection, argumentative.

12 THE COURT: I'll permit it.

13 A Actually I'm not certain I would say it was information
14 that wasn't transmitted before, it's the same information as
15 what's in the records.

16 Q The records we have here show over and over and over
17 and over again that a unit number was sold to Bowater and by
18 different people, that is very different with the
19 information I got 18 minutes before midnight about where the
20 machine was. That is objectively and fundamentally true,
21 correct?

22 A I don't know what you're talking about to be honest
23 with you, I'm a little lost with that.

24 THE COURT: Rephrase.

25 Q A boiler in Illinois and a boiler in South Carolina are

1 really different things, right?

2 A Absolutely, and so is 18344 and 18343.

3 Q And the commercial records I got and you swore under
4 oath told me the exact same thing as the index records, told
5 me this boiler was four times in only 25 pages of records a
6 second boiler that was at Bowater, that's what's written
7 down.

8 A The number is different, it's a typographical error. I
9 know and you and I probably aren't going to ever agree on
10 that, but it's very clear to me when I look at the other
11 records that there was one boiler that went to Bowater and
12 it's 18343.

13 Q Whether we agree on that or, what is fundamentally and
14 objectively true is what the commercial records show, which
15 you gave me, and what the index records show, which you
16 didn't give me even though we asked, are showing something
17 very different, and they only appeared almost at midnight
18 last night.

19 A The index card matches every other document other than
20 those four that they're talking about in these commercial
21 records. It matches the invoice, it matches the test kit
22 report for the assembly check sheet that the boiler was
23 checked in the factory before it left, it matches the data
24 report which is the manufacturers data report on the back of
25 it, so I guess I'm not sure where the disconnect is here.

1 Q Here it is. You mentioned six types of records, I
2 mentioned four types of records. Four of them show one unit
3 which somebody who doesn't have a dog in the fight says
4 that's something different and six of them show another, and
5 the first time I'm hearing the key to learning that somebody
6 messed up over and over and over and over again is something
7 you didn't give us when we asked at almost midnight last
8 night. And when you say all of the other records, we're
9 talking about 25 pages of records, right?

10 A A total of 25 of the commercial records. And again, I
11 would just point out that -- it makes sense to me at least
12 that the mistake that was made by Mr. Tinner in writing down
13 the wrong unit number was perpetuated with the process, that
14 just makes sense to me.

15 Q Have you evaluated the record more carefully since we
16 asked you to evaluate them in the past to see what other
17 distinguishing markers there are in the record just to make
18 it clear that there's more than one boiler that was sold?

19 MS. O'NEIL: Object to the form, it misstates his
20 testimony.

21 THE COURT: All right. Rephrase, Ms. Dean.

22 Q Have you gone back since you've acknowledged that maybe
23 you missed the different unit numbers to look and see what
24 other indicators there are about those boilers to make clear
25 that we're talking about more than one boiler?

1 A I suppose in pulling out the records for wanting 344 to
2 see where it was indicated otherwise, that that boiler 18344
3 was not a Bowater. So in a way, yes, I did do that to see
4 if there was a second boiler there and it was not 18344,
5 18344 was in Illinois.

6 Q When is the first time you did that and how much time
7 did you spend looking?

8 A It was yesterday afternoon.

9 Q Somebody texted you when Art was on the stand?

10 A I don't think I got a text, I got here and was asked
11 about it.

12 Q Have you looked at other information in those records?
13 Because there are other numbers other than the unit number
14 to determine whether they were the same?

15 A Whether what is the same?

16 Q Whether the unit 34 and unit 44 that are referenced --
17 I think I said that wrong, whether unit 43 and unit 44 match
18 up in the other characteristics that are identified in those
19 records?

20 A I'm not sure how I would do that. The 44 in my mind
21 again is the typographical error. If we look at 44 and the
22 records for 44, it's a different boiler if that's what
23 you're asking, it's a different model and a different size
24 boiler.

25 Q I think you are comparing what we got last night to

1 what is in the Bowater records so let me ask a question that
2 makes it clear. In the 25 pages of Bowater records where a
3 third of them references 44 and two-thirds of them
4 references 43, did you compare the different characteristics
5 of the boilers referenced to see whether there were any
6 distinguishing factors to show that the two boiler unit
7 numbers just in those 25 pages were, in fact, different?

8 A Again, I don't know how I could do that because there
9 weren't two boilers, there was one and it was a
10 typographical error.

11 Q You say that, and what I'm questioning particularly
12 after some of your other conclusions earlier is did you ever
13 go through the records to look, whether it be horsepower,
14 purchase number, model number, the different characteristics
15 of the boiler to see whether before you testified to the
16 jury verified whether they were talking about two different
17 boilers?

18 A well, certainly as I said before, the manufacturing
19 documents call out the 43, I want to make sure I didn't mix
20 it up, so I certainly looked at that to make sure there were
21 no other errors in relation to that. But as far as the
22 horsepower, since Mr. Tinner was dealing with the 30
23 horsepower, which was 43, he said 43, or he said 30
24 horsepower.

25 Q The requests by us to look at these records and see if

1 they're accurate is something that wasn't just done in this
2 litigation context, you admit that there was an effort to go
3 through and kind of pull down those files from duplicative
4 records done by your own people repeatedly.

5 A Yes. There was a couple of stamps on the front page of
6 the commercial records that indicates that at one time
7 someone went through the file to take out anything that was
8 a duplicate.

9 Q That wasn't done at one time, it was done at two times
10 and it's a very, very faded print on the front of this
11 manila folder, the fact they did it once in '64 and once in
12 '75.

13 A That's the way it looks, yes.

14 Q And at no point in time did somebody -- not whether
15 there's litigation but as a practical matter say, "Hey,
16 these records are wrong in four different places over and
17 over again," right?

18 A For what they were doing it probably wasn't important
19 to them.

20 Q In your evaluation of Wayne Howe's work both from his
21 own words and the words of those people that knew him and
22 worked side by side, is there anything that Cleaver-Brooks
23 is coming here to say that he did and how he conducted
24 himself at work especially as it relates to boilers that
25 was --

1 A I'm not sure I can say I evaluated the testimony in
2 that way but I can't think of anything that would fall into
3 that category.

4 Q Is there anything at all that Cleaver-Brooks would
5 admit as it related to them selling boilers in asbestos to
6 50's, 60's and 70's that they would have done differently?

7 A I don't know that I could answer what someone would
8 have done differently in the 50's, 60's and 70's, some 40
9 years after, I'm sure I would have a way to place myself in
10 exactly that situation that was there in the 50's, 60's and
11 70's and say this is what we would have done differently.

12 Q You as a person that came in at the tail end of them
13 selling asbestos was not the decision maker as it related to
14 asbestos matters, right? You didn't decide to put it in,
15 you didn't decide to specify it and you didn't decide not to
16 warn about it, you didn't make the budget decisions on
17 safety and health, you literally were not involved in those
18 decisions.

19 A Correct.

20 Q You've never talked to any of the board of directors or
21 leaders in the company in order to evaluate what they
22 understood about asbestos health hazards or why they made
23 the decisions they made throughout the years that they were
24 selling asbestos products to the public.

25 A No, I haven't.

1 Q And so while you weren't the decision maker and you
2 haven't armed yourself with knowing why they did what they
3 did, you have been in position to speak for the company
4 specifically on these asbestos issues for years, right?

5 A In relation to what our documents say on that specific
6 boilers and our knowledge, yes.

7 Q And as it relates to your knowledge and what you did
8 with that knowledge as the company's representative, is
9 there one thing that the company will admit that they should
10 have done better when they were selling asbestos to the
11 public over the course of over half a century?

12 A Again, sitting here some 40 years later I don't know
13 that I can look at it from the same perspective as somebody
14 sitting there in the 70's and 80's, I just don't have that
15 ability.

16 MS. DEAN: Your Honor, that's all of the questions I have.

17 THE COURT: Very good. Ms. O'Neil -- all right. Of
18 course you have the ability to cross examine -- excuse me. Ms.
19 O'Neil, you have the ability to cross examine at this time, how
20 do we want to handle it? Do we want to take a break for lunch
21 now or you tell me?

22 MS. O'NEIL: We're going to take a break for lunch, we're
23 going to allow the plaintiffs to rest and then we will recall
24 Mr. Tornetta in our case-in-chief this afternoon.

25 THE COURT: Very good. Before they do that we will give

1 them a chance to kind of review everything and see if they are
2 prepared to rest. So ladies and gentlemen of the jury, let's
3 take our lunch break at this time, let's try to be here about
4 quarter of or ten minutes to 2:00.

5 MS. O'NEIL: Your Honor, before you let the jury go could
6 we side bar for just a second? You might want to change the
7 break a little.

8 (A bench conference was held.)

9 THE COURT: Thank you, ladies and gentlemen of the jury.
10 I am reminded now that there are a few other technical things
11 that we have to do so you come back at 2:10, a little bit
12 longer period of time, thank you so much.

13 (The jury left the courtroom.)

14 THE COURT: So we're at rest now.

15 (A lunch break was taken.)

16 THE COURT: What we're doing now is taking DV motions.
17 Plaintiffs? Well, I presumed plaintiffs don't have any
18 directed verdict motions, I just put that on the record.
19 Plaintiffs have no directed verdict motions and now we go with
20 the defense. On the record I will say that for the convenience
21 of the jury we are at the point where plaintiff will put in a
22 few more exhibits formally into the record, they have already
23 been mentioned in examinations previously made, are identified
24 in some way and they will be formally put upon the record and
25 then the plaintiff will formally close. The jury is out for

1 lunch right now and so for the convenience of the jury the
2 defendant is prepared to enter its directed verdict motions and
3 I will repeat and recognize those motions as having been made
4 and my rulings as having been made when the proper time comes
5 as they would say in -- as if they were repeated word for word.
6 So with that, Ms. O'Neil, you may proceed, motions for directed
7 verdict by the defendant.

8 MS. O'NEIL: Thank you, Justice Toal. As I said on the
9 record earlier, I understand the Court's preferred format for
10 this so I believe I have complied with that. I have a
11 question, do you want me to give you the points and you can
12 rule or do you want me to give you all of them and then you can
13 rule?

14 THE COURT: Whatever is most convenient for you.

15 MS. O'NEIL: Why don't I go through them all.

16 THE COURT: Sure.

17 MS. O'NEIL: All right. Our first one is a jurisdictional
18 one. As the Court is aware we filed a motion to stay
19 indicating that we believed that under the law of South
20 Carolina the discovery sanctions taken with respect to Covil
21 and the striking of its pleadings require the stay of this case
22 in order for the fair and equitable adjudication of their
23 liability in relation to the trial defendant under the South
24 Carolina System for Allocation of fault in a tort case. And we
25 would rely on that for the points made in our motion to stay

1 previously filed and the arguments made of other defense
2 counsel at the hearing on March 2nd of this matter when that
3 motion was raised. Our second point is a directed verdict --
4 also a directed verdict as to the entire case, that there's
5 failure of evidence with respect to Wayne Howe on the issue of
6 frequency, regularity and proximity of exposure to asbestos
7 from -- I'm sorry, let me start that over. The record lacks
8 the requisite evidence to meet the plaintiff's burden of proof
9 with respect to the frequency, regularity and proximity
10 requirement of exposure to asbestos from a product for which
11 Cleaver-Brooks bears responsibility. We would seek directed
12 verdict on the entire case on the third and additional ground
13 that a liability finding would require speculation by the jury
14 which is not permitted under the South Carolina rules because
15 they would have to speculate that there was more than one
16 Cleaver-Brooks boiler at Bowater. They would have to speculate
17 that the hypothetical other Cleaver-Brooks boiler was in the
18 powerhouse. They would have to speculate as to dose, and then
19 they would have to speculate again as to the frequency,
20 regularity and proximity needed to meet the standard applicable
21 in South Carolina. We would request directed verdict on the
22 punitive damage claim as there is no evidence of willfulness,
23 recklessness or gross negligence on behalf -- by
24 Cleaver-Brooks. We would request directed verdict on the
25 economic damages as there was -- on the basis that there was no

1 evidence by a physician as to what was reasonably necessary for
 2 the care of Janette Howe over her lifetime. And when I say
 3 economic damages, I should make it clear on the record that
 4 these are the economic damages as it relates to Janette Howe's
 5 future care, not the economic damages as to the plaintiff's
 6 medical costs to which the defendant stipulated. We would move
 7 for a directed verdict on those same Janette Howe economic
 8 damages on the basis that there was no evidence by Ms. Lustig
 9 of the cost of long term care options, and Dr. Wood testified
 10 he relied entirely on Ms. Lustig in making his opinions. And
 11 the by the lack of evidence I mean this, Your Honor, Ms. Lustig
 12 had a report which is not admitted into evidence pursuant to
 13 the rules in South Carolina and she never testified on the
 14 record as to any of the amounts for any of the care in that,
 15 thus the evidentiary record in this case is completely lacking
 16 for the basis for Dr. Wood's opinions. Those would be the
 17 points for our directed verdicts.

18 THE COURT: Very good.

19 MS. O'NEIL: I forgot one?

20 MR. PUGH: No, that's just a correction.

21 MS. O'NEIL: Oh, I'm sorry. I said that the hearing on
 22 the motion to stay where I was adopting all of their arguments,
 23 I said that was March 2nd, it was apparently March 9th, seems a
 24 lot longer ago.

25 THE COURT: I know. Ms. Dean, you can argue if you wish.

1 I will simply tell you I plan to put upon the record now
2 rulings which will all be denials and you may want to save your
3 power to the -- but if you are burning to say something which I
4 know you're all burning to do, I see Ms. McVey over there
5 shaking her head --

6 MS. MCVEY: I'll sit down.

7 THE COURT: That's right. Okay.

8 MS. DEAN: I'm glad to hear it.

9 THE COURT: Okay. Number one with respect to the
10 jurisdictional matter. Covil Pipe Company appealed my sanction
11 rulings striking their answer for failure to comply with
12 discovery requirements on the 30B6's and other requests for
13 information and documents. Covil has appealed and that
14 appeal is -- and they were a codefendant in this matter and
15 that appeal is pending before the South Carolina Court of
16 Appeals. That stay, if there is a stay, and that has not been
17 tested yet, but even if Covil's participation is stayed and no
18 party has raised through -- or I have not made any ruling about
19 that, if the matter is stayed then my ruling is that it does
20 not apply for the rest of the case citing Smith versus Tiffany
21 which says that non-present defendants don't impact the
22 liability damage allocations that the jury will make with
23 respect to these defendants and therefore I would deny the
24 motion for a directed verdict. And I realize through that
25 argument Ms. O'Neil also incorporates very detailed arguments

1 about that issue that was made in connection with both motions
2 of summary judgment and motions in limine in the hearings that
3 we had on March the 9th of 2018, so that motion is denied.
4 With respect to the number two, the failure to show that the
5 Cleaver-Brooks boiler as that regards only one boiler was a
6 boiler to which the asbestos containing substances were
7 substances to which Wayne Howe was exposed with frequency,
8 regularity and proximity that would be required to find
9 Cleaver-Brooks liable. I find that the evidence, at least a
10 scintilla and maybe more conflicted on that point and
11 susceptible to different interpretations used in the standards
12 for this stage of the trial where the evidence is viewed in the
13 light most favorable to the non-moving party, there is a
14 conflict in the evidence with respect to whether there was one
15 boiler or two boilers because of the various records that have
16 been introduced. And even if there is just one boiler there is
17 a conflict in the evidence as to what interpretation there is
18 to be made of the restart records and where the boiler was then
19 located, and even in the opening statement of defense, defense
20 shows a drawing and photographs of the boiler in questions,
21 which is the smallest package boiler that Cleaver-Brooks makes
22 that is still a piece of equipment, which because other
23 testimony might well be used as a supplementary boiler in
24 process activities at the paper mill rather than simply
25 something that satisfied -- that would supply steam to an

1 office building for I suppose using in radiators and hot water
2 and things of that nature. It might well be that the jury
3 would conclude that this is much too large a piece of machinery
4 to have been used for the small technical purpose for which
5 Cleaver-Brooks contends it was used, which was as a power
6 supply to the administrative building. So all of those things
7 pose as I see it a genuine issue of material fact as to these
8 matters at this moment, the close to the plaintiff's case, I do
9 not find that a directed verdict is warranted. Similarly with
10 respect to number three, which is the argument that speculation
11 would be required rather than the ability to use circumstantial
12 evidence as a platform for concluding that there was either a
13 second Cleaver-Brooks boiler or a boiler that was moved to the
14 powerhouse and utilized there. The argument from defense by
15 Ms. O'Neil is that the evidence, such as there is, is not
16 enough to get past mere speculation and into an area where it
17 could be sequential evidence of the type that is recognized as
18 valid circumstantial evidence since the test to circumstantial
19 evidence is that the circumstances may be connected in such a
20 way that they point towards one conclusion to the exclusion of
21 all other reasonable hypotheses. We don't charge that to the
22 jury anymore but that is the test of contributory negligence
23 and she says that test cannot be met by the boiler --
24 conflicting boiler evidence at this time. I say that there's
25 at least a scintilla that would allow the jury to apply a

1 charge on circumstantial evidence and conclude in plaintiff's
2 favor either that the -- under oath one boiler that there is
3 was moved, or that there is a second boiler and it was in the
4 powerhouse and it is a Cleaver-Brooks boiler, so I would deny
5 that motion. Number four is a directed verdict on punitive
6 damages because it requires the finding of willful, wanton and
7 reckless conduct, and the argument is that there's not any
8 evidence of such. And there is at least a scintilla of
9 evidence based on failure to warn, sale of asbestos containing
10 materials at a point in time when it was known that they were
11 hazardous, and that I think is at least at this moment with all
12 inferences in favor of the non-moving party enough to allow the
13 jury to make a determination of whether the conduct, if they
14 find liability, was willful, wanton and reckless. As we know
15 if that occurred there would be a lot more that had to be done
16 in the case before punitive damages could be awarded and
17 defense waives nothing by making the motion, simply it's a
18 requirement that we will submit at the first stage of the trial
19 to the jury. And with respect -- nor does plaintiff for that
20 matter. Now, with regard to number five, economic damages, no
21 evidence by a physician as to Janette Howe. I don't think that
22 physician's evidence is required for the findings as to future
23 claims and claims of future expenses for the care and
24 maintenance of Mrs. Howe and therefore I would deny that. And
25 with number six, that is the one that I am troubled by. I sat

1 here and looked at y'all and you were doing this and I don't
2 like to try people's cases for them, I came this close to
3 saying -- from Ms. Lustig. And I don't know, I frankly
4 cannot -- at this moment I don't have -- I am looking at my
5 trial notes and I don't see what happened with respect to
6 Lustig. I know that Dr. Oliver Woods testified as to all of
7 these figures. And I am going to simply say this, I am
8 troubled by the fact that Ms. Lustig testified, but unless you
9 all have put in a document I don't know about, I don't see
10 those numbers from her. But Dr. Oliver Wood testified
11 extensively and said he was using the numbers from Lustig,
12 referred to Ms. Lustig's report in terms of its numbers and
13 there was no objection to that and therefore I am going deny
14 this on the basis that the numbers were proper in front of the
15 jury because of the economic damages testimony of Dr. Oliver
16 Wood. Now, I may be hung from a sheet for a goat because of
17 it, but anyway, that is my ruling on the subject that I am
18 covered by it very candidly. So those are my rulings, anybody
19 has anything else to say about them why say. Ms. McVey?

20 MS. MCVEY: Nothing about the directed verdict. We do
21 have one more motion before the jury comes back in.

22 THE COURT: Anything else to be said about -- Mrs. O'Neil,
23 anything else that I need to protect that I have not protected?

24 MS. O'NEIL: I'm afraid to say these words but not that
25 I'm aware of.

1 THE COURT: Okay. Well, you'll have another chance to
2 take a breath we're to formally make arguments in the place in
3 which they fall sequentially, if you think of something else I
4 am not going to punish you by not allowing you to have that.
5 We're just doing this for convenience. Ms. McVey?

6 MS. O'NEIL: Have an issue about the documents that Ms.
7 Dean --

8 THE COURT: Let's get to whatever she's got to say. Is
9 yours in the directed verdict category?

10 MS. MCVEY: I think we're all passed directed verdict.

11 THE COURT: That's done, now where are we.

12 MS. MCVEY: We are on to the infamous midnight documents
13 that occurred last night.

14 THE COURT: Oh, the midnight documents. Are you talking
15 about the ones that Tornetta referred to?

16 MS. MCVEY: Yes, ma'am.

17 THE COURT: All right, very good.

18 MS. MCVEY: Let me just hand them to you if you don't mind
19 so you will have them.

20 THE COURT: Yeah, I looked at them.

21 MS. MCVEY: Your Honor, the only one that was put up on
22 the screen in Ms. Dean's presentation was that index -- what
23 we're calling the index card for 43, all three of those
24 documents were produced at midnight last night.

25 THE COURT: This document, the Bowaters 18343, that one

1 wasn't produced until last night?

2 MS. MCVEY: No. And this is part of the problem --

3 THE COURT: These cards were never produced at all.

4 MS. MCVEY: Never.

5 THE COURT: And then you've got this other card, 18344.

6 MS. MCVEY: That was never produced.

7 THE COURT: All right.

8 MS. MCVEY: And then the next chunk of documents is the
9 commercial file which you have seen for 43 but you --
10 apparently there's a brand new one for 44 and we thought we had
11 43 and 44.

12 THE COURT: Uh-huh, well -- okay. Tell me what you want
13 to tell me.

14 MS. MCVEY: So let me just back you up a little bit about
15 documents and Cleaver-Brooks, and we're not talking about --

16 THE COURT: Let me tell you, by the way, that I am a
17 little troubled about, one thing right off the bat, about these
18 two.

19 MS. MCVEY: What is that?

20 THE COURT: Why didn't y'all tell me about this before she
21 asked questions to Tornetta about these?

22 MS. MCVEY: Well, because we didn't -- we can talk about
23 that in a second, but let me back you up for a second.

24 THE COURT: Okay. I'm just telling you that if there's an
25 objection to using them then my mind is going to be turning to

1 waiver because --

2 MS. MCVEY: well, the only document we only used -- the
3 only document we used is the index card for 43.

4 THE COURT: Oh, you didn't use this one for 44?

5 MS. MCVEY: No, ma'am.

6 THE COURT: I see. Okay.

7 MS. MCVEY: So let me back you up a little bit. You
8 remember there were tons of motions to compel, and when I'm
9 talking about Cleaver-Brooks I am not talking about either Mr.
10 O'Neil or Mr. Pugh because they are incredible lawyers, I am
11 talking about the acts of Cleaver-Brooks.

12 THE COURT: Oh, I understand. Listen here, Tornetta
13 yesterday -- and he found some, right?

14 MS. MCVEY: But what's troubling about that, of course, is
15 we asked for the stuff.

16 THE COURT: Oh, no question about that.

17 MS. MCVEY: We asked for the stuff, we filed motions to
18 compel, we took two depositions of Mr. Tornetta. We asked for
19 the index card for 43 and he said, "You don't need it, because
20 the only thing the index card does is get you to the commercial
21 records, you don't need it," okay?

22 THE COURT: Right.

23 MS. MCVEY: All right. So then all the sudden we have
24 known we see there's two boiler unit numbers, and the unit
25 numbers -- am I calling it the right number -- the unit numbers

1 are essentially the specified ID for each boiler, right? The
2 43 and the 44 are the social security numbers for the boilers.

3 THE COURT: Right.

4 MS. MCVEY: The only records we have show that there were
5 two boilers then at Bowater, all right? We don't have anything
6 else to say anything different. We have gone through a week of
7 trial, and then as you heard this morning in my 18 years of
8 practice now I have never slept through an alarm of a trial
9 date and because we got records at midnight last night we were
10 all trying to figure out what the heck is this. That is the
11 definition of trial by ambush. So there's two things, one is
12 something that we could put off to another day which is whether
13 or not this is sanctionable for Cleaver-Brooks for not giving
14 us what we asked for when you ordered them to give us, that's
15 number one, that's for another day. Number two is they
16 shouldn't be allowed to use these documents.

17 THE COURT: Uh-huh.

18 MS. MCVEY: They can use the 43 index card, I think
19 that's -- I don't -- but we showed it to them, I think they
20 can. They shouldn't be able to use the 44, they don't get the
21 benefit of that. All he had to look at was these 25 pages
22 and it was clearly marked in four different areas of the
23 documents that there were two different boiler records there
24 and that's significant, that's what we've based this case on in
25 large part. That's my concern and we don't think they should

1 use them.

2 THE COURT: Very good. Ms. O'Neil, in reply?

3 MS. O'NEIL: I think what I just heard Ms. McVey say was
4 they based their entire case on the fact that they noticed in
5 the commercial records, which were produced months ago, I know
6 it was months ago, I can't tell you the date off the top of my
7 head, they based their entire case on it because they have
8 known and did notice that there was two unit numbers in there,
9 and then they deposed John Tornetta for, I believe, nine hours
10 and they never asked him a question about it. So the
11 defendants, who are entitled to know the plaintiffs theory of
12 the case and were not advised of the plaintiffs theory of the
13 case until yesterday, I think that is the definition of trial
14 by ambush. And the defendants upon hearing for the first time
15 in court the plaintiffs theory of the case -- and I'll tell
16 you, Your Honor, I actually had given apparently incorrectly
17 Ms. Dean credit for having thought that up after she got those
18 documents from Bowater that showed what I thought was her
19 original theory of the case about it being in the powerhouse, I
20 was giving her a lot of credit for having thought that up on
21 the fly like that. Apparently I am wrong, because Ms. McVey
22 just said they have known their theory of the case, and the
23 defense didn't know? I think it would be highly prejudicial to
24 say that Cleaver-Brooks, having learned yesterday is now
25 precluded from using the documents to defend itself. Had they

1 asked Mr. Tornetta at either of his two depositions prior to
2 both of which they had all of these documents, and as she said
3 it's only 25 pages, how hard is that for them to have gone
4 through and said to Mr. Tornetta, "I have a question, Mr.
5 Tornetta, does this indicate two or one?" Then we wouldn't be
6 here because Mr. Tornetta would have done his work in February.
7 I think he gave his first deposition where they talked to him
8 about these documents February 2nd, and by these documents I
9 mean the commercial records. I will tell you, Your Honor, I'm
10 stating my place, that Cleave-Brooks did not use those index
11 cards, my understanding that it's because -- they don't produce
12 them because they are duplicative, they just get you to the
13 next step. I think the plaintiffs have waived the Bowater card
14 because they displayed it to the jury so I think I'm allowed to
15 put that into evidence and use it. I think that the card for
16 what we're calling the 44 boiler is also equally responsive,
17 but I believe that the commercial record for the other boiler
18 is fair and appropriate in this case, and I think it would
19 be -- Mr. Pugh's writing me a note -- I think it would be
20 appropriate for a couple of reasons, because if we hadn't found
21 this out and it was new evidence which would change the outcome
22 of the case, I think under Rule 60 I could move for a new
23 trial, and that would certainly be a shame and a waste. They
24 showed the document with the -- sorry, I'm not sure I
25 understand that. And the plaintiffs yesterday raised this

1 issue by saying they talked to Art Welker about multiple
2 boilers, they actually asked Mr. Tornetta a hypothetical which
3 I think misstates the evidence because they said that Mr.
4 Welker looked at the Cleaver-Brooks records and identified
5 multiple boilers, but the plaintiffs have opened this issue up
6 and I believe the defendants have a right to defend themselves.
7 Because as Your Honor said in denying our motion for a directed
8 verdict, one of the ways that the jury could find
9 Cleaver-Brooks liable is it could take the plaintiff's theory
10 that 44 -- the mention of 44 means there's two boilers, and
11 Cleaver-Brooks has an absolute right to defend itself against
12 that, and we believe that given the circumstances in which this
13 issue was presented and the fact that it was not presented to
14 Cleaver-Brooks before yesterday as the plaintiffs theory of the
15 case that we should be able to admit these documents into
16 evidence and to use them in our defense.

17 THE COURT: Okay.

18 MS. MCVEY: I'm sorry, I just have to respond to one thing
19 quickly. And my biggest issue, we don't have to tell them the
20 theory of our case. We've interpreted the documents as they
21 told us to, they said these unique numbers are the boiler
22 identifiers, that's what they told us to do.

23 THE COURT: I got that.

24 MS. MCVEY: Okay.

25 THE COURT: This is nothing on lawyers on either side of

1 this case, but the concept that Mr. Tornetta as the repository
2 of all of the material and the guy who has got -- in his office
3 to never have taken a look at these index cards and these files
4 and looked in the file for 1843 -- whatever it was -- 18343 to
5 begin with and looked at that entire file and seen that there
6 was a 18344 mentioned on several of the documents in that file,
7 the fact that he would not have done that, and then to turn
8 around and says they're to blame for not asking him about that,
9 it's been known for some time that the big lynch pin of this
10 case was going to be whether there was a Cleaver-Brooks' boiler
11 wherever Wayne Howe worked, that's been -- and we've known that
12 from Jump Street about this case that that's what the fuss is
13 going to. And Mr. Tornetta has had all of those records there,
14 he's been deposed twice and he doesn't look at the commercial
15 documents, the 25 pages which he had available to him just like
16 they were available to the plaintiffs several months before he
17 ever was examined even the first time much less the second time
18 as a 30B6 witness, and not notice that disparity himself and
19 have taken it upon himself to look at 344 and see, that is
20 something that I find a dereliction on his part if that's what
21 it was. I don't know that he was actively trying to deceive,
22 I'm not accusing anybody of doing that, but I am saying that is
23 incredibly sloppy on his part to have never looked at those
24 documents beyond the technical ability of any of you lawyers,
25 including the lawyers for the defense. The corporate

1 representative deals with these things every day, that's all he
2 does, and to have not looked at these records to see that there
3 was that numerical disparity, and then give them everything
4 that was right -- I mean, I would have wanted -- if I would
5 have been Cleaver-Brooks and I had taken the time to look at
6 this and say, "Hey, we've got this information and we've got
7 844 but let us just tell you that's a typographical error,"
8 why? Because that had to be done by doing one thing and only
9 one thing because of the way the Cleaver-Brooks records are set
10 up, you had to have these index cards to be able to do that and
11 he deliberately did not give those index cards out saying that
12 it was simply duplicative, but for him it was the road map for
13 him to look in the 843 file -- or 343 file and saying, "Hey,
14 there's something about 344 in here, man, that could suggest a
15 second boiler, I'd better go check that out." And then
16 suddenly to have this thing come up at this stage of the trial,
17 I think that there's a very simple answer to that, it's viable
18 to the rules of discovery and I am going to permit it to be
19 introduced. And I am going to protect Ms. O'Neil every way in
20 the record, this is not the fault of the attorneys in this case
21 whatsoever. Now, I'm kind of like you, Ms. O'Neil, I thought
22 they'd gotten very creative having figured out an alternative
23 formula after they got the Bowaters documents and had
24 Mr. Welker on the stand. But Ms. McVey and -- all of you have
25 been as truthful as you could possibly be with me, and what

1 they say is they noticed that disparity and they are the kind
2 of lawyers that do notice those kinds of things. I don't think
3 they're obligated to tell y'all that. They had one little old
4 something that they were going to hang their hat on to say,
5 "Hey, there were two boilers here," and did a good job of
6 elucidating that theory yesterday, and I think they were
7 entitled to do that without violating the rules of having to
8 disclose their theory, because you all had these records just
9 like they did, but the person I point the finger to big time is
10 Mr. Tornetta for letting this occur. And I'm not saying it was
11 a sin of active -- that was done as we say, but I am going to
12 say it was a terrible lapse in doing his job of checking these
13 records, because this is the lynch pin of them getting out of
14 this case and he could have nailed the door shut by checking
15 this out and bringing it to his lawyer's attention, number one,
16 that's the worst part about it, not brining -- you've got two
17 of the finest lawyers in the United States dealing with
18 asbestos cases and you don't put this in their hands? So
19 anyway, I will calm down and simply say that frankly I don't
20 know why you put in the card on 18343 because I would have
21 struck that, too. I am striking --

22 MS. O'NEIL: They're not in yet?

23 THE COURT: I'm striking all of these things, they are not
24 going to the jury. And whatever you did about talking about it
25 it's something you did, I can't unlock that door. But I'm not

1 allowing this thing to be put into evidence and not letting it
2 go to the jury and the basis for it is a violation of the South
3 Carolina Rules of Evidence regarding production.

4 MS. O'NEIL: And so could I mark them so we've got them in
5 the record? They've been marked so I would just like to mark
6 them for the proffer.

7 THE COURT: Absolutely, please, Ms. O'Neil, take these
8 things back and --

9 MS. MCVEY: And, Your Honor, just to clarify, are they
10 going to be able to elicit testimony based on those documents?

11 THE COURT: No. This is forbidden territory, forbidden
12 fruit, we're not going to refer to this. If I'm wrong then we
13 might have to try this case over again but these things are not
14 going to be used before the jury.

15 MS. MCVEY: Yes, ma'am, thank you.

16 MS. O'NEIL: So I need a clarification on that but I would
17 like to mark these before I ask Your Honor that.

18 THE COURT: Sure. Mark them and put whatever you want to
19 in the record, Ms. O'Neil. And please understand, this is not
20 a ruling that reflects in one way, shape or form on your
21 integrity or ability as a lawyer, and the same goes for you,
22 Mr. Pugh, but this is something the clients did a sloppy job on
23 and they're going to have to pay a price for it.

24 (Break in proceedings.)

25 MS. O'NEIL: If I could just put a couple of things on the

1 record. We have marked as Defendant's Exhibit 11 for ID the
2 index card that Bowater Carolina Corporation --

3 THE COURT: And that's 18343.

4 MS. O'NEIL: Yes, ma'am. And we would take exception to
5 Your Honor's ruling with respect to this on the basis that the
6 plaintiffs displayed it already and we think that that's
7 waiver. We have the -- other two that are Defendant's Exhibit
8 12 marked for ID, Defendant's Exhibit 13 marked for ID. And we
9 take exception to Your Honor's ruling on both of those on the
10 basis that the plaintiffs -- you can't look for what you don't
11 know. The fact that we didn't have any notice that the
12 plaintiffs would see this differently, we didn't -- certainly
13 even if Mr. Tornetta would have looked he would have produced
14 any documents about the boiler at American Milling and Refinery
15 or National Protein because they're not involved in this case.
16 I understand the Court's ruling, I'm just making my record.
17 And I would like to clarify a point just to the extent that the
18 Court I think maybe misunderstood a little bit. These are
19 thousands of documents, thousands and thousands and these were
20 on, microfiche so it's not exactly the same thing as opening a
21 file drawer, which I think is relevant to the question which I
22 think will come up later about whether or not Cleaver-Brooks
23 failure to discover this 44 is inappropriate or sanctionable,
24 et cetera, because as Your Honor is aware this is not our only
25 case involving the Bowater Mill.

1 THE COURT: Sure. And let me just clarify -- I will
2 return for a minute for Defendant's ID for 11, that's the one
3 that is 18343, I'm going to return to that in a minute, let's
4 go to the other two. The testimony of Mr. Tornetta was that
5 there are, of course, enormous volumes of documents for the
6 historical transactions of defendant Cleaver-Brooks. But the
7 one thing that he has very available to him in his office is
8 these index cards, because they are in microfiche, y'all know
9 what microfiche is, a lot of information on a little small
10 thing and you put it on a reader and he has that in his office.
11 And he says, "If I get a number, this what they call unit
12 number which is a discrete, a machine discrete number, I can
13 within minutes go to the microfiche that has that particular
14 unit number on it. Now, it may take me awhile to look at all
15 the documents but I can very quickly go to that and identify
16 it." And it turns out that these index cards have a great deal
17 of relationship even though 344 is in a completely different
18 location because of the fact that in the varying records he's
19 got for 343. There are several documents that have 344 on them
20 suggesting that that machine is also at Bowaters, and that
21 could have been clarified with taking those two files and
22 putting those microfiches on his desk and looking at them and
23 he would know better than you, Ms. O'Neil, as thorough as you
24 are or Mr. Pugh or Ms. Dean or Ms. McVey, he would have known
25 the significance of that more than y'all would have before

1 y'all even got started with deep document exchange and that
2 would have been a key factor in clarifying this matter. He
3 didn't do that and that is why I'm striking the documents he
4 didn't do. And then after all the testimony about the new
5 theory you say, but the theory that is ground in documents that
6 have been with both parties for quite some time, only after
7 that, after the testimony of Mr. Welker and the cross
8 examination yesterday, at midnight last night did Mr. Tornetta
9 finally get to the lawyers material which they very promptly
10 got to the other side. The lawyers have done exactly what they
11 are supposed to do but the clients let everybody down and the
12 client is going to have to suffer the consequences.

13 MS. O'NEIL: I understand, Your Honor. And may I just
14 state for the record that -- and I appreciate the Court's
15 ruling, I'm certainly not asking to quibble, but that would
16 have required Mr. Tornetta to anticipate plaintiff counsel's
17 misinterpretation of his records. I understand your ruling
18 but --

19 THE COURT: He's not the man to make that evaluation. He
20 is supposed to produce information and it's up to someone else
21 to decide whether it's misleading or not, and he can have his
22 theories about that but he had something that nobody else had
23 which was these commercial documents and the index cards and it
24 was up to him to look at those documents, see that what he
25 calls typo and say, "Hey, just in case anybody gets any ideas

1 that this represents another machine it does not," because he
2 would well know the significance of those numbers. They are
3 the fingerprint, they are the social security number, they are
4 the discrete identifier of the machines so he would know how
5 important that was.

6 MS. O'NEIL: I understand that. And I would like a point
7 of clarification on your ruling about what we can and can't do.
8 I understand I can't use the documents that we marked for ID,
9 can't admit them into evidence, can't ask him questions about
10 them, but am I still permitted to ask him questions about the
11 document that plaintiff's marked as --

12 THE COURT: The index card?

13 MS. O'NEIL: No, the records themselves for the boiler at
14 Catawba. They spent a lot of time asking him about this one
15 says 44, this one says 43, I can examine him about all of that
16 because that record is already into evidence, correct?

17 THE COURT: Yeah. The ones that gave rise to their
18 theories, certainly you can do that. What he cannot do is
19 reference the index card and point to the location of 344 at
20 Illinois.

21 MS. O'NEIL: I understand that.

22 THE COURT: And with respect to the 343 index card, I'm
23 keeping it out of evidence but it is identified because they
24 identified it and you can talk to him about it, it's just they
25 can't go to the jury, it's not going to be admitted into

1 evidence. But she referred to it and it would only be fair for
2 allowing you to refer to it but it cannot go to the jury. Are
3 we clear?

4 MS. O'NEIL: I am, yes, Your Honor.

5 THE COURT: Very good. Anything else, Mr. Pugh?

6 MR. PUGH: No, Your Honor. I was going to ask if I could
7 step out and make sure that we don't have insult to injury by
8 telling Mr. Tornetta do not do X --

9 MS. O'NEIL: He's here in the courtroom.

10 THE COURT: He's here in the courtroom, I think he has
11 heard this. But it would -- Mr. Tornetta, let me say to you,
12 this is not a reflection on your integrity or your goodness as
13 a person, you are a person of integrity until I hear otherwise
14 and so I'm not reflecting on you at all. But I am saying that
15 it was not a capable and competent job of looking at these
16 records not to run that down because you had the ability to do
17 that, but we all make mistakes in life, I have made more than I
18 could possibly rattle off for you, and mistake are just that.
19 So please understand that it's no imputation of anything other
20 than complete honesty on your part but the ball was dropped and
21 I've got to decide what happens when the ball is dropped.

22 MR. PUGH: Your Honor, the last thing before the jury
23 comes in, and I know we've got them waiting, I think for
24 planning purposes we would finish with Mr. Tornetta and with
25 Your Honor's permission call it a day still staying within what

1 we talked about in chambers on a schedule, we don't foresee
2 that being an issue.

3 THE COURT: Okay. So let's see where we are and then
4 we'll get the jury back. Ms. Dean, we'll call the jury back
5 and you'll put in some final documents and then you will rest,
6 then I will say that -- I will send the jury out because I
7 don't want them to hear rulings about things like directed
8 verdict and then I will put on the record that the arguments
9 have already been heard, the rulings have been made and they
10 should be regarded as having been ruled upon finally at this
11 moment in the record and they were made, argued, ruled and I
12 will repeat those rulings for the record as if they appeared
13 here in the record word for word. And then I'll turn to Ms.
14 O'Neil and say, "You may begin your case," then Ms. O'Neil,
15 what will you do then?

16 MS. O'NEIL: I will recall Mr. Tornetta to the stand.

17 THE COURT: That's right. And if you cannot finish with
18 Mr. Tornetta today then that's one thing, if you can finish him
19 today that's another thing.

20 (Break in proceedings.)

21 MS. DEAN: Can I get one point of clarification?

22 THE COURT: Yes, ma'am.

23 MS. DEAN: I had understood that we'd reached an agreement
24 for direct examinations that powerpoints and exhibits would be
25 produced in enough time before we start so we can look at them

1 and then cross and just kind of go as we go. With that in mind
2 I had asked if there was anything at lunch, thinking lunch is
3 going to be more than enough time, nothing was given to me.
4 Something was just handed to me, I just want to make sure the
5 agreement we've reached is well understood. And sometimes we
6 have last minute things but as a general matter, you know --

7 THE COURT: Ms. Dean, let me tell you something, you've
8 got those documents and she'll start rolling with her
9 powerpoint and if you feel disadvantaged then you let me know,
10 but I don't think she's going to --

11 MS. O'NEIL: We produced them in the case.

12 MS. MCVEY: Just so you know, we showed the powerpoint
13 well in advance and documents to them.

14 THE COURT: I get you. But I'm just telling you if
15 there's some disadvantage that's going to be suffered you let
16 me know and then I'll take it up, but otherwise I'm not going
17 to stop the trial and get all wound around the axle about that.

18 MS. O'NEIL: And I told the Court, I decided to do it
19 because of what Ms. Dean asked our witness, we showed her our
20 powerpoint and it is something we produced in discovery, it's
21 not new.

22 THE COURT: Defense has to -- and I was in this position
23 many times as I was on your side of the table, but defense has
24 to react to what comes up and that's what they've done and
25 that's what she's telling me they've done. They're not trying

1 to hide the ball from you, they haven't tried to do that. The
2 client tried to hide the ball a couple of times but I do not
3 think they are trying to do that.

4 MS. MCVEY: I think we're just sleepy.

5 (Break in proceedings.)

6 (The jury returned to the courtroom.)

7 THE COURT: Good afternoon, ladies and gentlemen of the
8 jury, we're just about at the close of the plaintiffs case. I
9 will call on Mr. Holder, is it you or Ms. Dean that's going to
10 put in the documents?

11 MR. HOLDER: I will, Your Honor.

12 THE COURT: Very good. The plaintiff has a few more
13 documents to put in as client -- y'all are going to have to be
14 jumping jacks a little bit -- the plaintiff has got some
15 documents to put in. The plaintiffs -- just to give you a
16 script of what's going to happen, the plaintiffs are going to
17 formally close the plaintiff's case. Then you will go out for
18 a minute, I've already dealt with the technical matters I have
19 to deal with in your absence but I will put them on the record
20 and bring you right back out, and Ms. O'Neil will begin the
21 defense case. We still anticipate that we will be able to
22 close business by around 4:00 today so do not be frightened
23 that I am going to make you stay here a long time, particularly
24 on a Friday afternoon. Before you get out completely I will
25 talk with everybody about next week and whether you have any

1 dilemmas that I need to know about, so that's kind of the
2 format for this afternoon just so you'll know exactly what's
3 going to happen when. All right. Mr. Holder?

4 MR. HOLDER: Thank you, Your Honor. Ladies and gentlemen
5 of the jury, we now read from the hospice records, it will just
6 be a few excerpts. I am not reading the whole thing from the
7 hospice records of Wayne Howe with the final week, March 3rd
8 through March 7th.

9 THE COURT: All right. And Mr. Holder, when you read
10 those things get up to the microphone so that be --

11 MR. HOLDER: This is part of Exhibit 26, Plaintiff's
12 Exhibit 26.

13 THE COURT: And again without objection, Ms. O'Neil?

14 MS. O'NEIL: Yes. These have already been admitted, I
15 believe, Your Honor.

16 THE COURT: Yes, ma'am, very good. Mr. Holder?

17 MR. HOLDER: All right, thank you. March 4th of 2016,
18 19:00 report from Marsh, RN. "Denies pain at this time,
19 visitors at bed side. 21:00. Dilaudid per needed, order when
20 for care of pain. Something light --"

21 THE COURT: wait a minute. All right. Mr. Holder, I
22 don't know what's going to be better, but Ms. McVey, why don't
23 you help him out by you put the things up and -- because both
24 of these court reporters have to hear you.

25 MR. HOLDER: Thank you, Your Honor.

1 THE COURT: So we began with --

2 MR. HOLDER: I believe I was at 19:00, I was going down
3 there -- if it's okay I'll just use normal time instead of
4 military time.

5 THE COURT: I think maybe you were at 2100 diluted --

6 MR. HOLDER: Yes.

7 THE COURT: Go somewhere in there and repeat it.

8 MR. HOLDER: Thank you. "9:00 p.m. Dilaudid ordered for
9 care of pain. Request something light so that he can visit
10 with family, repositioned for comfort. 10:00 p.m. resting
11 quietly, no signs of distress noted. Medication effective.
12 Midnight. Appears to sleep, wife and son at bed side. 1:00
13 a.m. Dilaudid permitted, ordered for care of pain.
14 Repositioned. 2:00 a.m -- closed breathing is easy, medication
15 effective. 3:00 a.m. Dilaudid per needed ordered for care of
16 pain. 4:00 a.m. resting without signs of distress, medication
17 effective. 6:00 a.m. bed low and locked, side rails up for
18 safety. Call bell within easy reach. The next document,
19 comprehensive psychosocial assessment. It says, "Briefly
20 describe patient's current circumstances, social and
21 developmental history, work histories, hobbies. Patient has
22 been married for 50 years and has two children. Patient worked
23 as a pipefitter and mechanic for Bowater Paper Mill. Patient
24 enjoyed fishing and family. Patient concerns: Concerns for
25 his spouse. Comments: Patient stated that he was ready to go

1 to heaven." This is the second page of the comprehensive
2 psychosocial assessment. "Does the patient have much social
3 interaction with society? Yes. Patient's family is
4 consistently at bed side. Primary caregiver's response to
5 illness: Sadness. What is primary coping mechanisms? Family,
6 faith and community are acting as support." Further down,
7 comments, "Support from West End Baptist Church and has no
8 concerns at this time." These are the notes from March 5,
9 2016. "Patient slept well throughout the night, patient
10 complains about pain several times throughout the night. Pain
11 meds were given by registered nurse." Then there's an error
12 down at the bottom and you can see it, patient's hands too weak
13 to use the call bell and then there's three exclamation points.
14 This is March 6, 7:00 a.m. Report receive by Registered Nurse
15 Marters. 8:00 a.m. "Patient opened eyes when spoken to and
16 mumbled no when asked if he was in pain. Asked if he could
17 swallow his meds and he stared at me and then dosed off.
18 Commented that he thought his father seemed pretty medicated.
19 Held methadone for now. Mouth breathing." 10:00 a.m. "Family
20 followed me into room, felt patient was ready to take medicine.
21 Tried him small amount of apple sauce which he was able to
22 swallow. Gave his morning methadone crushed in small amount of
23 apple sauce. He took sips of Ginger Ail." 10:00 a.m. Patient
24 CO, feeling warm and of pain on his left side. Temperature
25 increased to 98.3. Dilaudid one milligram given, flushed

1 easily, pull patient up in bed to reposition on right side.
2 Patient requested water. Started coughing and coughed up a
3 moderate amount of yellow sputum. Took a few sips of water."
4 11:00 a.m. "Patient has facial grimacing, was able to say yes
5 when asked if he was still hurting. Respiration slightly
6 labored. Continuing to have cheyne stroke breathing, 20
7 seconds, heart rate 130. Son said usually patient responds
8 within a short amount of time to pain medicine. Talked with
9 his son and wife about how much he has changed and that I feel
10 he may be starting to actively die, said they had -- asked if
11 they had read when that is near and they said yes. I explained
12 that he might be like this for awhile or that he might suddenly
13 draw his last breath. I assured them our goal was to keep him
14 comfortable and that I would be back and in 30 minutes to see
15 if medication had worked. Other family members at bed side."
16 7:15, report received from Vicki, the registered nurse. 7:45.
17 "Assessment complete, multiple family members at bed side.
18 Patient lethargic, eyes closed, patient snoring, respiration
19 even appears unlabored." 8:45. "Turn patient with help of
20 nurse tech. Carol, scar on back sacrum intact. Patient
21 positioned on right side." 9:30. "Family requests patient to
22 be turned back to the other way, turned patient back with help
23 of nurse tech, grimacing, furrowed brow. 11:30. "Medication
24 effective, no furrowed brow. Patient" -- one second, it's the
25 last page. It is the last page of records, March 6th of 2016.

1 I believe this is at 10:30. "Appears more comfortable, family
2 pleased with care." 12:30. "Patient with increased
3 respiration, moaning grimacing, Dilaudid, IV given, terminal
4 congestive heart on EOL symptom with daughter." 1:30. "No
5 change of breathing. His brow is furrowed, environment calm,
6 family at bed side." 3:05 a.m. "Patient without heart beat or
7 respiration for 72 minutes. Family at bed side grieving
8 appropriately." 4:10 a.m. "Chart well reviewed. Care given
9 by tech. nurse, family to come back in at bed side, awaiting
10 funeral home." This is the final hospice records of Wayne
11 Howe.

12 THE COURT: All right. Ms. Dean?

13 MS. DEAN: Your Honor, plaintiff rests.

14 THE COURT: Thank you, ma'am. All right. The plaintiffs
15 have now completed the presentation of the plaintiff's case and
16 has rested. Please, members of the jury, will you go to your
17 jury room and I will call you back I think pretty shortly.

18 (The jury left the courtroom.)

19 THE COURT: All right. You may be seated. Ms. O'Neil
20 makes a motion for a directed verdict on six grounds. The
21 first is a jurisdictional ground on the fact that Covil, a
22 codefendant, appealed a sanctions ruling in a discovery dispute
23 where I struck the defendant Covil's answers because of the
24 extensive discovery violations. The jurisdictional motion is
25 that because of the stay for Covil the matter should be stayed

1 entirely. I denied on the basis of the teachings of Smith
2 versus Tiffany as to the effect of non-involved defendants.
3 Number two, Ms. O'Neil made a motion for directed verdict with
4 respect to the failure of the plaintiff to provide a record
5 sufficient to allow a determination that defendant
6 Cleaver-Brooks boiler was worked on or its asbestos containing
7 materials released with such frequency, regularity and
8 proximity in the vicinity of the defendant's work or while he
9 was working on the boiler that he could be found -- that the
10 boiler could be found to be a substantial factor in his
11 development of mesothelioma, I denied that motion. Number
12 three, the defendant moves for a directed verdict on the basis
13 that evidence as to whether the Cleaver-Brooks boiler or
14 boilers were actually boilers that Mr. Howe suffered any injury
15 from exposure to would require complete speculation rather than
16 being able to be -- rather the determination being able to be
17 made on the basis of circumstantial evidence. I denied on the
18 motions on the basis that has been previously discussed in the
19 hearing I held about 30 minutes ago. And number four, a
20 directed verdict motion as to the determination that the
21 conduct of the defendant was willful, wanton and reckless, a
22 platform for a future hearing on punitive damages. I denied
23 that motion on the basis that evidence as to failure to warn,
24 failure to take action in the face of knowledge was sufficient
25 to allow the request to be made for the jury to make a finding

1 on the existence, if any, of willful, wanton and reckless
2 conduct and therefore directed verdict denied as to grounds
3 number four. Grounds number five, a directed verdict requested
4 on the issue of the economic damages with respect to future
5 medical or future caregiving for Mr. Janette Howe were not
6 proved by evidence being offered by a physician. I denied on
7 the basis of the evidence that was offered. And six, a
8 directed verdict as to future claims for Mr. Janette's long
9 term care because witness Lustig never testified as to exact
10 amounts. Denied on the basis of the testimony and comments of
11 Oliver Wood. These matters have already been fully explored in
12 a detailed hearing that was conducted by me as a convenience
13 during the jury's lunch break. The only thing that was left to
14 do in the case after I conducted that hearing and arguments
15 were made and the rulings made was to come back and in the
16 presence of the jury read in the hospice notes for Mr. Howe and
17 formally rest the plaintiff's case. Now that the plaintiff's
18 case is rested these motions and the arguments of counsel and
19 my rulings are repeated here in the record again in the full
20 completeness. And with that, Ms. O'Neil will open the defense
21 case as soon as I call the jury back. The jury has been out
22 for the purpose of memorializing these rulings on motions for a
23 directed verdict. They've also been -- there's also been a
24 discussion that is completely on the record but outside the
25 presence of the jury with respect to the late production last

1 night at midnight of three documents which have been marked as
2 Defendant's for identification 11, 12 and 13. We have
3 conducted complete argument on these matters, rulings have been
4 made and the parties -- and the defendant, of course, has
5 excepted to the rulings, that was on the record too and were
6 obtained as the defendant goes forward with the presentation of
7 the defendant's case. And with that, is there anything else
8 that we can put upon the record?

9 (A break was taken.)

10 THE COURT: All right. All are peaceful?

11 MS. O'NEIL: I'm going to tell you that we will withdraw
12 the Defendant's Exhibit 14 that gave Ms. Dean such heartburn
13 because it is 3:00 and you told us we couldn't have a one
14 witness day so I cannot imagine what is going to happen if a
15 witness goes two days, so we are withdrawing that exhibit that
16 will cause her concern and I am hoping that it will move us
17 along.

18 THE COURT: Excellent, well done. All right, bring me the
19 jury.

20 (The jury returned to the courtroom.)

21 THE COURT: The defendant's case will now begin, and I've
22 explained to you that we'll just make a little running start at
23 it at this time. Ms. O'Neil?

24 MS. O'NEIL: Thank you, Justice Tol. Defendant calls
25 John Tornetta to the stand.

1 THE COURT: Mr. Tornetta, come around, sir.

2 THE witness, JOHN TORNETTA, remained under oath and
3 Testified as follows:

4 DIRECT EXAMINATION

5 BY MS. O'NEIL:

6 Q So John, you've known me for a long time, I'm going to
7 go right to the questions. I want to start by asking for
8 the answers to some of the very basic questions that are at
9 issue in this case and then I am going to go back and talk
10 about the basis for your answers, okay?

11 A Okay.

12 Q Did Cleaver-Brooks ship a boiler to the Bowater Paper
13 Mill in Catawba, South Carolina?

14 A Yes.

15 Q And when I use the word Bowater in my questions, I mean
16 the Bowater Mill at Catawba.

17 A Okay.

18 Q Did that boiler that Cleaver-Brooks shipped to Bowater
19 contain asbestos?

20 A At the time of manufacturing it, yes.

21 Q How many boilers did Cleaver-Brooks ship to Bowater?

22 A One.

23 Q What was the unit number of the boiler that
24 Cleaver-Brooks shipped to Bowater? And you could just get
25 the last two digits.

1 A I think the whole unit number, if I get it, correctly
2 is 0-18343.

3 Q Did Cleaver-Brooks ship a boiler to Bowater with the
4 unit number 0-18344?

5 A No.

6 Q Did Cleaver-Brooks sell replacement parts for the
7 boiler that it shipped to Catawba?

8 A Yes, a couple of instances.

9 Q Did any of those replacement parts that Cleaver-Brooks
10 sold to Bowater for the Cleaver-Brooks boiler that had been
11 shipped contain asbestos?

12 A No.

13 Q Did Cleaver-Brooks ever sell any of the following
14 things to Bowater as replacement parts: 100 percent raw
15 asbestos?

16 A No.

17 Q Did Cleaver-Brooks ever sell 100 raw asbestos to
18 anybody?

19 MS. DEAN: Objection, foundation.

20 THE COURT: What's that?

21 MS. DEAN: Objection, foundation.

22 THE COURT: Overruled. You may proceed.

23 A No, I'm not aware of that at all.

24 Q Did Cleaver-Brooks ever sell to Bowater as a
25 replacement part asbestos containing block mix?

- 1 A No.
- 2 Q Did Cleaver-Brooks ever sell to Bowater as a
3 replacement part asbestos board?
- 4 A No.
- 5 Q How about asbestos packing?
- 6 A No.
- 7 Q How about asbestos gaskets?
- 8 A No.
- 9 Q How about asbestos rope?
- 10 A No.
- 11 Q How about asbestos cement?
- 12 A No.
- 13 Q Were any of those things I just read to you used in the
14 original manufacture of the boiler?
- 15 A Yes.
- 16 Q Which ones?
- 17 A The block insulation -- I'm probably not going to be
18 able to give them in order of what you just read out.
- 19 Q Let me do it --
- 20 A Okay.
- 21 Q Let me go -- was 100 percent asbestos used in the
22 original manufacture of the boiler?
- 23 A No, it was not.
- 24 Q Was asbestos containing block mix?
- 25 A Yes.

- 1 Q How about board?
- 2 A Yes.
- 3 Q And I mean asbestos board.
- 4 A I believe there was some board --
- 5 Q Asbestos containing packing.
- 6 A The packing as sometimes used as in we talked about
- 7 earlier with valves and pumps, no. But Packing as in people
- 8 refer to sometimes rope as packing, yes.
- 9 Q And so asbestos containing gaskets?
- 10 A Yes.
- 11 Q Asbestos containing cement.
- 12 A Yes.
- 13 Q Where was that boiler manufactured?
- 14 A In Milwaukee, Wisconsin.
- 15 Q I want to talk a little bit about the boiler industry.
- 16 what's the main safety concern for the boiler industry?
- 17 A Certainly dealing with pressure vessels and volatile
- 18 fuels, the biggest issue really that we think of is
- 19 explosion.
- 20 Q why is that a big issue for the boiler industry?
- 21 A Oh, a -- some types of explosions with boilers can take
- 22 down buildings or kill people.
- 23 Q The plaintiff's claim in this case that Cleaver-Brooks
- 24 didn't care about safety; is that true?
- 25 A I don't believe so.

1 Q What was Cleaver-Brooks' concern about safety as it
2 relates to its boilers?

3 A Well, there's different areas, again, talking about a
4 pressure vessel that's holding steam in it or even hot water
5 in the pressure. There are issues you run into with what we
6 said with the potential of a boiler exploding, when dealing
7 with fuels you run into the issue of combustion not being
8 proper and having explosions in that way. There is
9 electrical issues dealing with electrical panels, things of
10 that sort.

11 Q You said during plaintiff's case when you were being
12 examined that you thought if the hazard of asbestos was
13 communicated to Cleaver-Brooks in the terms of the way that
14 a boiler would operate that it would be reasonable for
15 Cleaver-Brooks to pass on that asbestos to its customers, do
16 you recall that general testimony?

17 A Generally, yes.

18 Q Have you ever seen any evidence that any of the
19 manufacturers who sold Cleaver-Brooks asbestos containing
20 components to use in building the boiler warned
21 Cleaver-Brooks about the hazards during the 50's, 60's or up
22 to the time of OSHA?

23 MS. DEAN: Objection, no foundation.

24 THE COURT: Overruled.

25 A No, I haven't seen any evidence of that.

1 Q Ms. Dean asked you a question about Cleaver-Brooks and
2 safety and what it had done to investigate, and you made a
3 reference to something called the ABMA?

4 A Yes, ma'am.

5 Q What's the ABMA?

6 A It stands for American Boilers Manufacturer's
7 Associations, it's a group of manufacturers of both package
8 boilers and larger utility type field erected boilers that
9 gather still today that go back many, many years to talk
10 about all issues related to the boiler industry itself.

11 Q Was Cleaver-Brooks a member?

12 A Yes.

13 Q For how long, do you know?

14 A From what I can tell it was somewhere in the 1948 time
15 frame that we seem to have some things indicating a
16 membership in it, certainly built boilers before that, I'm
17 not certain, I can't nail down being a member prior to that.

18 Q What is the ABMA product safety committee?

19 A That was a committee that was formed from the
20 information we had located in some records, formed around
21 the time that OSHA in the early 70's to talk about how the
22 OSHA regulations would be addressed or effect the boiler
23 industry.

24 Q Do you recall whether asbestos was ever discussed --
25 strike that. Do you recall in the documents that you

1 reviewed whether asbestos was discussed at any of those
2 meetings?

3 A Actually discussed in the meetings, we have several
4 agendas and minutes of meetings, I don't know if it was
5 discussed. There was a report that mentioned thermal
6 insulation that was apparently presented in the meetings, so
7 possibly it was, yes.

8 Q Do you know who presented that, what manufacturer?

9 A I believe it was Babcock Wilcox.

10 Q Did anyone from OSHA come to those meetings as far as
11 you could tell from the records?

12 A Yes. It seems like there was an open invitation to
13 OSHA, at least a couple of different OSHA representatives
14 going to the meetings.

15 Q Did you see anything in those documents about any OSHA
16 representative telling the America Boiler Manufactures
17 Association about the hazards of asbestos?

18 A No, I did not.

19 Q I want to talk a little bit about the document that was
20 marked as Plaintiff's 55. Do you have that?

21 A Fifty-five you said?

22 Q Yes.

23 A That would be this one.

24 Q Yes. So you testified to Ms. Dean that there were four
25 pages in there that contained the unit number 018344.

1 A Correct.

2 Q And you said it in answer to one of my questions that
3 unit number 18344 was never shipped to Bowater, right?

4 A Correct.

5 Q So I want to talk about the first document where that
6 error appears. And I believe that if we go in chronological
7 sequence it starts with BPM 0010, it has got some zeros and
8 then a ten.

9 A Yes.

10 Q And what is this?

11 A It's the supplemental field report we discussed a
12 little earlier, and it's the supplement to the field report
13 which is ahead of it in the way these records are sequenced
14 and it's what the service person is filling out on the job
15 site as he's starting up the boiler.

16 Q So is the first document the one that starts with BPM
17 seven?

18 A That would certainly be the coversheet of the documents
19 behind it, yes.

20 Q And in this one somebody has handwritten in the serial
21 numbers.

22 A Correct.

23 Q Tell the ladies and gentlemen of the jury what a field
24 report is generally.

25 A A field report as we see here is used to report some

1 service or some activity with a boiler. In this particular
2 case you'll see on the right-hand side it has starting
3 service checked so this was used to report the starting
4 service in the boiler.

5 Q That's when the boiler was very first started at
6 Bowater after it was shipped there, correct?

7 A Yes. The initial commissioning or whatever, in fact,
8 it appears this was actually somewhat of a temporary
9 start-up on propane because gas wasn't available yet,
10 natural gas wasn't available yet.

11 Q Why wasn't natural gas available yet, can you tell that
12 from the record?

13 A There was a mention in one of the documents coming up,
14 I believe, that it was a new job site I think is what they
15 referred to it as, and natural gas wasn't yet available all
16 of the way around it.

17 Q Does Cleaver-Brooks expect to find a field report in
18 its commercial records for every boiler start-up?

19 A In general, yes.

20 Q Is there a field report in the records you found for
21 Bowater for 18343?

22 A Short of the --

23 Q Let me rephrase. Did you find anything in your records
24 that said field report in the top and had written as the
25 serial number 18343?

1 A No.

2 Q And what did you conclude based upon all of your work
3 in looking at Cleaver-Brooks files over all of the years by
4 that fact?

5 A That the 18344 written on the field report and the
6 supplemental field report was a typographical or written
7 error which led to the subsequent typographical errors on
8 the next two documents.

9 Q Any doubt in your mind about that?

10 A No.

11 Q I'm going to talk a little bit about that boiler. What
12 kind of boiler was shipped to Bowater?

13 A A progress model number, model name is called progress,
14 and it's a 30 horse power 15-pound PSI steam boiler.

15 Q How big is that boiler?

16 A Roughly nine feet long front to back including some of
17 the things hanging off of it, four and a half feet tall and
18 about four feet wide.

19 Q So would it fit in this room?

20 A Absolutely. I would say it would fit in this area
21 right here.

22 Q And you're gesturing sitting in the witness box to your
23 left?

24 A Correct. And probably have a little -- maybe -- it
25 would fit very tightly there.

1 Q And what was the horsepower and the steam pressure?

2 A Thirty horsepower and a 15 pounds per square inch
3 pressure.

4 Q When that boiler was shipped to Bowater, what would be
5 required to get it up and running?

6 A It would be connected to the fuel source which in this
7 case was initially propane, eventually natural gas connected
8 to steam piping connected to a flew gas outlet for getting
9 rid of the combustion gasses and a feed water inlet and
10 electricity.

11 Q You said it had to be connected to steam lines?

12 A Correct.

13 Q Would Cleaver-Brooks provide the pipes to do that?

14 A No.

15 Q How do you know that?

16 A It would have shown up in our commercial records as
17 another piece supplied with the boiler and I didn't find any
18 record of that. It would be somewhat unusual to find that
19 in general. Occasionally I would find where we supplied
20 what is called a spool piece off the top of the boiler or a
21 small steam pipe or hot water pipe, and in this case I did
22 not.

23 Q If you would look at BPM 12, please.

24 A Okay.

25 Q It says that Cleaver-Brooks provided something called

1 the gas piping system?

2 A Under 63 you're talking about there?

3 Q Yeah.

4 A It's actually noting the circumstances of the
5 insulation of the gas piping system, so it's not -- what's
6 being discussed here is truly the Cleaver-Brooks gas piping
7 that we supplied with the boiler, it's piping in the plant
8 to the boiler, and essentially in this case initially it was
9 propane bottles or tanks feeding it.

10 Q Was the Cleaver-Brooks progress boiler shipped to
11 Bowater insulated?

12 A Yes, not necessarily on the outside. I think we talked
13 a little bit about this earlier, there was a sheet metal
14 lagging around the insulation that was around the shell.

15 Q We're going to get to that. What was it insulated with
16 for that internal insulation?

17 A Around the shell and under that sheet metal lagging was
18 material called Microlite.

19 Q Did that contain asbestos?

20 A I don't believe it did, no.

21 Q How do you know that that boiler had internal
22 insulation that was Micro -- Microlite? Pardon me.

23 A It was called that on the drawings that was pulled out
24 in relation to that boiler and it eventually led to the
25 building material on the drawing calls that it was

1 Microlite, and then the part number on that also identifies
2 Microlite.

3 Q Is the part number what we have marked as BPM 59 and
4 60, I believe; is that right?

5 A Yes to 59, 872144. And on BPM 60 is 872145. Yes, two
6 different part numbers I believe due to two different
7 dimensions.

8 Q We're supposed to be displaying it to the jury but we
9 apparently have AV issues. If you could look at Plaintiff's
10 Exhibit 7, please. I'm sorry let me ask you a question. In
11 that document that you -- can you tell the ladies and
12 gentlemen of the jury what is BPM 45 to 60?

13 A BPM 45 to 60, I think 61 actually, is --

14 Q To 61.

15 A -- is the part descriptions for some of the parts shown
16 on the bills and materials which are the drawings earlier in
17 that exhibit.

18 Q I'm going to show you Plaintiff's Exhibit 7, sorry I'm
19 shouting but I want the court reporter to hear me. Is that
20 the same thing as what you've just said is the parts
21 descriptions, BPM 45 to 61?

22 A Yes.

23 Q Does anything in what's Plaintiff's Exhibit 7 or BPM 45
24 to 61 indicate that Cleaver-Brooks sold replacement parts to
25 Bowater?

1 A No.

2 Q So if you look at these documents there's some years on
3 them in the parts description, do you see that?

4 A Yes.

5 Q What does those years mean?

6 A I've really never been able to figure that out. You'll
7 see them and occasionally on some part descriptions and not
8 on others. It's never given me a good indication of whether
9 that was a date that someone changed it, a date someone
10 looked at it or just a date that was put in there, I've
11 never really been able to run down what that was.

12 Q So it's really clear, does anything on 45 to 61 relate
13 to sale of replacement parts to Bowater of any kind?

14 A No.

15 Q All right. I want to go back and talk about that
16 internal insulation you said; is that correct?

17 A I would call it the shell insulation but I think we're
18 talking about the Microlite material, or were you talking
19 about something else?

20 Q Nope, Microlite. I'm going to show you Plaintiff's
21 Exhibit 6 which was previously marked into evidence. This
22 is the operating manual for the boiler sold to Bowater,
23 right?

24 A Yes. It's very close in time frame but prior to it so
25 I would say more than likely it went with that boiler, or a

1 copy of it I should say.

2 Q And if you look at I believe it's page four, is there a
3 picture which helps show where the insulation is in the
4 boiler?

5 A Yes, there's a cut away.

6 Q And just so you walk the ladies and gentlemen through,
7 can you explain to them, and hopefully if this works we'll
8 have some colors that show them where the -- maybe not.
9 Okay.

10 A Okay. So that's -- this is a blow-up kind of the
11 easier sight to see of what's a cut-away. So what you're
12 looking at through there is through the sheet metal lagging,
13 through the insulation, through the shell into the tubes --
14 I thought I might have them marked but maybe I didn't --

15 Q So what does the yellow represent?

16 A The yellow represents the shell of the boiler, so the
17 pressure vessel shell, that's what's holding in the steam or
18 water inside the boiler.

19 Q And that's metal?

20 A That is steel, metal to hold pressure.

21 Q And then the next layer is what?

22 A What's marked as sort of a green is the insulation, or
23 the Microlite insulation that insulated that shell.

24 Q And what goes over that?

25 A The sheet metal lagging, which I talked about a little

1 earlier, is a relatively light gauge material, probably a
2 little less than the steel and the makeup body of a car and
3 its thickness, but around that size.

4 Q And where would all of this be done, the Microlite
5 insulation wrapped around the pressure vessel and then the
6 metal lagging put over it.

7 A In our plant in this case in Milwaukee, Wisconsin.

8 Q How can you be certain that that was all done before it
9 left the plant in Milwaukee?

10 A It shows on the invoice as a component, I guess for
11 lack of a better term, boiler that's insulated and lagged,
12 as well as the manufactured drawings that we used to build
13 the boiler show that assembly as part of the manufacturer of
14 the boiler. And quite frankly once we started insulating
15 boilers in general that's how we did it, we shipped them out
16 insulated.

17 Q Did you turn it on at the factory?

18 A Turned on the boiler at the factory?

19 Q Yeah.

20 A Yes.

21 Q Can you do that if it's not completely built, insulated
22 and lagged? Let me withdraw that and ask this question. Is
23 there anything in the commercial records which shows firings
24 of this boiler at the factory in Milwaukee?

25 A Yes. There's an assembly checklist which ultimately

1 was our -- what I would call our test pit report. When we
2 made these boilers they're all tested prior to being
3 shipped, basically fired up, run through an electrical
4 sequence and shut down.

5 Q And then put on a rail car or truck and shipped
6 somewhere.

7 A Correct.

8 Q When it got to the factory at Bowater, would you expect
9 somebody to have to put insulation on it to use it?

10 A No.

11 Q Would you expect somebody to have to cut that metal
12 shell in order to maintain it, the lagging?

13 A No, not at all. And the fact that the doors don't go
14 into that sheet metal lagging so it can be opened up on the
15 front and rear door without manipulating that material at
16 all.

17 Q So we've been talking about the insulation on the
18 boiler and we -- I guess we didn't look because it didn't
19 work, but we talked about the Microlite. I want to go back
20 a minute to those replacement parts -- I'm sorry, to those
21 parts descriptions which you said were not an indication of
22 sales and replacement parts, and I want to just run through
23 them quickly. If you could, it might be easier to do on
24 Plaintiff's Exhibit 7 because it's smaller.

25 A Okay.

1 Q If you could look at BPM 53, please?
2 A Okay.
3 Q Does that contain asbestos?
4 A I don't believe that did.
5 Q How about 54?
6 A No, again I don't believe that did.
7 Q How about 56?
8 A No. That one again --
9 THE COURT: Well, wait a minute, let him get up there --
10 MS. O'NEIL: I'm not displaying this.
11 THE COURT: Oh, okay, very good.
12 Q How about 56?
13 A No, that did not either.
14 Q How about 31?
15 A Thirty-one or 61?
16 Q 31?
17 A Thirty-one was prior to 45?
18 Q So I don't know what number that was supposed to be.
19 Let's look at 45, because it's fair to tell the ladies and
20 gentlemen of the jury there were asbestos containing
21 components on this boiler, right?
22 A Absolutely.
23 Q And they are reflected on the parts description?
24 A Yes.
25 Q And give them example of one of them.

1 A Forty-five, which is the first one, is actually what's
2 called the hand held gaskets and it calls out several
3 different manufacturers, Flexitalic, Garlock or a JM
4 material, and actually says with ABS filler, which I think
5 was probably a little dyslexia on someone's part and meant
6 to asbestos filler.

7 Q And so Cleaver-Brooks isn't claiming that that's not
8 asbestos, are they?

9 A No.

10 Q And to be fair there's some that actually say something
11 different like 49, correct?

12 A Correct.

13 Q And 49 -- we'll get it up here in a minute -- it says
14 it's fiberglass, right?

15 A Yes.

16 Q When the boiler was shipped to Bowater in 1957, do you
17 think that this part or this part of it was fiberglass?

18 A No, it was an asbestos rope.

19 Q How do you know that?

20 A If we look at the drawing that calls out that quarter
21 inch diameter rope it will identify it as an asbestos rope.

22 Q So why does this say fiberglass?

23 A We only have the part descriptions as you see them here
24 in basically a snapshot of time, so some may have been
25 updated over the years. I don't know when these were

1 updated. Again, the years don't do much for me so it's what
2 we have, but based on looking at the drawings we know that
3 was not asbestos -- or it was not a fiberglass rope at that
4 time.

5 Q So you talked a little bit about the products that
6 Cleaver-Brooks used to make a boiler, some that contained
7 asbestos, some that did not. Did Cleaver-Brooks make all of
8 those products?

9 A No.

10 Q Where did they get them?

11 A Bought them from the suppliers that make gaskets or
12 make cement and make insulation.

13 Q Why did they do that?

14 A Because we built boilers, we didn't make those types of
15 products. We used those products to build a boiler but our
16 business was building boilers.

17 Q What was Cleaver-Brooks' expectation from its suppliers
18 who were providing those components parts for it to use in
19 the manufacturer of boilers?

20 A I guess essentially to give us a product that would fit
21 the form and function of what we needed it for and whatever
22 that function was. In the case of a door gasket something
23 that would seal this surface to that surface and withstand
24 this temperature.

25 Q So you tell them "It needs to perform this way, send me

1 what I need."

2 A Correct.

3 Q We talked about it several times now, the fact that BPM
4 45 to 60 do not show sales of replacement parts, but you
5 said in response to Ms. Dean's question that Cleaver-Brooks
6 did sell replacement parts to Bowater.

7 A Yes.

8 Q And I believe you said it was BPM, I think you were
9 looking at 13 and 14?

10 A Thirteen and 14 and 15 actually. Fourteen and 15 are
11 related to each other so that's one sale, or actually a
12 warranty return, and then 13 is an actual sale.

13 Q And I want to talk about that. So on 13 --

14 A Yes.

15 Q -- there's a unit number, right?

16 A Correct.

17 Q And so in -- that's 1969; is that correct?

18 A Yes. It looks like either August of 29, '69 or maybe
19 September the 29th, probably August 29th it shipped in the
20 far left.

21 Q So in 1969, let me understand this correctly, Bowater
22 contacted you, said, "We have unit number 8343 and we need
23 something replaced on warranty?"

24 A That actually was the toggle switches, I don't believe
25 that was warrantied, the warranty was the 14 and 15.

1 Q Okay. So the toggle switches, are those asbestos
2 containing?

3 A No, it's an electrical switch.

4 Q And then going to the 14 and 15, that's the low water
5 control?

6 A Correct. That is the -- it appears to have been a
7 warranty return, it was in 1958. 15 is the invoice for
8 shipping it, and then 14 is the credit once the defective
9 one was returned.

10 Q Did that contain asbestos?

11 A No, it didn't.

12 Q Is there anything else at all in the Cleaver-Brooks
13 records that indicate that showed it sold any replacement
14 parts to Bowater?

15 A No.

16 Q Is that unusual?

17 A Not completely. This shows a couple, I've seen records
18 with many more, I've seen records with none.

19 Q Does it mean that Bowater -- to you because if you
20 don't have a record of replacement parts, does it mean that
21 Bowater didn't maintain its boiler?

22 A No. It means they got their components to do that in
23 other locations.

24 Q That was okay with Cleaver-Brooks.

25 A Sure.

1 Q I am going to talk a little bit about maintenance.
2 when you're looking at the Cleaver-Brooks progress boiler
3 like the ones sold to Bowater, what do you see on the
4 outside?

5 A Many components, but for the most part you're looking
6 at metal.

7 Q And when it's running are there any asbestos containing
8 components visible?

9 A No.

10 Q I want to talk to you specifically about maintenance
11 with respect to what you would expect for the progress
12 boiler sold to Bowater.

13 A Okay.

14 Q How often would you expect that boiler to be shut down
15 for maintenance?

16 A It would depend a little bit on the conditions of the
17 site, but it wouldn't be unusual for a boiler -- this is a
18 15 PSI steam boiler so it was used in a low pressure steam
19 application, it wouldn't have been unusual for that to be
20 opened up or shut down for an annual maintenance, possibly
21 less than that depending on the jurisdictional rules in
22 inspecting boilers.

23 Q would it be opened up and shut down every month?

24 A No.

25 Q why not?

1 A That would be an indication of a pretty sizeable
2 problem if a boiler like this had to be shut down every
3 month for something, I don't think they would be very happy
4 with it.

5 Q Would the gaskets have to be replaced every month?

6 A Every month?

7 Q Yes.

8 A If they're opening it up every month probably not, but
9 I don't know why they would be opening it up. You wouldn't
10 open it up just to replace the gaskets every month, no.

11 Q What about the cements, would these have to be replaced
12 every month?

13 A No.

14 Q When would you expect the cements to be replaced?

15 A When it was opened up and that rear door was opened and
16 that baffle rope across the baffle we talked about, when
17 that was opened, so it would be typically once a year or a
18 little greater than that, greater as in longer time frame.

19 Q What about the asbestos containing board, would that
20 need be replaced or repaired every month?

21 A Oh, the board was in the -- kind of inside the rear
22 door, we talked a little bit about that earlier, kind of
23 buried between the refractory and the steel, certainly not
24 every month.

25 Q How often would the refractory need to be replaced?

1 A In this size boiler relatively small -- the amount of
2 refractory in it, it wouldn't surprise me if it went five to
3 ten years before the refractory had to be replaced in a
4 boiler that size. It's just not as much refractory, it
5 doesn't expand or contract as much when it's heated and
6 cooled.

7 Q There's an allegation in this case that Mr. Howe was
8 inside the Cleaver-Brooks boiler at Bowater. I'm going to
9 represent to you there are medical records in evidence in
10 this case that show that in 2004 Mr. Howe was six feet tall
11 and he weighed 226 pounds, and I'm not going to tell it is
12 not -- 2004 is not when he was working at Bowater. Could a
13 person that size, six feet tall, 225 pounds, get inside a
14 Cleaver-Brooks progress boiler?

15 MS. DEAN: Your Honor, I object to the extent that she
16 absolutely misstates plaintiff's allegations.

17 MS. O'NEIL: Would you like us to approach?

18 THE COURT: Yes.

19 (A bench conference was held.)

20 THE COURT: Ladies and gentlemen, let me just explain to
21 you, there's a factual dispute between the parties as to
22 exactly what the testimony said about whether Mr. Howe said he
23 was inside the boiler or opened the door of the package boiler,
24 and Ms. O'Neil, I think, is going to rephrase her question, so
25 let's see how she does that. Go ahead, Ms. O'Neil.

1 Q Mr. Tornetta, if there's evidence in this case that Mr.
2 Howe was inside the Cleaver-Brooks boiler at Bowater, and
3 I'm representing to you that there are medical records which
4 show that he was six feet tall and 226 pounds at least by
5 2004, could a person that size get into the Cleaver-Brooks
6 progress boiler that was sold to Bowater?

7 A No. The largest opening -- this didn't have any
8 manhole openings, the largest opening would have been in the
9 fire side in the furnace, and the furnace is roughly 12
10 inches in diameter.

11 Q I think I got the wrong document up to show that.

12 A No, I think it's the right -- scroll down.

13 Q Oh, there it is, right. So this document, which is BPM
14 23 --

15 A Correct.

16 Q -- that shows the diameter of what? Tell me that
17 again.

18 A That's the furnace or the main fire tube some people
19 will call it, it's where combustion takes place and it's
20 where some of the refractory is in the front end of the
21 boiler, and it's basically a large 12-inch pipe, 12 and
22 three quarter inch outside diameter.

23 Q So I will represent to you that yesterday the jury
24 heard some testimony from the Bowater corporate
25 representative Art Welker and he told them that the boiler

1 in the powerhouse at Bowater was used for supplemental steam
2 to add to the system on cold days. Could the Cleaver-Brooks
3 progress boiler sold to Bowater do that?

4 A I don't believe so, no.

5 Q Why not?

6 A The size of this boiler at 30 horsepower equates to
7 roughly what's called 1,000 pounds of steam per hour. And I
8 would suspect based on the size of the equipment that we
9 were -- that I understand was in the powerhouse, large field
10 erected boilers, that 1,000 pounds of steam per hour was a
11 drop in the bucket for those to be frank. As I understand
12 it the boiler that someone was talking about was that
13 supplemental steam boiler was 100,000 pounds per hour.

14 Q And when you say as you understand that, you looked at
15 some documents that Bowater produced with respect to a
16 boiler that may or may not have been in the powerhouse,
17 correct?

18 A Correct.

19 Q And do you recall or can you tell the ladies and
20 gentlemen of the jury who the manufacturer of that boiler
21 was that you represented at the thousand pound -- no,
22 hundred pound steam capacity?

23 A 100,000 pound per hour steam capacity was a Combustion
24 Engineering boiler.

25 Q So how much -- if I take this steam capacity of a

1 Combustion Engineering boiler and the steam capacity of a
2 Cleaver-Brooks progress boiler, what's the differential?
3 A The Cleaver-Brooks boiler is roughly 100 times smaller.
4 Q I'm going to show you what was previously marked as
5 Plaintiff's 6, I think, except I don't see it up here.
6 A I think I have it.
7 Q Plaintiff's 6? Okay, good. All right. This is the
8 operating manual for the progress boiler that we sold to
9 Bowater, right?
10 A Yes.
11 Q And there was a service and maintenance chapter in
12 here?
13 A Yes, there is.
14 Q And it's on page 29, I believe, at the bottom?
15 A Bates number 29?
16 Q Bates number 29. Is that right?
17 A Yes, it starts there.
18 Q I want to talk a little bit about this. The section
19 there for general maintenance, would this require the boiler
20 to be opened?
21 A No. It's talking about observing whether or not there
22 are fuel connection leaks or water leaks or steam leaks in
23 the boiler room, so the boiler would be running.
24 Q Do you have to access any internal components which
25 might be asbestos containing in order to do the general

- 1 maintenance described here?
- 2 A No.
- 3 Q All right. The next one is water side care, feed water
- 4 treatment.
- 5 A Yes.
- 6 Q would that require the boiler to be opened?
- 7 A No. That area is talking about the care that you
- 8 provide for the water treatment of a boiler. In general
- 9 talking about making sure it doesn't scale up and doesn't
- 10 corrode the tube so it's all externally -- actually external
- 11 to the boiler. You're talking about the treatment of the
- 12 water prior to getting to the boiler.
- 13 Q So would it involve accessing any of the internal
- 14 components on the progress boiler which might be asbestos
- 15 containing?
- 16 A No.
- 17 Q The next one is washing out the boiler?
- 18 A Yes.
- 19 Q would that require the boiler to be opened?
- 20 A Yes, it would.
- 21 Q And how often would that have to be done?
- 22 A That's what we talked a little bit earlier about,
- 23 every -- in many cases every year, in this particular case
- 24 manual they talk about no later than three months after it's
- 25 initially started, checking it out to see how the water

1 treatment was, and then doing it periodically based on what
2 you see there. So someone may open it up after a relatively
3 short period running it and then base the next opening on
4 how it looked when they opened it, as they're treating the
5 water it probably would be every year or a little bit longer
6 time space to it.

7 Q So we know from the field report that somebody was out
8 there in February of 1958 to start this boiler up, correct?

9 A Correct.

10 Q So then it would be -- under this system it would be
11 opened three months later.

12 A Yes. If they followed this, yes.

13 Q In May of 1958?

14 A That's what I would come up with too.

15 Q And then maybe a year later or some other point later?

16 A Or whatever time period is convenient with a state
17 inspection if they had that.

18 Q And there would be cleaning the fire tubes, would that
19 be require the boiler to be opened?

20 A Yes.

21 Q How often would that be done?

22 A That again would normally coincide with whatever state
23 inspection that might be required and the washing out of the
24 water side of the boiler, at least looking at it. Whether
25 or not they actually have to clean it out by brushing the

1 tubes would depend on how well the boiler has been set-up
2 combustion wise.

3 Q And then the next one is gaskets and packing. Would
4 this require the boiler to be opened?

5 A No. It actually -- this paragraph is talking about the
6 gaskets and the packing I believe in a feed water pump,
7 which in this particular case we did not supply with the
8 boiler.

9 Q And how do you know that?

10 A It would have shown up on the commercial records to say
11 whether or not we shipped that component.

12 Q And you didn't see that.

13 A No, I didn't.

14 Q And the next one is lubrication, would that require it
15 to be opened?

16 A No. It's talking about lubricating motors and things
17 of that sort that are external to the boiler.

18 Q So no accessing any internal components which might be
19 asbestos containing.

20 A No.

21 Q The next one is refractory maintenance, would that
22 require it to be opened?

23 A Yes.

24 Q And how often would that have to be done?

25 A About the same time -- looking at it, as I said before,

1 probably coinciding with an annual type inspection along
2 with the fire side cleaning and the water side flushing.
3 Actually doing anything to a refractory would depend on the
4 condition of the refractory.

5 Q So this says to renew fire tube lining. What is that?

6 A The lining they're talking about is actually the
7 furnace tube that we talked about a little earlier, so it's
8 that 12-inch pipe in the front of the boiler. I talked
9 about some refractory in it, that's what it is, it's
10 actually a picture lower on that page.

11 Q And how often would that be done?

12 A The renewing of it?

13 Q Yes.

14 A In the event it failed or fell apart, whatever it
15 may -- and again, given the size of this boiler I would
16 suspect there would be well past every year, much longer
17 than once a year.

18 Q And the next one is burner maintenance. Would that be
19 open or closed?

20 A That would be opened, all of the burner components are
21 really on the front. You may pull the electrode, which I
22 think it talks about a little bit later to look at the --
23 there's a spark that actually lights the fire and to make
24 sure that's okay.

25 Q would that require accessing any of the asbestos

1 containing components inside the boiler?

2 A No.

3 Q What about electrical control maintenance?

4 A No. That's all in the electrical panel, is the flame
5 safe guard, the motor starters and things of that sort.

6 Q I'm going to show you what was previously marked as
7 Plaintiff's 11. Have you seen this before?

8 A Yes, I have.

9 Q Can you tell the ladies and gentlemen of the jury what
10 was the purpose of this document for Cleaver-Brooks?

11 A This was related to models of boilers when in the
12 earlier years, I'll call it the 30's and 40's and part of
13 the 50's, ones that are listed out on this, and they were
14 shipped bare, they didn't have any insulation on the
15 outside.

16 Q Does Cleaver-Brooks have any -- well, strike that.
17 what kind of boilers -- were they shipped bare? what were
18 they made out of?

19 A They were made out of steel, the vessel itself, but it
20 would have been like that progress boiler without the
21 insulation lagging on the outside.

22 Q would they have been made in a different way, would
23 they have been riveted?

24 A Yes, I'm sorry. One of the reasons that was initially
25 done was boilers back in the 30's were riveted together

1 versus being welded together, and they had to get the boiler
2 on site, make sure it was started up and make sure it was
3 heated up to make sure the rivets didn't leak after
4 traveling across the country. So they would not normally
5 insulate the boiler because you couldn't see the rivets once
6 it was insulated.

7 Q And the Cleaver-Brooks progress boiler sold to Bowater,
8 was it the kind of boiler that was riveted?

9 A No.

10 Q It was welded.

11 A Correct.

12 Q So does Plaintiff's Exhibit 11 have anything to do with
13 the boiler that was sold to Bowater?

14 A No.

15 Q All right. I'll show you Plaintiff's Exhibit 12. And
16 I'm going to give you 13 for good measure.

17 A Thank you.

18 Q What is Plaintiff's Exhibit 12?

19 A It is a rear door refractory repair and replacement
20 manual for different boiler diameters from -- I would date
21 it some time after 1967.

22 Q And why would you do that?

23 A The bottom of it refers to Cleaver-Brooks, a division
24 of Aqua-Chem, and we weren't a division of Aqua-Chem until
25 1967.

- 1 Q So do you believe that this document that's been marked
2 as Plaintiff's Exhibit 12 existed when the Cleaver-Brooks
3 progress boiler was shipped to Bowater in 1957?
- 4 A No, ma'am.
- 5 Q If you look at page two of that document.
- 6 A Okay.
- 7 Q It talks about -- and the jury has seen this before, it
8 talks about two layers of insulating block, do you see that?
- 9 A Yes, I do.
- 10 Q Was that true for the Cleaver-Brooks progress boiler at
11 Bowater?
- 12 A No. The drawings and actually the manual call out a
13 layer of the vee block mix poured in there.
- 14 Q Would that be in Plaintiff's 55 that you would know
15 that?
- 16 A Correct, as well as the manual, which is Plaintiff's 6.
- 17 Q And would specifically within Plaintiff's 55 -- well,
18 strike that. If you look at Plaintiff's 13 which I handed
19 you.
- 20 A Yes.
- 21 Q That's an illustrated part list for a CBH package steam
22 boiler, do you see that?
- 23 A Yes.
- 24 Q Does that apply to a progress boiler that was sold to
25 Bowater?

1 A No.

2 Q How do you know that?

3 A Because a CBH was a different model boiler. It was a

4 fire tube, which both the fire -- the CBH and the progress

5 boiler were fire tubes, but the CBH is a different model.

6 Q And so it had different parts and components?

7 A Yes. Not necessarily all, but --

8 Q I'm going to hand you Plaintiff's 14. What is

9 Plaintiff's 14?

10 A It appears to be part of a manual, it looks to be laid

11 out the way ours are and it talks about Cleaver-Brooks on

12 the front, three pages not necessarily sequential from

13 chapter eight, parts ordering instructions and parts list.

14 Q Does it have anything to do with the Cleaver-Brooks

15 progress boilers sold to Bowater?

16 A No. If you look at the second and third page of the

17 exhibit it talks about the usage of these components being a

18 125 horsepower through roughly 350 horsepower boilers. So I

19 presume it's from a manual related to a 125 horsepower

20 through 350 horsepower boiler, and the one at Bowater was 30

21 horsepower.

22 Q I really should have given you all of these at one

23 time. I'm going to show you what's been marked as

24 Plaintiff's 45. And I'm going to represent to you that --

25 first of all if you see here it shows that the 30 horsepower

1 Cleaver-Brooks gas powered boiler was in the administration
2 building at Bowater in 1971, right?

3 A Yes.

4 Q Would the Cleaver-Brooks 30 horsepower progress boiler
5 be suitable for use in an administration building?

6 A Yeah, depending on the use of it.

7 Q What uses do you use it for?

8 A It wouldn't be unusual in this type of climate to use
9 it for some space heating as needed, and possibly hot water
10 for bathrooms, showers, whatever they may be.

11 Q Now you say in this climate, you mean because it's warm
12 down here as compared to 3 feet of snow like y'all have?

13 A A little warmer than where I am from, yes.

14 Q So I'm going to represent to you that yesterday that
15 Mr. Welker told the ladies and gentlemen of the jury about
16 two administration buildings, and I'm going to represent to
17 you that he was -- the following testimony was given:
18 Question, "So there was a little bit of discussion on direct
19 examination about the building of paper machine two and the
20 administration building and the old original administration
21 building, is that the correct term?" Answer, "And I would
22 say the original administration building was the one
23 demolished to make the way for paper machine two, yes."
24 Question, "Now we talked about the original administration
25 building. It is your understanding that when we were

1 talking about the building that had" -- I'm sorry, "Is that
2 your understanding that we are talking about a building that
3 had offices or something in it? That's correct?" So you
4 were asked questions by Ms. Dean about the administration
5 building built over at Bowater in 1961. Do you have any
6 information at all about whether there's one or two, an old
7 one, a new one or when they were built.

8 A It appears in this document, Plaintiff's Exhibit 45, it
9 talks about the CB boiler, Cleaver-Brooks boiler, being in
10 the administration building, and then the 37 and a half
11 horsepower Kewanee in the new office building. So that
12 tells me there were probably two office buildings,
13 administration buildings of some type at one time or
14 another.

15 Q And you're looking right there on Exhibit 45 that's
16 referencing two of them.

17 A Correct, that's the way I would interpret that.

18 MS. O'NEIL: Those are all of my questions.

19 THE COURT: Ms. Dean, where are we?

20 MS. DEAN: Okay to redirect (sic) or --

21 THE COURT: Yes, it is okay to redirect, length of time is
22 what I'm trying to get in to.

23 MS. DEAN: I'm hoping 20 minutes, I know that's close to
24 4:30, obviously no less. How long it will take with his
25 answers I would estimate 20 minutes.

1 THE COURT: I am going to call a halt because I can't
2 guarantee that that's what it would take and I don't want you
3 to be restricted, I hate to cut this in two because it means
4 Mr. Tornetta has to come back Monday. How do you feel about
5 that, Mr. Tornetta? You're not in love with it I'm sure --

6 THE WITNESS: I'll do what I'm asked to do.

7 THE COURT: Very good. Well then that's what we're going
8 to do. I just don't want to restrict anybody and I frankly
9 don't want to restrict Ms. O'Neil because I don't know what
10 you're going in to, she may want to have something on redirect
11 and has concluded her direct, but I just don't want there to be
12 some anxiety about this time frame, so I am going to adjourn
13 for the day. Now, here is what we're going to do, and speak to
14 you jury members for a minute. I have at least one jury member
15 who has expressed some issues about job, and I have at least
16 one jury member who has expressed some situations about child
17 care, I think the other jury member is maybe in a more peaceful
18 spot because her issues have to do with a fill-in thing by
19 husband. But what I want to have done is this: I want you to
20 go to your jury room but I don't want you to be dismissed yet.
21 I want to be sure that I have got my finger on the pulse of any
22 issues that we've got, those are the two issues I intend to
23 explore, if there are any other issues let me know. But go to
24 your jury room and I'll send a note as to who I need to see.

25 (The jury left the courtroom.)

1 THE COURT: Bring Ms. Giles in, please.

2 (Juror Giles returned to the courtroom.)

3 THE COURT: Hi, Ms. Giles. Here is what I am concerned
4 about and I just want to make sure we are peaceful here. We
5 will begin Monday, Tuesday will probably be a short day because
6 of some obligations I've got back in Columbia because I come
7 back and forth everyday so I travel a little further than you
8 do everyday, but Tuesday will be a very short day. The case
9 will probably be concluded on Wednesday and that includes
10 deliberations. I don't know how long deliberations are going
11 to take and I don't want any of the jury, including you, to be
12 concerned about that. What would happen if 4:30 comes and we
13 are not out of deliberations and I don't assume we would be,
14 would there be any -- what would be your situation in terms of
15 having your baby picked up?

16 THE JUROR: It would be kind of tight.

17 THE COURT: Any fill-ins available?

18 THE JUROR: No.

19 THE COURT: Okay. Very good, I get that and I understand,
20 and I have that information now, not going to make any decision
21 about it. You come on back and we'll function normally. I'll
22 have a better feel for how that's going to be but thank
23 goodness we've got some alternates, and if that ends up having
24 to be the situation that's the situation. I just wanted to get
25 straight with you precisely what your situation was. Have a

1 great weekend.

2 MR. KENNADAY: Thank you, you too.

3 (Juror Giles left the courtroom and Juror Rouse
4 Entered the courtroom.)

5 THE COURT: Mr. Rouse, have a seat for a second. Am I
6 pronouncing it right, Mr. Rouse?

7 THE JUROR: Yes, Your Honor.

8 THE COURT: Now, I believe you sent me a note about
9 something about your job and your other person on the job with
10 you. Tell me what we're talking about.

11 THE JUROR: On my job we are very short-handed right now
12 and -- excuse me for the note, but I was supposed to say
13 something before trial started but I thought I wouldn't be
14 picked on it so I didn't want to reschedule. But my boss is on
15 me about he's working so many hours so I did one week so he
16 need me to help him out next week and cover some of the shifts
17 that he's covering because he's opening in the mornings and
18 still having to kind of work at nights.

19 THE COURT: I see. Let me ask you this, I think the
20 trial will go Monday, Tuesday and Wednesday and it will then be
21 concluded, Tuesday will be a short date, Monday and Wednesday
22 would be days like we're talking about now. What's your
23 situation, can you do that?

24 THE JUROR: No, ma'am.

25 THE COURT: Not without a lot of angst?

1 THE JUROR: No. He is needing me to cover the night shift
2 today but I told him that --

3 THE COURT: I know, that you're stuck. Okay. Go to the
4 jury room, don't let the jurors go yet. Thank you, Mr. Rouse.
5 I'm going to let you go but go back in the jury room and we'll
6 bring all the jury back before I do that, okay? So go to the
7 jury room, don't talk it about it.

8 THE JUROR: All right, thank you.

9 (The juror left the courtroom.)

10 THE COURT: Ladies and gentlemen, what I'm going to do,
11 he's been antsy the whole time, it has just been building and
12 building and building, I'm going to excuse Mr. Rouse, and I'm
13 sorry but I just don't feel like I can put a fellow in peril
14 like he is concerned about being put at peril, and so I'm going
15 to substitute alternate number -- what was number two is now
16 number one and that's Brian W. Townsend, number 219. Bring all
17 the jury back in.

18 (The jury returned to the courtroom.)

19 THE COURT: Ladies and gentlemen of the jury, two things:
20 Number one, I have one juror with a pretty difficult situation
21 and for that reason I am excusing him and that is juror number
22 194. And what that means is that juror number 219, which is
23 Mr. Brian Townsend, Mr. Townsend, you are now a full member of
24 the jury and thank goodness for my two alternates, do not leave
25 me. Now, everyone wants to know what's the tentative schedule

1 for next week, here is how that will work. Here is how Monday,
2 Tuesday and Wednesday will work, each day will be -- Monday and
3 Tuesday will be days where we will try to be out some time
4 between 4:00 and 4:30. I believe that the cases will rest by
5 Tuesday, that is defendant will rest and whatever plaintiff has
6 got will rest and the case will be in shape Wednesday that the
7 only things that will be left to be done will be the closing
8 statement by each of the parties, and I have limited them to I
9 think it's an hour and 15 minutes. What will happen is the
10 plaintiff will make a closing statement of an hour, no more
11 than an hour, then the defense will make its entire closing
12 statement, and then since the plaintiff has the burden of proof
13 the plaintiff has the last word and will probably use 15
14 minutes of their total time to reply, then those closing
15 arguments will be over. Then you will hear my charge to the
16 jury, that's when I discuss the law with you and the things
17 that I'm required to describe to you about how you deliberate
18 in the terms of a legal concept. Remember, the facts are
19 totally in your hands and I will tell you what the legal
20 burdens of proof are and things of your nature, give you your
21 form of your verdict and show you how it works, and then the
22 case will go to you. I anticipate that the case will go to you
23 before the lunch break and you will probably -- that's what I
24 will be trying to make happen. I think it will go to you well
25 before the lunch break and then you will begin your

1 deliberations and you'll have lunch brought to you and you will
2 deliberate. If there are dilemmas in the afternoon about the
3 length of your deliberations we'll talk about them, but we will
4 have complete deliberation and we don't want to rush to
5 deliberations on an important case like this so we will talk
6 about how that's going to be managed if there gets to be any
7 problems of a timing nature. So that's kind of the schedule
8 for next week as best I know it, and if there are any changes
9 of that, of course, I will inform you immediately on Monday
10 when we get here. All right. Ladies and gentlemen of the
11 jury, y'all have worked mighty hard this week and I feel like I
12 have been rode like a rented mule myself, so I think we -- none
13 of us has to back up to the pay window this week. I appreciate
14 your service more than I can say. So I know you're going to
15 remember the things that keep this process a stable one, which
16 is don't post on social media, don't try to do any research,
17 and don't talk about the case. Have a wonderful weekend and
18 I'll see you Monday. 9:00, ladies and gentlemen, as always.

19 (The jury left the courtroom.)

20 THE COURT: All right, what else have we got?

21 MS. MCVEY: I think we're good for the day.

22 (Court recessed for the day and resumed at 9:00 a.m on
23 Monday, March 19, 2018.)

24 THE COURT: Ms. McVey, I have y'all's motion about Mr.
25 Polk, and my thinking, and you can kind of follow with me on

1 this, Ms. O'Neil, my thinking is that we would wait until some
2 convenient break to deal with it.

3 MS. MCVEY: That's absolutely fine with us.

4 MS. O'NEIL: Yes. We were thinking that we would finish
5 Mr. Tornetta's testimony, do the proffer, go right into with
6 the video that's ready to go.

7 MR. PUGH: Yes. There is one issue with the video that we
8 need to talk about.

9 (Break in proceedings.)

10 THE COURT: Well, y'all just let me know what I need to
11 deal with.

12 MS. O'NEIL: Here is what I think: We'll finish Mr.
13 Tornetta, we'll do the proffer, wherever we are in the morning
14 there if we haven't taken a break we can take a break and deal
15 with this issue about the video and move forward. We have a
16 video, we have --

17 MR. PUGH: We have the video and then we have coworker
18 Gilbert Smalls, and then we have our portion of Mr. Howe's
19 testimony. I have conferred with Mr. Holder that he and I
20 would get together over lunch about those two so that it would
21 hopefully be seamless and --

22 MS. O'NEIL: And then we have the Polk issue. So I think
23 we have plenty of opportunities at least throughout the day to
24 address both the question about the video and Polk.

25 THE COURT: Great. Otherwise all are well?

1 MS. MCVEY: I think.

2 MS. O'NEIL: I need to get my witness.

3 THE COURT: Okay. Go do that before I call the jury in.

4 (Break in the proceedings.)

5 THE COURT: Bring me the jury.

6 THE jury returned to the courtroom.)

7 THE COURT: Good morning, ladies and gentlemen. I hope
8 you had a nice weekend, plenty of victories for the lady
9 Gamecocks, I'm proud to say, and Clemson, wow. We'll have a
10 very good idea I think at the end of this day as to what our
11 schedule is for the rest of this trial. I have been briefed on
12 what Ms. O'Neil is offering and I think we will have a good
13 idea of kind of where we stand about everything. So Ms.
14 Dean -- I mean Ms. O'Neil, we're continuing with Mr. Tornetta
15 at this time, and I think it's Ms. Dean's reply cross
16 examination, am I right?

17 MS. DEAN: Yes, Your Honor.

18 THE COURT: Very good. Mr. Tornetta, you may come around.

19 THE witness, JOHN TORNETTA, remained under oath and
20 Testified as follows:

21 CROSS EXAMINATION

22 BY MS. DEAN:

23 MS. DEAN: Okay to proceed?

24 THE COURT: Yes. I hope everyone had a good weekend.

25 Q Good morning.

1 A Good morning.

2 MS. DEAN: I hope everyone had a good weekend.

3 Q I just want to followup on some of the questions that
4 were asked by Ms. O'Neil, Cleaver-Brooks' lawyer, and ask
5 you first, in addition to knowing that you took an oath, did
6 you always try to be very straight forward about what you
7 know and equally as important as what you just don't know on
8 behalf of Cleaver-Brooks?

9 A I believe so, yes.

10 Q One of the things that you told us on Friday when you
11 were asked if Cleaver-Brooks ever sold 100 percent raw
12 asbestos to anyone was no, right?

13 A I think I said not to my knowledge or not that I'm
14 aware of, yes.

15 Q Your memory is good. "No, I'm not aware of that at
16 all," was your answer, correct?

17 A Correct.

18 Q Before you said that did you give us any context to the
19 amount of effort you put into figuring out whether
20 Cleaver-Brooks, in fact, did sell raw asbestos over and over
21 again for years?

22 A I don't think I gave any indication of that on Friday,
23 but certainly I have looked at many, many records in
24 Cleaver-Brooks and parts descriptions and things of that
25 sort in having come across that other than as we discussed

1 on Friday cement that we used, asbestos cement.

2 Q Has that always been your testimony?

3 A Has what always been my testimony? I'm sorry.

4 Q That you've investigated specifically this issue of
5 whether Cleaver-Brooks was using raw or pure asbestos in
6 their boilers.

7 A In that general context I believe so, yes. We've
8 talked about -- certainly talked about cements. I think
9 I've said in the past that I'm not necessarily privy to
10 exactly what was the ingredients in all of those cements.
11 In our records we just don't have the information that tells
12 us percents in some cases and types and things of that sort.

13 Q But to be fair what you said to the jury was in
14 relation specifically about use of raw asbestos wasn't no,
15 but I'm not really sure what we used in cements, it was,
16 "No, not at all," right?

17 A As in no but we have used asbestos cements.

18 Q I would like to show you in relation to my last
19 question about whether you've been asked this before and had
20 a different answer, the testimony that's marked in that
21 notebook under Bumgardner in page 110 of that testimony, I
22 am looking at line 17 to 20. And for reference this was
23 actually you and I talking a few years back about
24 Cleaver-Brooks boilers, do you agree with that?

25 A Yes.

1 Q Let me know when you've gotten a chance to get there.

2 A I am at page 110, that's the page you said, I believe.

3 Q And you were asked the question, "whether this is
4 referring to JM450 or whether it was asbestos fiber you
5 haven't done anything to see if JM450 was just pure raw
6 asbestos?" And your answer wasn't that I spent countless
7 hours trying to figure it out, it was, "No, I wouldn't know
8 one way or another, it's JM450." Did I read that correctly?

9 A Yes.

10 Q JM 450 is a type of cement, correct?

11 MS. O'NEIL: Objection, Your Honor. Sorry, she had
12 something on the screen that wasn't admitted into evidence but
13 we didn't see that she went by it so I withdraw.

14 THE COURT: Very good.

15 Q JM 450 is a type of cement.

16 A That's my understanding, yes.

17 Q It's one of a variety of Johns Manville, or JM asbestos
18 containing cements that Cleaver-Brooks chose and used with
19 their boilers for years, correct?

20 A There are different cements, I believe, from JM that we
21 called out on different boilers, yes.

22 Q I want to hand you what we've marked as Exhibit 57.

23 MS. O'NEIL: Your Honor, may I have a moment to ask Ms.
24 Dean a question to see if I have an objection?

25 THE COURT: All right, very good.

1 (Break in proceedings.)

2 MS. O'NEIL: Your Honor, we just have an objection on the
3 record for Exhibit 57 for completeness but it is a portion of a
4 Cleaver-Brooks document.

5 THE COURT: Very good.

6 Q I've blown up about two-thirds of the page that's in
7 front of you, right?

8 A Correct.

9 Q And a couple of things. First of all, this is the
10 suggested insulation specification for LR boilers from
11 Cleaver-Brooks in 1956, correct?

12 A Correct. It's revised. I'm not certain I can read the
13 revisions but it looks like '56 as well, yes.

14 Q And what it shows is that there's different suggestions
15 whether it's factory installed or whether it's a field
16 installed boiler, right?

17 MS. O'NEIL: Objection, misstates the documents.

18 A I think it's field insulated or factory insulated, yes.

19 Q Thank you. And either one of them references asbestos
20 as cement and has a little asterisk, do you see that?

21 A Yes.

22 Q And the asterisk is Johns Manville number 352, do you
23 see that as well?

24 A Yes.

25 Q And that is something you have seen not just in this

1 document but in some of the materials, specifications or
2 part lists of Cleaver-Brooks as it relates to cement that
3 they used in their boilers.

4 A I've come across of lot of different references, I
5 believe I have come across JM 352 as well, yes.

6 Q Do you agree this is a fair and accurate depiction of
7 what JM 352 asbestos cement looked like?

8 MS. O'NEIL: Objection, foundation.

9 THE COURT: Overruled.

10 A I wouldn't have any idea. I'm not sure I have ever
11 come across it physically.

12 Q Do you have any basis to dispute that it looked like 50
13 pound bags of powder?

14 A I don't think I have any basis. I don't think I have
15 ever really actually used the material. I may have, I just
16 don't recall it.

17 THE COURT: I don't think the question is whether you have
18 used the material, Mr. Tornetta, the question is whether you
19 know whether it is a powder like material.

20 A No, I don't know. If that picture is a good depiction
21 I guess I would say it's hard to tell.

22 Q I want to hand you what we've marked as Exhibit 68.

23 A Thank you.

24 Q Given your job working with the legal department for
25 Cleaver-Brooks for years you are familiar with

1 interrogatories, sworn questions and sworn answers from a
2 company.

3 A Yes.

4 MS. DEAN: Your Honor, at this time we seek to admit
5 Exhibit 68, which is a Johns Manville sworn interrogatories
6 about the products that are used in Cleaver-Brooks boilers.

7 THE COURT: This is Exhibit 68 or 58?

8 MS. DEAN: Sixty-eight. This is the one, Your Honor,
9 that --

10 THE COURT: Sixty-eight.

11 MS. DEAN: Yes.

12 THE COURT: All right.

13 MS. O'NEIL: And I'm looking for the verification, Your
14 Honor, if I could get counsel to point it to me so I could
15 determine if I have an objection. I'm going to take counsel's
16 representation that it is verified because the pages aren't
17 numbered and I can't find it in my stack.

18 THE COURT: Very good. She says it is, if you find
19 differently let me know.

20 Q And I'll just represent it references David Oster
21 (phonetically), who is the general counsel who both signed
22 and notarized this document as of December 7th, 1989. I
23 want to ask you a few questions about this. It says, "Give
24 a complete and detailed description of each and every
25 asbestos containing product that your company has designed,

1 manufactured and distributed into the stream of commerce.
2 Include in their description the trade, brand and generic
3 names of any such product and indicate the type and amount
4 of asbestos that was contained in each particular product.
5 Include in this answer the inclusive dates that each
6 particular product was manufactured and distributed." Now,
7 first of all, this isn't Cleaver-Brooks making or
8 manufacturing, this is relating to Johns Manville, right?

9 A Yes. That's the way I understand it, yes.

10 Q And sworn filed documents that have existed since 1989,
11 you can figure out that raw, pure 100 percent asbestos was,
12 in fact, used by Cleaver-Brooks because they write it down
13 and report it in the section that I put up for the jury to
14 see, correct?

15 A That's what it says, to us it was cement and to me it
16 was cement. Again, I haven't spent a great deal of time
17 looking at other defendant's interrogatories to see what
18 each of the products were, that just isn't what I do.

19 Q To the guy that also dumps the powder into a bucket and
20 mixes it up and then puts it on the edge of your boiler, or
21 who years later opening up and claws it off with a hammer or
22 their hands, they also would have the same impression as
23 you, "I'm just working with some cement," right?

24 A That's possible, yes.

25 Q And unless a company who has actual knowledge because

1 they have warned educates someone like yourself or the guy
2 who was in the boiler they have no idea they are working
3 with something that is toxic themselves, their coworkers and
4 their family, fair?

5 A I don't know.

6 Q Certainly you didn't know even though you came in 1985
7 and started with the company that this was one asbestos
8 in --

9 A I didn't know that it was asbestos and probably at that
10 time didn't know anything related to that hazards of
11 asbestos.

12 Q I want to hand you what we've marked as Exhibit 58. So
13 the first document that I still have up here, not the one I
14 just handed you, is a legal document, it's sworn statements
15 that is happening in some kind of legal proceeding, right?

16 A That's what it appears to be, yes.

17 Q What I've just handed you says JM cements and fills
18 insulating and finishing, and it's a product description
19 from JM about the different cements that they sold, do you
20 see that?

21 A Yes.

22 MS. DEAN: Your Honor, at this time I would like to admit
23 Exhibit 58 into evidence.

24 THE COURT: That's Exhibit 58.

25 MS. DEAN: Yes, Your Honor?

1 THE COURT: All right, Ms. O'Neil?

2 MS. O'NEIL: Could we approach for one minute? I
3 apologize but --

4 (A bench conference was held.)

5 MS. O'NEIL: With that objection, Your Honor, we would
6 object on the basis incompleteness and non-verification.

7 THE COURT: Very good. I overrule the objection on the
8 basis that it is a private specification for the 352 cement
9 that they're discussing by the manufacturer of that cement, so
10 I overruled and would allow the exhibit to come in.

11 Q I put up the page, the first page of Exhibit 5, do you
12 see that?

13 A Yes.

14 Q I just want to look at a few parts of this. They
15 reference a 450 cement and a 500 cement and they reference
16 that one is a mineral cement, and the second is vermiculite
17 cement, and then they recommend different applications where
18 those things can be used, are you following?

19 A Yes.

20 Q And so first of all they are just showing some options
21 for cements and fills that do not contain asbestos, and
22 mineral cement as we --

23 A I guess that would surprise me, I thought the JM450 had
24 asbestos content to it as well.

25 Q Then they have one called Fiberfill, which is a

1 mixture, it's a silica and a long fiber asbestos according
2 to the document.

3 A That's what this says, yes.

4 Q 352 is a general purpose all asbestos fiber cement,
5 correct?

6 A That's what it says.

7 Q Do you know for how many years this 352 cement was
8 specified or sold with Cleaver-Brooks boilers?

9 A No, I don't. I don't think I have that information
10 certainly not off the top of my head, and I don't believe it
11 was part of the boiler we've been talking about, but --

12 Q The next exhibit I would like to show you is Exhibit
13 59. This is an internal correspondence for Johns Manville
14 dated October 14th of 1975 that talks about dealing with raw
15 asbestos, do you see that?

16 THE COURT: Yes. Without objection?

17 MS. O'NEIL: Same objection as it's hearsay, Your Honor.

18 THE COURT: Very good, overruled.

19 (The document was received as Plaintiff's 59.)

20 A Yes, I do see that.

21 Q And there in reference to labeling raw asbestos they
22 say they started doing shipment warnings as early as 1969
23 with an exception to the 352 cement which they labeled
24 earlier, January of '66. Do you see that?

25 A Yes.

1 Q So I don't disagree with you that 352 is not the
2 asbestos cement that they used, but if we want to know about
3 when Cleaver-Brooks was warned about their use of 352 and
4 other boilers they tell us the exact wording of their
5 warning right here, right?

6 A That's what they say there, yes.

7 Q This bag contains chrysotile asbestos fiber, persons
8 exposed to this material should wear adequate protection --
9 protective devices as inflation of this material, over long
10 periods it may be harmful. First and foremost, this was an
11 indicator to Cleaver-Brooks that this isn't just cement,
12 this is asbestos, right? They not only say asbestos but
13 they say what type of asbestos was being used.

14 A Yes. I don't know that it definitively says it's not
15 cement but that is what it says.

16 Q Next I want to hand you Exhibit 60, which is from the
17 Environmental Protective Agency and it's part of the federal
18 register, and it's called asbestos publication of
19 identifying information.

20 MS. DEAN: First, Your Honor, I seek to admit Exhibit 60.

21 THE COURT: What is Exhibit 60?

22 MS. DEAN: It's an EPA document that's part of the federal
23 register. It has access to the public that identifies asbestos
24 products, their manufacturers and their percent content of
25 asbestos.

1 THE COURT: Admitted over objection of defendant, we have
2 made rulings on that with respect to OSHA and EPA documents,
3 you may proceed.

4 MS. O'NEIL: I understand Your Honor's prior ruling and I
5 renew my objection.

6 (The document was received as Plaintiff's 60.)

7 Q I just handed you Exhibit 60 and it says Environmental
8 Protection Agency, or EPA asbestos product, production of
9 identifying information from February 13th of 1990. First
10 of all, are you aware that those numbers at the top indicate
11 that this is part of the federal register, it's something by
12 its nature and design made available to the public through
13 the federal register?

14 A I will have to go with your statement of that, I
15 really -- that's not something I get in to.

16 Q So before you swore under oath that, "No, not at all
17 that I'm aware of, there's no raw asbestos," you didn't even
18 go to publically available documents from years ago that
19 exclusively indicated there was asbestos in the cement used
20 by Cleaver-Brooks?

21 A I didn't spend any time going to the federal register
22 to look for information on that, no.

23 Q And again, just for context, we being the lawyers
24 representing this family, didn't ask to speak to John
25 Tornetta, we wanted to speak to someone who was tasked with

1 an obligation to look at what was known and available to the
2 company about the products it chose to sell to the public
3 and you were picked, right?

4 MS. O'NEIL: Objection, argumentative, Your Honor. The
5 obligation does not extend to researching the law.

6 THE COURT: Yeah. Let's not propound an argumentative
7 question, Ms. Dean, break it up a little bit instead of kind of
8 jamming --

9 MS. DEAN: I can do that.

10 Q You were the person picked on behalf of the company to
11 investigate specific matters, and one of them were whether
12 asbestos components were used in the products that
13 Cleaver-Brooks sold.

14 A Yes, which I believe I did and provided, yes.

15 Q Are you aware that it isn't just the cement that was
16 sold by Cleaver-Brooks that contained 100 percent asbestos,
17 there were other products as well?

18 A I am not aware of that, no.

19 Q Let me first hand to you what was provided to me by
20 Cleaver-Brooks' lawyers and marked Exhibit 61. And it has
21 Bates labels SALZ69 to 153.

22 A Thank you.

23 Q And you're familiar with these documents, correct?
24 They came from Cleaver-Brooks.

25 A Yes. I can't say I've committed them to memory but am

1 certainly familiar with them.

2 Q Two of the products that are referenced in Exhibit 61
3 as products sold by Cleaver-Brooks historically include raw
4 asbestos, one called Thermo-pac number 100 which is from JM,
5 and a second JM Thermo-pac 500, and I've tabbed the two
6 pages where I found that if it makes it easier for you to
7 look at.

8 A I see that. Yes, I do see that.

9 Q Mr. Holder is letting me know I said 100, it's actually
10 Thermo-pac 1,000, correct?

11 A Yes, it is. Sorry, I should have caught that too.

12 Q I did sleep but I'm still tired. Let me hand you what
13 we've marked as Exhibit 62.

14 THE COURT: Is that a product description or what is that?

15 MS. DEAN: That's a Johns Manville Thermo-pac product
16 description.

17 THE COURT: Very good. Ms. O'Neil has interposed an
18 objection previously --

19 MS. O'NEIL: Same objection as to 58 and 59.

20 THE COURT: And she has that same objection with respect
21 to Exhibit 62, overruled for the same reasons. This was a
22 product specified by Cleaver-Brooks, correct?

23 MS. DEAN: Yes, Your Honor.

24 THE COURT: Very good.

25 (The document was received as Plaintiff's 62.)

1 Q And on the front page it says at the bottom that this
2 references descriptions of the many uses for asbestos and
3 refractory, do you see that?

4 A Yes.

5 Q And it tells us a little bit about the specific kinds
6 that we know that were used in the -- according to the
7 Cleaver-Brooks documents that I got in this case, and that
8 includes the 500 and the 1000, and it gives us an idea what
9 temperature ranges they are able to service.

10 A Yes.

11 Q And Thermo-pac 1000 is pure white chrysotile asbestos,
12 98 to 100 percent asbestos, do you see that being reported
13 there?

14 A That's what it says, yes.

15 Q I want to go into a second topic that you were asked
16 about with Ms. O'Neil last Friday, and that is your claim
17 that no one, not a single supplier of a single asbestos
18 product that we used ever warned us, do you remember being
19 asked about that?

20 A Yes.

21 Q And again your answer was, "No, I have seen no evidence
22 of that," do you recall that?

23 A I would have to look at the testimony. I'm not aware
24 of any and we haven't found any records related to that
25 until well into -- we do have some MSDS sheets that I can't

1 really date that appear to be well later than the time frame
2 we're talking about here.

3 Q So you were asked in earlier years, I think the
4 clearest MSDS sheets were the 50's and 60's and all of the
5 way up to OSHA, did anybody give you warnings?

6 A Correct.

7 Q And your answer was, "No, I haven't seen any evidence
8 of that," right?

9 A Correct.

10 Q Did you spend even a minute looking?

11 A We have done an extensive search of our records within
12 the company, that was done over the years and several years
13 ago looking for information like that.

14 Q So Exhibit 59 that we looked at together was an
15 internal memorandum from Johns Manville where they claimed
16 it was internal, it was internal to the company and it says
17 that right on the front, right?

18 A Fifty-nine you said?

19 Q I believe so, the letter that shows for raw asbestos
20 they were giving warnings.

21 A Yes.

22 Q Are you aware in the public records that have been
23 known for years that they were provided warnings not just on
24 rope or cement but the gaskets and variety of other Johns
25 Manville products that were sold to Cleaver-Brooks?

1 A I'm not specifically aware of that. I guess when I'm
2 answering those questions I'm relating it to the documents
3 I've been able to locate or have been located for
4 Cleaver-Brooks.

5 Q Did you make any effort to go to the companies that
6 sold you products -- I mean, you have a list of them -- and
7 say, "Look, I didn't start until 1985, I'm trying to figure
8 out things that were known to the company before I got here,
9 if you had evidence of warnings that would be helpful." Did
10 you do anything like that before you said this so
11 confidently on Friday?

12 A I have not.

13 Q I've handed you a set of interrogatories for Johns
14 Manville Corporation marked as Plaintiff's Exhibit 63.

15 MS. DEAN: And first of all, Your Honor, at this time I
16 would like to admit 63.

17 THE COURT: And it is -- Exhibit 63 is -- just describe it
18 for me.

19 MS. DEAN: Interrogatories sworn by Johns Manville
20 Corporation.

21 THE COURT: Ms. O'Neil?

22 MS. O'NEIL: I'm trying to figure out the date, Your
23 Honor.

24 THE COURT: What is the date, Ms. Dean?

25 MS. O'NEIL: And I'm looking for the verification. Again,

1 I'm not saying it's not there, I just don't see it.

2 MS. DEAN: We have the signature date on the last page of
3 March 1976 mailed to attorneys of records and signed by the
4 attorneys of Johns Manville. So the date is March 19th, '76.

5 MS. O'NEIL: Then I would object because it's not verified
6 by the company, it's signed by the lawyers.

7 THE COURT: Overruled.

8 (The document was received as Plaintiff's 63.)

9 Q I was actually going to start with the date, this is
10 something that was sworn to nine years before you started at
11 Cleaver-Brooks if we look to the date on the last page of
12 1976, correct?

13 MS. O'NEIL: Object to the form.

14 A Yes.

15 Q And what they indicate on page six of this document is
16 that they affixed caution labels on the packaging of their
17 insulation products that contain asbestos, and then they
18 list out the exact warning that they gave, do you see that?

19 A I do see it, yes.

20 Q And it exists -- it contains information first
21 identifying the asbestos that's in it, and second
22 identifying the harms, and third identifying the precautions
23 that should be taken because of those harms, do you see
24 that?

25 A In general, yes, that appears to be what it's saying.

1 Q And they indicate that in 1964 they started this first
2 warning and then it continued until 1970.

3 A That's what they say, yes.

4 Q And then they had a more detailed warning from '70 to
5 '72, that's on the next page, or page seven.

6 A I can't say that it's more detailed without comparing
7 the two of them, but it appears they're saying there was a
8 different one, yes. It talks a little bit more about
9 pneumoconiosis producing dust.

10 Q And then they had a third warning that went from '72 to
11 the present, which the date of this document is 1976, do you
12 see that?

13 A Yes.

14 Q Another statement you made on Friday was that
15 Cleaver-Brooks never sold replacement parts to Bowater, do
16 you remember that?

17 A Yes.

18 Q And you were kind of asked to take them off; did you
19 sell blankets, did you sell block, did you sell gaskets, did
20 you sell packing, and you went through the list and
21 unequivocally said no, no, no, do you recall that?

22 A Yes.

23 Q Who is this?

24 A That is CB boiler services, Inc. I'm not sure of the
25 time frame we're talking about but there was a company in

1 Illinois out of basically the Chicago area that was at one
2 time a portion of Cleaver-Brooks, a service organization
3 covering that area.

4 Q What did they do as a service organization?

5 A They serviced boilers and sold equipment and parts.

6 Q I'm going back to Exhibit 61, which is the document
7 that was provided to us from Cleaver-Brooks in this case. I
8 want to ask you a little bit more about them.

9 THE COURT: This is what number?

10 MS. DEAN: Sixty-one.

11 Q And here it indicates -- and it's on Bates 73 if you
12 want to look at the document or you can look at the screen,
13 whichever you prefer -- but it's talking about the documents
14 of CB Boiler Services and it talks about the records of
15 Cleaver-Brooks division.

16 A Yes.

17 Q Are you with me?

18 A Yes.

19 Q Sorry, I didn't mean to jump ahead. It says, "As
20 stated above the primary source for asbestos products was
21 Cleaver-Brooks division of AquaChem." I want to stop there.
22 We haven't gotten into the different names and ownerships of
23 Cleaver-Brooks over the years, but you know that starting in
24 the late 60's Cleaver-Brooks became a division of AquaChem,
25 correct?

1 A Correct.

2 Q And so when they say that the Cleaver-Brooks we've been
3 talking about where you're the corporate representative
4 involved for some years, them being a division of Aquachem.

5 A Correct.

6 Q It goes on to say that Cleaver-Brooks supplied boiler
7 repair parts to CB Boiler Service and incorporated those
8 same parts in new boilers that they manufactured. Are you
9 following with that?

10 A Yes.

11 Q It goes on to say in the prior page, Bates 72,
12 Cleaver-Brooks division of Aquachem Inc. manufactured the
13 boilers that Salzgeber, and I'm going to spell that,
14 s-a-l-z-g-e-b-e-r, serviced and repaired. These boilers
15 contain numerous parts that contain asbestos. The
16 Cleaver-Brooks division supplied CB boiler services with the
17 majority of the repair and replacement parts it used, many
18 of which contain asbestos. First of all, is this something
19 that you had any firsthand involvement in working with CB
20 Boiler through Cleaver-Brooks to provide any replacement
21 parts to boilers --

22 A No, I can't say that I have. I am certainly aware of
23 them, but firsthand involvement in working with supplying
24 those parts, no.

25 Q Do you know outside of CB Boiler Services, whether

1 other repair and replacement outfits existed where
2 Cleaver-Brooks used them to service their boilers throughout
3 the country?

4 A I think we talked Friday about other local authorized
5 representatives.

6 Q Yeah, that's right where I was going. So we have a
7 whole page that I showed you and kind of highlighted a South
8 Carolina one of different representatives that were used by
9 Cleaver-Brooks as a company to help service the boilers
10 depending on where in the country we were looking.

11 A Correct.

12 Q Did you make -- before we look at that -- any effort to
13 talk to anyone at Allied, anyone in that list to figure out
14 how complete their records were about sales for the
15 Cleaver-Brooks boilers they started up, serviced,
16 maintained, anything before you came here today?

17 A I'm not sure who Allied is. Did you say Allied or --

18 Q Applied, I'm sorry, if I said Allied that was a
19 mistake.

20 A Applied is no longer our rep in this area and I'm not
21 quite sure if they're even around, but no, I haven't.

22 Q What they indicate -- and this is going back to CB
23 Boilers, in Exhibit 61, and I'm on Bates 71, there is no
24 guarantee that the files are complete. The job files which
25 contained documents concerning installation or servicing of

1 boilers at a particular location were culled from time to
2 time until 1977. Many of the items that were discarded were
3 purchase orders and delivery tickets that identified repair
4 and replacement parts that may have contained asbestos or
5 fiberglass, do you see that?

6 A Yes. And I believe we're talking about -- or the
7 person here is talking about the CB Boiler Service files, is
8 that your understanding too?

9 Q Yes.

10 A Okay.

11 Q And so when you confidently said Cleaver-Brooks did not
12 sell parts, you did so without making any effort to find out
13 what parts may have been sold through their representatives,
14 not just for a year or two but over the course of decades,
15 correct?

16 A I don't know that I would have a way to do that, but
17 you are correct. I didn't contact our no longer
18 representative who is no longer a company to see whether or
19 not they sold anything.

20 Q And here is the point, Mr. Tornetta, you didn't say to
21 the jury, "You know, we don't know because I didn't contact
22 and I'm not sure I could the people that sold most of our
23 replacements parts. I don't know if their records are like
24 the records that I know were discarded." You just said
25 confidently no, that it did not happen. Do I remember those

1 things right or not?

2 A Yes. And I was doing that based on the records we had
3 and what we did sell.

4 Q In doing this now for how many years have you been
5 acting as a company representative in an asbestos context?

6 A Roughly 16, going on 17.

7 Q Have you found that you have repeatedly believed
8 something to be true based on very limited research that you
9 have found out later was not true?

10 A I guess -- I think anyone would be foolish to say in 17
11 years they didn't learn something different that they
12 thought was true. There certainly have been things that
13 over the years have changed and we found more information
14 that have added to the information we had.

15 Q But would you also agree that that happened because
16 when you first said something under oath after claiming you
17 made a reasonable search of it you actually spent very
18 limited time or effort trying to figure out the issue.

19 A No, I don't believe I would agree with that.

20 Q I want to talk about Cleaver-Brooks and what they said
21 at the time of what they knew about the dangers of asbestos,
22 and start off by asking you, that is almost always one of
23 the first things in the notice that says, "Here is the
24 topics we want to know about," asks you, "when did
25 Cleaver-Brooks know this stuff was harmful?" It's probably

1 phrased more eloquently, but would you agree with that?

2 A I don't think I would sit here and testify that was one
3 of the first things, but certainly I have seen that topic a
4 great deal.

5 Q I could find dozens of transcripts where you have been
6 asked the same question, "When did Cleaver-Brooks first
7 understand that asbestos created a health risk for humans?"
8 You've been asked that over and over and over again.

9 A Yes.

10 Q You've been asked that by me personally in the
11 Bumgardner case along with attorneys from all over the
12 country.

13 A Yeah, that's likely true.

14 Q You admitted on Friday that you had once stated under
15 oath that you believed that Cleaver-Brooks as a company
16 understood asbestos was a health hazard in the 80's or 90's
17 when it came up in the media, do you recall that?

18 A I think the way I phrased it, at least would have
19 phrased it would have been the company found out through
20 individual employees through the general media, I personally
21 was the late 80's or 90's. But again, that is one that as
22 we found more information on it has changed.

23 Q This isn't something that you just said once, this is
24 something that you said over and over again. I can find
25 transcripts from 2002, 2004, 2007, 2009, 2011 and onward

1 where you swore under oath to juries and judges, "Look, we
2 didn't know until the 80's or 90's," right?

3 A I don't know that that answer says that. That answer
4 says individual employees found out from the general media,
5 it doesn't say we didn't know until the 80's and 90's. I
6 believe the answer of 80's or 90's was John Tornetta
7 personally. I don't think I ever threw a date out for the
8 company because frankly at that time we didn't know, I had
9 no documentation to say when we did and when we didn't. We
10 have since found some documentation that allowed me to put a
11 date on it, or a time frame.

12 Q So let's make sure I understand first what was said on
13 Friday. You looked at that notebook -- I actually got the
14 transcript from Friday, I printed it out so we could also
15 see the same thing. And I'm looking at page 89.

16 A Eighty-nine you said?

17 Q Yes, sir.

18 A Okay.

19 Q And there I asked you the question when you were first
20 asked the question when did Cleaver-Brooks as a company
21 understand asbestos to be a health hazard. It was your
22 belief based on research that you conducted that it was in
23 the 80's or 90's when it was in the news, do you recall
24 that? And your answer on Friday was, "Yes, I remember
25 talking about that years ago, yes." Did I read that

1 correctly.

2 A Yes, you did.

3 Q And that's not just something again that you said on
4 Friday, that's something you indicated repeatedly for
5 Cleaver-Brooks as a company, not just you as an individual,
6 that's true, isn't it?

7 A I don't believe the 80's and 90's, I remember saying
8 the company was that. But if that's the way you interpret
9 that then that's the way you interpret it.

10 Q I would like you to turn now to the transcript -- and
11 I'm not sure how to say Douglas' last name, but it's
12 K-w-a-s-n-i-k.

13 A Okay.

14 Q And this was a deposition taken back in 2002, so we're
15 talking about 15 years ago, correct?

16 A Yes.

17 Q If you would look at page 13 at the very bottom,
18 question starts at the bottom of the page, "So you wouldn't
19 know who would have been in charge of determining that
20 asbestos was dangerous?" And your answer is, "I'm not aware
21 of anyone at AquaChem that knows anything about the dangers
22 of asbestos other than what people received in the general
23 media." Did I read that correctly?

24 A Give me a minute to find where you are.

25 Q Sure. I started at 13 line 25 to 14 line six.

1 A That must be a different part. Did you say it was in
2 the kwasnik?

3 Q Yes, sir.

4 A It looks different than what you have up there so I'm
5 not sure I have the same thing. The printing is completely
6 different so I'm not sure --

7 THE COURT: How about look at what he's doing, Ms. Dean,
8 we don't need to be back and forth about this. Look at what
9 he's looking at to be sure it's what you're putting up on the
10 screen.

11 MS. DEAN: Sure.

12 MS. O'NEIL: It is definitely not the same thing.

13 Q Well, that explains why we're confused. Let me give
14 you a copy of the one I have, and I apologize.

15 A That's okay.

16 Q I'm going to leave this up here just in case we need
17 it. And you can see here that's your deposition in the case
18 that I referenced, and if you go to page 13.

19 A Okay.

20 Q Sorry about these brackets on this copy but I just
21 started down here at line 25. Not meaning to hover --

22 A That's okay. Okay.

23 Q Now, when you testified under oath about no one at
24 Cleaver-Brooks or AquaChem, which we now know is
25 Cleaver-Brooks, knowing about the dangers of asbestos until

1 it was in the media, you've said that under oath with doing
2 almost no research to actually know whether that was true or
3 not, do you agree with that?

4 A No, I don't think I would agree with that as you stated
5 it. Certainly I worked with Mr. Province (phonetically)
6 when I first started. I'm not quite sure how I would know
7 what every employee had ever known throughout the history of
8 Cleaver-Brooks. At that point I didn't have documents that
9 would give me a time and a period that we did, so the answer
10 was related to what probably was the case, or what was and
11 that's kind of the way I think you phrased it, but
12 apparently you don't agree with that.

13 Q Well, what I mean by investigating the issue is -- I
14 called three categories of people that would be the ones to
15 talk to, one are the decision makers. Do you recall on
16 Friday you said, "Look, that wasn't me, I wasn't the one
17 making the decisions to use asbestos, to design asbestos, to
18 take it out" -- fair?

19 A Correct.

20 Q But there is a board of directors that exists for
21 Cleaver-Brooks, and when I asked you, "Did you talk to a
22 single one of the actual decision makers, you admitted, "No."
23 I said that under oath and hadn't talked to one of them,"
24 fair?

25 A Correct.

1 Q The second group of people that I followed kind of off
2 of that if I wanted to figure that out are safety personnel,
3 the people in charge of safety, and you admitted you didn't
4 talk to a single person in that category when you were sworn
5 and saying under oath, "Look, we didn't know until the media
6 told us," right?

7 A Not specifically in relation to asbestos, no.

8 Q The third group of people, the actual design engineers,
9 the ones that made the drawing that showed us that this
10 material goes here and this part is used here, you didn't
11 talk to any of those folks to say, "Hey, when you were
12 specifying or recommending or requiring asbestos, what did
13 you know about the health hazards that was in it?" That
14 didn't happened, right?

15 A No, I didn't.

16 Q And you learned that they were off in terms of what the
17 company concretely admits it knows from lawyers showing you
18 documents in litigation, right?

19 A I'm not sure what you mean by that, that I was off
20 with --

21 Q On the day of when the company understood the asbestos
22 was happening, sorry.

23 A No. I believe that I've learned that we now have a
24 more concrete date with documents that were found in
25 sweeping all of our facilities looking for more documents.

1 Q I want to follow-up on that but then -- give me one
2 second. Before we get into the documents that we had in
3 your own premises that talked about this, there were also
4 documents like the Pennsylvania Occupational Health and
5 Safety Act that we looked at together on Friday that you
6 didn't research and find yourself, lawyers who never worked
7 for Cleaver-Brooks found them and showed them to you, right?

8 A I generally have been shown those by plaintiffs
9 attorneys, yes.

10 Q But you also now admit that there were records that
11 Cleaver-Brooks had when you repeated over and over again,
12 "We didn't know until the media told us," that indicates
13 strongly that they understood and knew in the 1970's, early
14 1970's.

15 A Yes, 1972 time frame.

16 Q And that's over a decade earlier no matter how you kind
17 of cut those answers.

18 A Depending on how you cut it, yes.

19 Q I want to hand you what I have marked as Exhibit 64.
20 These are documents provided to us by Cleaver-Brooks, which
21 we know from the Bates labels at the bottom that we reviewed
22 before, correct?

23 A Correct. I'm not sure this includes all of the ones in
24 that category but certainly part of it.

25 Q I don't think it does, but I pulled the ones that I

1 thought most directly related to it.

2 A Okay.

3 Q But you agree with me these are the documents that kind
4 of changed the answer to say, "You know what? We did know
5 in 1972 about OSHA and asbestos health hazards."

6 A The documents that gave us the more concrete date, I
7 guess I disagree with changing the answer. The answer was
8 still employees could have found out through the general
9 media, what this gave us was a date which we've given you.

10 Q And in terms of a date that you said repeatedly would
11 have been associated with general media, it wasn't specific
12 but you gave us ranges, you said late 80's, early 90's and
13 we've seen that together, right?

14 A I believe that's related to when I would say I found
15 that out in the general media, I certainly don't remember
16 when commenting on when other employees did.

17 Q We know that Cleaver-Brooks was not just a member of
18 the America Boiler Manufacturing Association but part of the
19 subcommittee, and specifically a committee that was dealing
20 with product safety, do you see that?

21 A Yes, the ABMA product safety committee.

22 Q In one of the documents that we have goes back to 1973,
23 and it shows that one of the things that this committee was
24 discussing were the pro effects of the recent OSHA emergency
25 standard carcinogens, do you see that?

1 A Yes.

2 Q Part of that committee had kind of a presentation from
3 somebody at Babcock and Wilcox about the Occupational Safety
4 and Health Act, or OSHA, on August 18th, 1972 by Mr. Fisher
5 and they broke down what was discussed for the members of
6 the committee and you've seen that before, right?

7 A Yeah. I think this was actually sort of a paper that
8 Mr. Fisher wrote, and then in one way or another presented
9 it to the committee is the way I interpret that.

10 Q Me too. I want to highlight a few things that he was
11 presented. "This report was prepared for use by the ABMA
12 product safety committee now being formed. We expect the
13 committee members will use this to obtain a quicker
14 familiarity with OSHA standards as they apply to products."
15 Do you see that?

16 A Yes. I mean, he does in other places, I'm not sure
17 exactly where it was. It talks about it relating more to
18 that Babcock and Wilcox product, and he wasn't sure how it
19 would relate to everybody else's product on the committee.

20 Q And we'll get to whether it relates to Cleaver-Brooks
21 products in a moment, but here I just want to see if we
22 agree that much of what OSHA relates to is making sure that
23 the place a person works is being regulated in the way that
24 you promote safety, it effects employers for the most part.
25 Are you aware of that?

1 A That's the way I understand it, yes, it's the
2 employer's, for lack of a better term, duty.

3 Q And here this subcommittee that deals with product
4 safety is looking at that regulation and specifically seeing
5 how it applies to products, do you see that?

6 A Yes.

7 Q The specific product that I've highlighted here that we
8 are evaluating as to thermal insulation, do you see that?

9 A Yes, I do.

10 Q And we've heard from occupational medicine experts and
11 we're going to hear from coworkers that there's a variety of
12 types of thermal insulation from block to cement to pipe
13 covering, you would agree to at least three things.

14 A It's my understanding, yes.

15 Q And so at least as it relates to the boiler that we
16 knew was at Bowater we know that there were thermal
17 insulation products used, specifically asbestos cement.

18 A Yes. I'm not sure that when he talks about thermal
19 insulation here he's talking about asbestos cement, that's
20 not the way I took it but maybe I'm misreading it.

21 Q We'll read it together. Product application-thermal
22 insulation, right?

23 A Yes.

24 Q As a result of this new information on December 7, 1971
25 emergency standards were issued which greatly reduced the

1 quantity of asbestos dust permitted, do you see that?

2 A Yes.

3 Q In addition to the above limitations where they
4 reference the amount of asbestos put in the air it says
5 "Many restrictions were placed upon board practices use for
6 workers who were using asbestos materials." Are you still
7 with me?

8 A Yes, I am.

9 Q And the next page they say, "There has been some
10 incorrect talk circulating that OSHA prohibits the use of
11 asbestos materials, this is not true." Now, whether they're
12 talking about on the first page or OSHA review or the
13 second, they don't say asbestos materials or insulating
14 materials but just pipe covering, they say asbestos material
15 and insulated material, right?

16 A I guess I took it as thermal insulation so that's what
17 I'm thinking of when I'm reading this.

18 Q And they didn't say thermal insulation meaning just
19 these four type of thermal insulation, they just say the
20 category of thermal insulation, right?

21 A Correct.

22 Q It goes onto say, "This is not true. Instead, OSHA has
23 placed such severe limitations on the permissible dust
24 loading now and probably will lower this even further in the
25 future that many are considering it impractical to use

1 asbestos insulating materials and are seeking other types,"
2 right?

3 A That's what it says.

4 Q This is actual concrete knowledge had by Cleaver-Brooks
5 in the early 1970's, correct?

6 A There are documents we located related to the 1970's,
7 yes.

8 Q I want to hand you what we've marked as Exhibit 65,
9 which is just a copy of those December '71 emergency
10 standards referenced in that group.

11 MS. DEAN: Your Honor, these are just the OSHA 1971
12 regulations.

13 THE COURT: And this is Exhibit 65?

14 MS. DEAN: Yes, ma'am.

15 THE COURT: Ms. Dean, how many more of these have you got?

16 MS. DEAN: I have three more exhibits.

17 THE COURT: All right, y'all come to the side bar for a
18 minute.

19 (A bench conference was held.)

20 Q I have a copy here of the part of Exhibit 65, and you
21 see that this references this exact date referenced in the
22 Cleaver-Brooks material in 1971 emergency standards for
23 asbestos fibers, do you see that?

24 A Yes.

25 Q And what the actual regulations made clear is that

1 there are undisputed and grave consequences from exposure to
2 asbestos, and that lives of employees are in at stake. And
3 that's written in the first page of the regulations made
4 available to the public, do you see that?

5 A That is what it says, yes.

6 Q And in terms of what is required of companies that make
7 the products or sell their products to the public, it has a
8 section that I have highlighted here of caution labels, do
9 you see that?

10 A I do. I'm trying to find it here. Yes.

11 Q And whether it's raw materials like 352 that's 100
12 percent asbestos or a mixture like some of the products that
13 had asbestos with rubber, they say, "In even the reasonable
14 foreseeable use asbestos is -- of the levels then you need
15 to have a warning," and they showed the warning, and this is
16 something you've seen over and over again.

17 A I have seen documents like this, yes. I can't say that
18 I probably have seen this one specifically since it has
19 another exhibit sticker on it.

20 Q Yeah, from a different case, yeah. And you understand
21 from a very practical standpoint from a company that has
22 employees using asbestos and its users using asbestos, that
23 the first step in creating a hazard is identifying, right?
24 You need to know that it exists.

25 A And the company needs to know that there's a hazard,

1 yes, to me that's a first step.

2 Q And in terms of how this federal regulation balanced
3 the duties of different groups, it was the product seller or
4 manufacturer that had this caution label responsibility, and
5 that's something that because of a committee Cleaver-Brooks
6 was on they knew about from the inception of this act.

7 A I'm not sure I could say. I'm certainly not an expert
8 on what these regulations said or didn't say so I'm not sure
9 I would say that I would know the path that was supposed to
10 take.

11 Q What you do know is that no one at Cleaver-Brooks
12 measured how much asbestos was put in the air when working
13 on these boilers or warned anytime in the 1970's, correct?

14 A I haven't had any evidence to that.

15 Q The last thing I want to talk to you about in relation
16 to this exhibit, going back to the exhibit where you have a
17 part of the product safety committee, is there's document
18 after document talking about how they're educating boiler
19 manufacturers about product liability. There's a legal
20 administration section talking about product liability
21 education, do you see that?

22 A I do.

23 Q They talk about that there is a consensus that certain
24 provisions of all of these sections apply to boiler
25 products, and they include the sections about hazardous

1 materials and occupational health and safety control, do you
2 see that?

3 A Yes.

4 Q And so not only was Cleaver-Brooks aware of the
5 asbestos hazards, they contemplated them specifically as it
6 related to boilers and had legal discussions about the
7 consequence of selling those products, and we know this all
8 from this document that Cleaver-Brooks had in its files.

9 A I'm not sure I could comment on the legal discussion,
10 but I know it says product liability there. I haven't found
11 anything that describes that anymore specifically so I'm not
12 sure what that's related to.

13 Q In terms of how many people at Cleaver-Brooks thought
14 about the legal implications of selling asbestos without
15 warnings, is that something you have even investigated?

16 A No. I wouldn't have any idea how I would have
17 investigated that.

18 Q We talked a little bit about your records being
19 incomplete, and you said on Friday with Ms. O'Neil that you
20 believed that you had fairly and impressive good records, do
21 you remember that?

22 A Yes.

23 Q I'm going to hand you what we've marked as Exhibit 66.
24 This is a record you have seen before that has an affidavit
25 by Mr. Gidden and who is the bureau chief of boiler safety

1 indicating that these records are electronically maintained
2 and show registered boilers and pressure vessels in the
3 State of North Carolina. Do you see that?

4 MS. O'NEIL: I have an objection, Your Honor, we're going
5 to have to approach on this and I apologize.

6 THE COURT: All right.

7 (A bench conference was held.)

8 MS. O'NEIL: Could you tell me the Exhibit Number, please?

9 MS. DEAN: 66.

10 MS. O'NEIL: Defendants have an objection to Exhibit 66 on
11 the basis of relevance and hearsay.

12 THE COURT: I have examined the exhibit and the history of
13 its exchange and I sustained the objection.

14 BY MS. DEAN:

15 Q You have seen records from the North Carolina State
16 Department indicating that both at Clifford Steam Station
17 and McGuire they represent a 1960's boiler from the
18 Cleaver-Brooks to the present?

19 A I believe we talked about that a little bit Friday, and
20 it appears that they were present at one time. I don't know
21 that I could take the records that I have seen and
22 determined when they were there, how long they were there or
23 when they left, if ever.

24 Q The last document I want to talk to you has to do with
25 the maintenance and repair. You went on for about five or

1 six minutes in talking with Ms. O'Neil about your belief of
2 specific types of maintenance on how often it would happen,
3 do you recall that?

4 A Yes.

5 Q What has been your job at Cleaver-Brooks since you
6 started in 1985?

7 A My first job was a service technician, then as an
8 assistant service manager, then as an assistant training
9 manager, and then eventually the job I'm currently in.

10 Q And when did you start that job, the one you're
11 currently in?

12 A 2001.

13 Q I'm going to hand you what I've marked as 67. This is
14 several documents relating to Cleaver-Brooks, do you see
15 that?

16 A Yes, I've seen this one before. I'm not quite sure how
17 complete it is or if it all goes together, it appears that
18 the second half of it's a little different, but certainly
19 I've seen this before, or parts of this before.

20 Q And the first half is an insulation instruction guide
21 and then there's a service parts for Cleaver-Brooks.

22 A Yeah. The first three pages appear to be part of
23 something from 1948, an insulation -- general installation
24 and instructions, apparently not complete because it
25 references six pages. And the service parts part I believe

1 is only the fourth page, and the next the last two pages, I
2 don't know if they're related to -- I don't think they're
3 related to the first four pages but they aren't in relation
4 to the service parts.

5 Q In terms of why you were provided these from
6 Cleaver-Brooks in this form, do you know -- I mean, I know
7 sometimes records you lose pages, but do you have any idea
8 of why --

9 MS. O'NEIL: Objection. There's no indication that they
10 were provided by Cleaver-Brooks in this form. They're not
11 Bates stamped, there's no indication these came from
12 Cleaver-Brooks.

13 THE COURT: All right. Ms. Dean, can you clarify?

14 MS. DEAN: Sure. These were produced to us in another
15 case in this form, and so I can represent to the Court these
16 came from Cleaver-Brooks. I think he's admitting he has seen
17 them before, and since he volunteered that there are parts
18 missing I really don't know why that is so I'm just asking if
19 he knows.

20 MS. O'NEIL: Your Honor, my objection is to the
21 representation that these came from Cleaver-Brooks in this
22 form. We don't know what the discovery request was in that
23 other case, we don't know if it was produced in something that
24 the plaintiff's lawyer has shown you.

25 THE COURT: Rephrase the question, Ms. Dean.

1 Q I'll go back to my original question and let's see if
2 we can limit it to this. This has insulation and service
3 recommendations to Cleaver-Brooks, while it may not give all
4 of them they at least give us a sense of some of the
5 installation and service recommendations from Cleaver-Brooks
6 at various points in time.

7 A The first three pages certainly do in relation to a
8 type of boiler built in 1948.

9 Q And the second was service requirements?

10 A The service -- I'm sorry, the --

11 Q And the second deals with service recommendations in
12 the 60's.

13 A The second being the second half of this?

14 Q Yes, sir.

15 A The fourth page relates to the rear doors in 1966, the
16 fifth and sixth page isn't in relation to the rear doors.
17 On the fourth page it's actually in relation to some rear
18 doors on some older style doors from the 40's and 50's, just
19 based on the pictures there.

20 Q So if we want to understand what was written down back
21 in the time before you even started about installation and
22 service requests, there are some written documents that help
23 us understand.

24 A Some, yeah. It would depend on which boiler we're
25 talking about because these actually relate to several

1 different styles, I think we talked a little bit about that
2 on Friday depending on the age there were a little bit
3 different and be different with no configuration.

4 Q And that's the next question I wanted to ask you is
5 about the different styles. I have seen from your testimony
6 and Mr. Province's testimony that there were a variety of
7 historical styles from OB to BR, LL, LLR, CB among others,
8 right?

9 A Correct, including the progress model we've talked
10 about in this case.

11 Q The progress model had what letter nomenclature with
12 it?

13 A As a kind of model?

14 Q Yeah.

15 A P as in Paul.

16 Q We've also seen in the records outside of the list that
17 gave you D pipe water two boiler sold by Cleaver-Brooks --

18 A Correct, yeah. They were later in the history of
19 Cleaver-Brooks but certainly there have been over the years
20 what we would refer to as a D type water tube, not really
21 specifically related to Cleaver-Brooks in that nomenclature,
22 it was more of an industry issue.

23 Q In terms of -- even if there were similarities, I mean
24 down to the exact product 450 or of 400 or 352 being used in
25 one or the other, the actual model is going to be distinct,

1 a CB is different than a P at least in some fundamental ways
2 and therefore was a model class.

3 A Yes. That's why we had different models because they
4 were different.

5 Q Last two questions have to do first with clarifying
6 this. I asked you when was the Pennsylvania plant put in, I
7 said it was in 1956, you said "I'm not sure, maybe 50's or
8 late 50's." Have you spent any time to investigate that so
9 you can give us an actual date?

10 A I think in our discovery responses we give a year, I
11 just couldn't remember what it was in that at the time.
12 It's in that time frame, I don't know off the top of my
13 head.

14 Q If you look at the Kraft deposition on page 1562, can
15 you confirm to the jury it was a year before the
16 Cleaver-Brooks boiler Unit 43 was sold to Bowater in 1956?

17 A I'm sorry, what page again, 16 --

18 Q 1562.

19 A Oh, 15, sorry. Again, I think that was a little -- I
20 wasn't certain but I think it was '56 is what it says.

21 Q Last topic. I know you said that Cleaver-Brooks in the
22 50's, 60's, and 70's did not warn. Would Cleaver-Brooks at
23 least tell us whether they believed that a warning was
24 needed when they sold either boilers with asbestos
25 components or replacement parts of asbestos cement?

1 MS. O'NEIL: Objection to the form.

2 THE COURT: Overruled.

3 A I think we talked a little bit about this Friday. I
4 guess I don't have a way to place myself back in the 50's
5 and 60's and say what would have been needed back then based
6 on what was known back then, I just don't have the ability
7 to do that.

8 Q Do you know of anyone at Cleaver-Brooks who actually at
9 least tried to figure out that issue, about whether they
10 needed to have a warning on the boilers in the 50's, 60's
11 and 70's?

12 A I haven't come across any documentation like that.

13 MS. DEAN: Thank you.

14 THE COURT: Does that complete your cross examination, Ms.
15 Dean?

16 MS. DEAN: Yes, Your Honor.

17 THE COURT: Very good. Ms. O'Neil?

18 MS. O'NEIL: I do have some questions but I would
19 appreciate the opportunity to take a break so we could scan in
20 a few of the exhibits so I could display them and the
21 questioning will go faster.

22 THE COURT: Very good. Ladies and gentlemen of the jury,
23 go to your jury room and we'll take a ten minute break or
24 thereabouts, let's see long it takes them to set up.

25 (The jury left the courtroom.)

1 THE COURT: Ms. Dean?

2 MS. DEAN: Your Honor, Ms. O'Neil was kind enough to give
3 me some exhibits she intends to use and most of them we don't
4 have an issue with, therefore to that I would prefer to just
5 object to them outside the presence of the jury if I can now.

6 THE COURT: What now?

7 MS. DEAN: There are two exhibits of the ones she gave me
8 she wants to use that I would like to object to outside the
9 presence of the jury if I can.

10 THE COURT: All right. Well, go ahead.

11 MS. O'NEIL: They're going to be 17 and 18.

12 MS. DEAN: They will be marked as Defense Exhibit 17 and
13 18. And one deals with the recommended rules for the care of
14 boilers from July 1, 1980, and one has to do with the rules of
15 construction for boilers on July 1st of 1980. And my concern
16 is two-fold; one, care for a 1980's boiler or construction of a
17 1980's boiler is not relevant to the boilers at issue in this
18 case which were several decades earlier. And two, that while
19 these were in the exhibit list they were never in reference to
20 their corporate representative, so I don't think he has the
21 foundation.

22 THE COURT: Well, in each case I'll have to see what kind
23 of foundation they lay, but just on the basis of what you say I
24 would overrule the objection.

25 MS. O'NEIL: And just so the Court is aware these are from

1 the ASME boiler and pressure vessel code, and so they, I
2 believe, relate to the issue we did in motions in limine about
3 regulations. And I did not -- and Ms. Dean is correct, I did
4 not --

5 THE COURT: Yeah. ASME is a trade association, not a
6 government regulator. I've been letting ASME material in all
7 over the place and it's general industry standards by the
8 mechanical engineers professional science group, if it's not
9 like the other boiler I'm sure it's going to be pointed out on
10 any cross examination.

11 MS. O'NEIL: Yes.

12 THE COURT: Very good.

13 (The jury returned to the courtroom.)

14 THE COURT: Thank you, ladies and gentlemen of the jury.
15 Ms. O'Neil, continuation of her examination of Mr. Tornetta.
16 You may be seated, sir. Ms. O'Neil?

17 MS. O'NEIL: Thank you, Your Honor. I apologize to the
18 Court for the delay, as I told you I left my prescription
19 glasses back at the hotel and I can't read anything so I needed
20 to get some things scanned in so I could read it.

21 THE COURT: Very good. Thank you so much.

22 REDIRECT EXAMINATION

23 BY MS. O'NEIL:

24 Q Mr. Tornetta, I'm going to jump around a little bit,
25 I'm going to try to be quick. You were asked a lot of

1 questions about whether you ever looked or ever did
2 anything. Can you tell the ladies and gentlemen of the
3 jury, when did you first start working on this case?

4 A On this case -- well, I guess technically when the
5 lawsuit came in, but in any substantial way late 2017,
6 December, before all of the way to December.

7 Q How many hours do you think you've spent working on
8 this case?

9 A On this specific case I don't know that I could give
10 you hours. But certainly since late December, certainly the
11 first two and a half months of this year my time has pretty
12 much been dedicated to the South Carolina cases.

13 Q And you gave -- I think the ladies and gentlemen have
14 heard a reference to this, I believe, in Ms. Dean's
15 examination on Friday, you gave two depositions.

16 A Yes.

17 Q How many hours did you spend in those depositions -- in
18 the deposition?

19 A I didn't actually count it up but I think it was easily
20 maybe eight to maybe nine hours total.

21 Q I want to go through a few things again hopefully very
22 quickly. If you look I gave you some of the exhibits that
23 plaintiff's counsel have marked. If you could look at
24 Exhibit 57, please.

25 A Okay.

1 Q Does Exhibit 57 have anything to do with the progress
2 boilers sold to Bowater?

3 A No, it's related to the LR boilers.

4 Q And if you would look at Exhibit 67, please.

5 A Okay.

6 Q Does this have anything to do with the Cleaver-Brooks
7 progress boilers sold to Bowater?

8 A The first three pages, no, that relates to boilers
9 going back into the OV range, I believe. Page four isn't
10 specific to model so it's just talking about rear doors so
11 it's possible but it doesn't -- because it's from 66 instead
12 of 57, so no, it doesn't. And then the last two pages are
13 related based on the pictures to either a LR or LF type
14 boiler, so no, it does not.

15 Q I'm going to show you what has been marked as
16 Defendant's 15 and Defendant's 16. Defendant's 15 is
17 plaintiff's answers and responses to defendant's master set
18 of interrogatories and request for production of documents
19 set two, and it is dated the 29th of December of 2015. And
20 16 is plaintiff's first amended answers to master
21 interrogatories numbers two and four, and it is dated
22 January 12th of 2018. I'm going to ask you to look at
23 Exhibit 16, please.

24 A Okay.

25 Q On Exhibit 16 if you would turn the second page you see

1 that it looks like the work history for Mr. Howe?

2 A Yes, I do.

3 Q And can you read to the ladies and gentlemen of the
4 jury when it says he began to work, what are the years that
5 he began to work at the Bowater Paper Mill in Catawba?

6 A It appears to be the first listing of Bowater Paper
7 Mill is 1978 to 1982, and then subsequent ones through 2008,
8 so 1978 through 2008.

9 Q You were asked some questions by plaintiffs about the
10 100 percent raw asbestos fiber, correct?

11 A Yes.

12 Q And you gave some testimony about how you thought of
13 that as being cement, not 100 percent raw asbestos fiber,
14 correct?

15 A Correct.

16 Q Can you explain to the ladies and gentlemen of the jury
17 why you thought that, why Cleaver-Brooks thought that?

18 A Because we bought cement for our boilers that happened
19 to contain asbestos. I'm not sure that I have ever seen
20 anything that indicated a percentage that was required or
21 not required by the Cleaver-Brooks work, it was cement we
22 used in the form or function like we talked about Friday.

23 Q Can you explain -- do you have an understanding of
24 what -- can you explain to the ladies and gentlemen of the
25 jury what in your mind as the corporate representative would

1 be use of 100 percent raw asbestos in the manufacture of a
2 boiler?

3 A In the manufacture of the boiler, 100 percent raw
4 asbestos? I can't imagine what that is. I picture that as
5 something used in the production of an asbestos containing
6 product in some cases.

7 Q I'm going to show you some stuff in Plaintiff's Exhibit
8 68. If you could turn -- I believe -- did Ms. Dean have
9 tabs on that?

10 A No.

11 Q We're going to go in the back on the attachment to page
12 seven of the attachment labeled --

13 A So the second set?

14 Q The second -- seven of Exhibit A. And see there where
15 it's talking about the 352 cement that you were asked about?

16 A Yes.

17 Q And it says that it is chrysotile?

18 A That's what it says, yes.

19 Q And that it's 25 to 40 percent chrysotile fiber by
20 weight?

21 A That is what that says.

22 Q And that it was discontinued in 1969?

23 A Correct.

24 Q And if what is contained in the plaintiff's
25 interrogatory responses is correct, that's how many years

- 1 before Mr. Howe started at Bowater?
- 2 A Nine. Sorry.
- 3 Q And if you would go to the next one, under that it says
- 4 352 cement, you see there was two of them?
- 5 A Correct.
- 6 Q And that one says that it's fiber type by weight 100
- 7 percent?
- 8 A Yes.
- 9 Q And it says that was discontinued in 1963? I'm sorry,
- 10 1973?
- 11 A Yes.
- 12 Q How many years before Mr. Howe got to Bowater?
- 13 A That would be five.
- 14 Q Do you know which of these 352 cements was used by
- 15 Cleaver-Brooks?
- 16 A No.
- 17 Q If you could look at page 35 of that same exhibit,
- 18 please, where there's an entry for Thermo-Pac 500, twisted
- 19 asbestos work packing, do you see that?
- 20 A Yes.
- 21 Q And this is a product that Ms. Dean asked you about?
- 22 A Correct.
- 23 Q And it's a product that you've said was used in the
- 24 boilers.
- 25 A Yes.

- 1 Q And it's got fiber type by weight 75 to 80 percent?
- 2 A That is what it says, yes.
- 3 Q And it's got a discontinued date of 1983.
- 4 A Yes.
- 5 Q And this boiler that was shipped to Bowater where
- 6 Cleaver-Brooks used this product was built in when?
- 7 A 1957.
- 8 Q 20 years before plaintiff's interrogatories say Mr.
- 9 Howe got to the plant?
- 10 A Yes, 21.
- 11 Q Ms. Dean asked if you knew whether JM352 was 100
- 12 percent asbestos when you got to work at Cleaver-Brooks, do
- 13 you recall that?
- 14 A I do recall that, yes.
- 15 Q what year did you get to work at Cleaver-Brooks?
- 16 A 1985.
- 17 Q It was discontinued in '73, that's 12 years after it
- 18 was stopped being used.
- 19 A Yes.
- 20 Q You were asked some questions about CB Boiler Services
- 21 and showed some evidence of it showing selling replacement
- 22 parts, do you recall that?
- 23 A Yes.
- 24 Q And I believe you said CB Boiler services a particular
- 25 area?

1 A Yes.

2 Q What area of the country is that?

3 A The Chicago land area when they were CB Boiler Service,
4 Inc. They serviced the Chicago land area, northern Illinois
5 and some parts into Iowa, but they had a specific territory.

6 Q Did that include South Carolina?

7 A No.

8 Q Did it include the Bowater Paper Mill?

9 A No.

10 Q I'm going to show you what we're going to mark as
11 Defendant's 14. Defendant's 14 is a set of documents from
12 Cleaver-Brooks, it is the complete set of the documents that
13 were excerpts that were marked by the plaintiffs and it is
14 the ABMA product safety committee documents, it's marked
15 with Howe-Smith-Sizemore-CB (LAN) Bates stamped one to 120?

16 MS. O'NEIL: And we would offer that into evidence, Your
17 Honor.

18 THE COURT: Objection?

19 MS. DEAN: No, Your Honor.

20 THE COURT: No objection.

21 (The document was received as Defendant's 14.)

22 Q I just want to point your attention to a couple of
23 things quickly in that document. If we look at Bates stamp
24 page 11, which I believe is one that Ms. Dean showed you.

25 A Okay.

- 1 Q Do you see there at the top the first thing it's
2 talking about in the safety meeting is noise, correct?
- 3 A Well, it's under the ABA product liability part, but
4 yes.
- 5 Q And the second thing it's talking about is noise.
- 6 A Yes.
- 7 Q And the third thing it's talking about is noise.
- 8 A Yes.
- 9 Q And the fourth thing it's talking about is noise.
- 10 A Correct.
- 11 Q And then if you go to the back of the document if you
12 look at Bates stamp 113 --
- 13 A Yes.
- 14 Q -- this is a speech by John Stender, the Assistant
15 Secretary of Labor for Occupational Safety and Health
16 Department that he gave to the ABMA, correct?
- 17 A Yes.
- 18 Q In 1973.
- 19 A Correct.
- 20 Q And I'm not going to display this but -- we're not
21 going to display the page, but Mr. Stender makes a reference
22 to something as being the most common disease for soldiers
23 and bull fighters, and then he says for boilermakers, it's
24 what?
- 25 A Deafness.

1 Q This is attached as -- if you look at 113 through 119
2 those are -- I'm sorry, through 117, those are from the
3 speech Mr. Stender, the Assistant Secretary of Labor for
4 OSHA came and gave the ABMA in 1973, correct?

5 A Correct.

6 Q And the topic that he talked on was noise, correct?

7 MS. DEAN: Your Honor, just object to the leading nature
8 of these questions.

9 MS. O'NEIL: I'll rephrase it.

10 THE COURT: What's that?

11 MS. DEAN: Leading. Sorry, I'll speak up.

12 THE COURT: Overruled.

13 Q The topic he spoke on was noise?

14 A Yes.

15 Q Did he talk about -- did he talk about OSHA -- I'm
16 sorry, did he talk about asbestos when the Assistant
17 Secretary of OSHA came and spoke to the ABMA?

18 A I don't see that, no.

19 Q Have you ever seen any indication when any of the
20 fellows who came to speak at the ABMA Product Safety
21 Committee -- let me rephrase that, have you ever seen
22 anything that suggested that the people from OSHA who came
23 to speak at the ABMA Product Safety Committee meetings spoke
24 about asbestos?

25 A I haven't seen any indication of that, no.

1 Q You were asked some questions from Ms. Dean about the
2 presentation from the Babcock and Wilcox --

3 A Yes.

4 Q -- representative and that is on page 66?

5 A Correct.

6 Q And Mr. Fisher said in his report in the introduction
7 on page 69 that the report was prepared for use by the ABMA
8 Product Safety Committee now being formed?

9 A Yes.

10 Q And he says that he's talking about the -- I think I
11 gave you the wrong page number -- he's talking about the
12 Babcock and Wilcox? This is the problem with not being able
13 to see.

14 A Halfway down that paragraph, I believe.

15 Q Halfway down that paragraph he says, "A limitation
16 exists as the writer is not familiar with the products sold
17 by other ABMA member companies and therefore this report of
18 necessity is restricted to B and W power generation group
19 products."

20 A Yes. That's what I was referring to a little earlier.

21 Q In response to some of Ms. Dean's questions you said
22 the D type boiler is more of an industry issue for term?

23 A Yeah. I would say it's more of an industry term that's
24 used in large, semi-large industrial water tube boilers.

25 Q So when you say it's an industry term, does that mean

1 that everybody who makes them calls them D types?

2 A Many people do. There's manufacturers of D type water
3 tube boilers all of the way --

4 Q So an indication of something, D type does not equal
5 Cleaver-Brooks, is that fair?

6 A That's the point I was trying to get across, yes.

7 Q I'm going to show you Defendant's 17 and 18.
8 Defendant's 17 is from the ASME Boiler and Pressure Vessel
9 Code from July 1, 1980, and it is specifically portions of
10 section eight rules for construction of pressure vessels,
11 and Exhibit 18 is the ASME Boiler and Pressure Vessel Code
12 section seven, recommended rules for care of power boilers
13 from July 1st, 1980.

14 A Okay.

15 MS. O'NEIL: We offer both of those into evidence, Your
16 Honor.

17 THE COURT: Admitted over objection.

18 (The documents were received as Defendant's 17 and
19 18.)

20 Q Mr. Tornetta, I have given you excerpts of 17, because
21 the whole thing is huge, but if you need it -- in 17 if you
22 can turn to page 378 at the bottom. Well, actually I need
23 you to turn to the page before to give context.

24 A So 377?

25 Q I forgot we don't have this to display to the jury.

- 1 A Okay.
- 2 Q 377, this is the section of flanges with ring type
- 3 gaskets, correct?
- 4 A Yes.
- 5 Q And if you turn to the next page when it's talking in
- 6 the table about gasket materials, can you tell the ladies
- 7 and gentlemen of the jury what the first one is?
- 8 A Self energizing type O-rings, metallic -- other gasket
- 9 types considered a self sealing.
- 10 Q And the second?
- 11 A Elastomers without fabric or high percent of asbestos
- 12 fiber, although 75A shore durometer, 75A or higher shore
- 13 durometer, two different categories.
- 14 Q And the third?
- 15 A Asbestos was suitable binder for operating conditions,
- 16 it looks like eight inch thick, 16 inch thick and a 1/32
- 17 inch thick.
- 18 Q So is it fair to tell the ladies and gentlemen of the
- 19 jury if you look at those first three things they're talking
- 20 about different gaskets to use for different things?
- 21 A Yes.
- 22 Q And some of those requirements in 1980 according to
- 23 ASME are asbestos.
- 24 A That's what it points out, yes.
- 25 Q And are there other references in Exhibit 14 to using

1 asbestos gaskets in the construction of a pressure vessel in
2 1980?

3 MS. DEAN: Your Honor, I just object, she said Exhibit 14,
4 I think it's 17, I wanted the record to be clear.

5 MS. O'NEIL: Thank you for the clarification.

6 THE COURT: Exhibit 17.

7 Q Exhibit 17. Are there other references on page 378 of
8 Exhibit 17 to using asbestos containing gaskets in the
9 construction of the pressure vessel in 1980?

10 A Yes, couple of others at least.

11 Q And on page 379 are there any references to using
12 asbestos containing gaskets in the ASME rules for
13 construction of pressure vessels in 1980?

14 A Yes.

15 Q And if you would look at Exhibit 17, please.

16 A Yes.

17 Q This is July 1980 ASME National Pressure Vessel Code
18 recommended rules for the care of boilers, correct?

19 A Correct.

20 Q And if you would turn to page 34. And actually I guess
21 you go to 33 to get a chapter heading, I'm sorry.

22 A Okay.

23 Q It says inspection of external surfaces and parts is
24 the chapter heading, correct?

25 A Yes. On the end of that page, yes.

1 Q And on page 34 in section C3403 where it's talking
2 inspection on fire tube boilers.

3 A Yes.

4 Q It says that the arch shall be entirely clear of the
5 rear tube sheet, sheet metal or asbestos rope closing the
6 gap, correct?

7 A Yes.

8 Q And the ASME Boiler and Pressure Vessel Code is what to
9 a manufacturer like Cleaver-Brooks?

10 A It is what boiler manufacturers use to in many cases
11 base the designs of pressure vessels on depending on the
12 section of code they're talking about. So it's what governs
13 the manufacturing of pressure vessels and boilers in this
14 country.

15 Q I show you one more exhibit that the plaintiffs marked
16 on Friday I forgot to give you. I'm going to stand into the
17 microphone so I can read into the record what it is and then
18 I will hand you the exhibit. I'm going to hand you
19 Plaintiffs 55 and I'm going to ask you to look at the Bates
20 stamped page BPM 022, and you will recall that 55 is the set
21 of records that were marked by plaintiffs on Friday for the
22 boiler that Cleaver-Brooks sent to Bowater.

23 A Okay.

24 Q Do you see there on that page there's something called
25 the boiler number 10509?

1 A Yes.

2 Q what is that?

3 A That is actually the pressure vessel number for the
4 boiler itself. The boiler is made up of the pressure vessel
5 and burner essentially the way we do it, and it's required
6 by ASME code to actually give the vessel itself its own
7 identifying number that can be traced back through the
8 national boiler.

9 Q You were asked some questions by Ms. Dean about the
10 culling of these files, do you recall that?

11 A Yes.

12 Q How long to your knowledge does Cleaver-Brooks keep
13 these records that show pressure vessel or boiler number for
14 each of the pressure vessels that it makes?

15 A Today they're kept forever essentially. Back in the
16 day before microfilming they were -- all of our records for
17 a specific boiler were kept until we were told that boiler
18 was taken completely out of service. The data reports,
19 which is what this is, were always kept within the records.
20 In fact, you see the stamp across the front of it, you can
21 see the entry there that says, "Important, this company
22 cannot be removed from the file." So this was actually a
23 fairly important document when it came to registering the
24 boiler with --

25 Q And so would you expect this to have ever been culled

1 from a file?

2 A No.

3 MS. O'NEIL: Those are all of my questions.

4 THE COURT: Anything further, Ms. Dean?

5 MS. DEAN: No, Your Honor.

6 MS. O'NEIL: May the witness be released from his
7 subpoena?

8 THE COURT: You may. Mr. Tornetta, you may come down.

9 MS. O'NEIL: Can we approach the bench for a second?

10 THE COURT: Certainly.

11 (A bench conference was held.)

12 THE COURT: Ladies and gentlemen of the jury, I'll give
13 you an early lunch, we have some documents to straighten out.
14 The first thing that will happen afterwards is a video, but
15 let's go you let you go to lunch, early it's 11:12 -- that's
16 pretty early.

17 MR. PUGH: Your Honor, why don't we take a break, mark
18 some documents and then we can bring the jury back, perhaps
19 play the video and then go to lunch.

20 THE COURT: That kind of is what I think then we've kind
21 of move the ball down the field. Why don't we take about a 15
22 to 20 minute break, ladies and gentlemen of the jury, we'll
23 come back and play the video and then you can go to lunch.

24 MR. PUGH: Your Honor, just for planning purposed if you
25 get hungry, the video is about a hour and eight minutes.